

# European Court Rules on Employee Monitoring Programs and Privacy

By John L. Sander

September 20, 2017



The Grand Chamber of the European Court of Human Rights (ECHR) issued its decision in the case of *Bărbulescu v. Romania* (application no. 61496/08) on September 5, an appeal from a determination by the Romanian courts upholding an employee's termination for personal use of the employer's computer system.

The Court held that the Romanian courts violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in failing to establish the relevant facts and perform an adequate balancing exercise between the applicant's right to respect for his private life and correspondence and the employer's interests. While the Convention does not apply directly to employers, the effect of the decision is that disciplinary actions in European Union countries based on personal use of company electronic media will be vulnerable if the facts do not satisfy the balancing considerations outlined by the Court.

## Background

Bogdan Bărbulescu, a citizen of Romania, worked for a private company in Bucharest. In 2007, the company requested that Bărbulescu establish a Yahoo Messenger account for the specific purpose of responding to client inquiries. In July 2007, the company informed Bărbulescu that it had been monitoring his Yahoo Messenger account and that its records indicated he had been using the account for personal use. Bărbulescu denied the personal use, but when confronted with proof, including chat transcripts with his brother and fiancée on personal matters, he claimed invasion of privacy. Shortly after, his employment was terminated.

Bărbulescu challenged his termination in the Romanian courts, where his case was dismissed.

Eventually, Bărbulescu's case reached the Chamber of the ECHR, a seven-judge panel, on the issue of whether the company's monitoring of its employees violated Article 8 of the Convention, which requires respect for an individual's private and family life, home, and correspondence. The Chamber, in a 6-1 decision, held that, although Article 8 was applicable, it had not been violated because Bărbulescu had not explained why his Yahoo Messenger account was being used for personal purposes and nothing indicated that the Romanian courts failed to strike a proper balance. "It is not unreasonable for an employer to want to verify that the employees are completing their professional tasks during their working hours," the Chamber observed.

## Grand Chamber Decision

The Grand Chamber, the appellate division of the ECHR, overturned the Chamber's decision. In an 11-6 ruling, the 17-judge panel concluded that member states have a positive obligation under Article 8. This obligation requires national authorities to confirm that employers with an employee monitoring system also are implementing "adequate and sufficient" safeguards.

The Grand Chamber advised national authorities to consider the following [criteria](#) (PDF) when assessing an employer's monitoring system:

- Whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications.
- The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy.
- Whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content.
- Whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications.
- The consequences of the monitoring for the employee concerned and the use made by the employer of the results of the monitoring operation.

Meet the Author



[John L. Sander](#)

Principal  
New York Metro  
New York City 212-545-4050  
Email

- Whether the employee has been provided with adequate safeguards, especially when the employer's monitoring operations are of an intrusive nature.

The Grand Chamber's decision in *Bărbulescu* highlights that it can be lawful to monitor an employee's communications, but that must be done with deference to the factors set forth above.

The employer must ensure that it provides clear advance notification of its policies on personal use of company electronic facilities and its reservation of the right to monitor the employee's use and to access communications. Monitoring also should be proportionate to the needs of the investigation and sensitive to unnecessary intrusion on privacy.

It is important to remember that national law can provide additional protections to employee's use of company facilities beyond the standards outlined in the Court's decision.

We can expect further refinements as this area of the law continues to change with advancements in monitoring technology.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.

---

©2020 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

\*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.