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The Turkish Constitutional Court Reframes the Principles for Surveillance of Employee E-mails

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The Constitutional Court of the Republic of Turkey ("**Court**") rendered its decision ("**Decision**") dated 17 September 2020 on surveillance of employee e-mails, which was published in the Official Gazette dated 14 October 2020 and numbered 31274.

The issue of surveillance of employee e-mails has been subject to many discussions in Turkish and European law practice. The Court has previously resolved on the same issue in the Kara/Özbek Decision numbered 2013/4825 in 2016. Also, B?rbulescu v. Romania decision on this issue was delivered by the European Court of Human Rights in 2017. Surveillance of employee e-mails has also been subject to several Article 29 Working Party Reports such as Working Document on the Surveillance of Electronic Communications in the Workplace[1], which is dedicated to this issue as well as others such as Opinion 8/2001 on the Processing of Personal Data in the Employment Context[2] and Opinion 2/2017 on Data Processing at Work[3].

The Court's recent decision has solidified its approach on the topic and reframes the principles the employers should follow for e-mail surveillance activities in Turkey.

Subject Matter of the Decision

The correspondences in the corporate e-mail account of an employee ("**Applicant**") working in an attorney partnership was subjected to surveillance within the scope of an internal disciplinary investigation at the workplace. The investigation was initiated upon several complaints brought to the management concerning problems caused by behaviors of the Applicant in the workplace. Within the scope of the investigation, the correspondences in the corporate e-mail accounts of the Applicant and other related employees were inspected by the employer. As a result, the employer terminated the employment contract of the Applicant on the basis of just cause and referred to e-mail correspondences among the Applicant and other employees as evidence.

The request for reinstatement, filed by the Applicant, was dismissed at the court of first instance and the dismissal decision was approved and finalized by the Court of Cassation at the stage of appeal. Subsequently, the Applicant made an individual application to the Court noting that the e-mail correspondences that the court regarded as evidence were examined without his consent and the court did not take this issue into consideration during the trials. Therefore, he claimed that his right to privacy and freedom of communication, which were within the scope of the right to respect for private life, were violated.

Assessment of the Court

The right to privacy is protected under Article 20 of the Constitution pertaining to "*the right to privacy and protection of private life*". As emphasized in the Court's established case law, all certain and identifiable information belonging to a person is considered as personal data. In this sense, e-mail correspondence contents must be regarded as personal data. Therefore, they are also protected from unlawful interventions by the Constitution within the scope of the right to privacy. In the event subject to the decision, the surveillance of the Applicant's communication without his knowledge and consent constituted an intervention due to several reasons to be explained.

The employer subject to the decision is a private entity. However, it is the state's duty to protect the fundamental rights and freedom of the individual; to that end, the state must provide the individual with an effective mechanism to protect its fundamental rights and freedom from any interventions from others. Therefore, the intervention by natural and legal persons can be subject to an individual application to the Court in case the state's organs, especially courts, do not take necessary actions to protect individual's rights. In this sense, the application was found triable.

The Court has previously set forth principles to be taken into account by the courts to evaluate proportionality and legality of the interventions by employers to the privacy of employee's communication. As previously set forth in the Kara/Özbek Decision, restricting rules under the employment contract, level of knowledge of the employee as to these rules and proportionality of the intervention to the legal interest of the employer should be considered in this respect.

In its recent decision, the Court recognized the employer's right to inspect the communication devices provided to the use of the employee by the employer for legitimate interest such as carrying out the works effectively, supervising the flow of information, being protected from penalties arising from the acts of employee and evaluation of productivity etc. However, just because the communication devices are provided by the employer doesn't mean the employer has an unlimited and absolute right to monitor employee's communication through those devices. In order for the surveillance to be legal:

- the employer must have a legitimate interest in monitoring communication by considering whether this interest can be pursued by only monitoring the flow of the communication or monitoring the content of the communication is compulsory,
- the employees must be informed by the employer beforehand about the surveillance, its purposes, its legal grounds, its scope, its results and employees' rights.
- the intervention to the privacy of the employee must be eligible to accomplish the purpose of the surveillance,
- the intervention must be compulsory for the purpose of the surveillance and the same results must be able to be accomplished by other means, which requires fewer personal data to be processed or require them to be processed less intensely,
- the data to be collected must be limited by the purpose of the surveillance, no excessive data processing must take place,
- the legitimate interest of the employer must be balanced with the employee's fundamental rights and freedom

In the case at hand, as the employee was not informed beforehand that her data could have been monitored for internal inspections, the employee had a reasonable expectation that the privacy of the communications would be protected.

Also, surveillance of the communication was not found compulsory for the purpose of investigation as the same results could have been reached from the statements of witnesses and co-workers, analysis of the complaints and defenses etc.

For these reasons mentioned hereinabove, the surveillance was found unlawful.

Finally, the Court referred to the positive obligation of the state with respect to the protection of privacy. However, it was determined that the obligation of the state was not fulfilled, since a diligent trial was not carried out considering the rights guaranteed by the constitution. As a result, the Constitutional Court decided that the applicant's right to privacy and freedom of communication were violated. A non-pecuniary compensation amounting to TRY 8,000- was ruled in favor of the applicant and a retrial was decided in the reemployment case.

Precedents in similar cases

As mentioned above, the Court has previously assessed the surveillance of employees' communication in Kara/Özbek decision. Accordingly, surveillance of the e-mail contents by the employer was not found to violate the

employee's freedom of communication and privacy of his private life on conditions that:

- the employer has a legitimate interest in reviewing the contents of e-mail,
- the measures are applied by the employer are proportionate to the employer's legitimate interest,
- the employees are bound with rules and regulations of the workplace which outlines the employer's legitimate interest as well as the employer's e-mail surveillance practice,
- employees are warned by the employer that corporate e-mails are restricted for private communications or use.

As a result, the employer will only act based on legitimate interests and apply measures to employees proportionate to his legitimate interests.

Although it is possible for the employer to interfere with the employee's privacy and freedom of communication-based on his legitimate interest, this intervention should not harm the essence of fundamental rights and freedom.

In, the European Court of Human Rights' ("**ECtHR**") dated 5 September 2017, ECtHR set out the principles for surveillance of communication in the workplace; which was also cited by the Court in its assessment of the case subject to the Decision. In the decision, ECtHR has adopted the principles set out specific factors to assess the proportionality of monitoring activities serve as a useful and essential tool for delineating acceptable monitoring activities within the workplace. Given the highly fact-specific nature of the required balancing, sketching out guidelines limits the ambiguity and promises more adequate safeguards against abuse.

Conclusive Remarks

Obviously, in its recent decision, the Court has aligned its approach with that of the ECtHR which can be observed in *B?rbulescu v. Romania* judgment. It is also observed that although reaffirming the main principles set in its Kara/Özbek Decision, the Court departed from its previous approach of requiring the employers to exclude or prohibit the private and personal use of corporate e-mail accounts as an element of the surveillance.

Although the case subject to the decision happened before the Turkish Personal Data Protection Law numbered 6698 coming into effect, this decision should also be considered as an important step towards complying with the employers' obligation to inform employees and the principles of processing personal data.

[1] https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp55_en.pdf

[2] https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp48_en.pdf

[3] https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169

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