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Q & A

Grand Chamber judgment in the case of *Bărbulescu v. Romania* (application no. 61496/08)

- **Why did the Court find a violation of Article 8 of the Convention?**

The Court concluded that the Romanian courts, in reviewing the decision of Mr Bărbulescu's employer to dismiss him after having monitored his electronic communications, failed to strike a fair balance between the interests at stake: namely Mr Bărbulescu's right to respect for his private life and correspondence, on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company, on the other.

The Court found that the Romanian courts failed to determine whether Mr Bărbulescu had received prior notice from his employer of the possibility that his communications might be monitored. They did not address the fact that he had not been informed of the nature or the extent of the monitoring, in particular the possibility that the employer might have access to the actual contents of his messages. The national courts also failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into Mr Bărbulescu's private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.

Consequently, Mr Bărbulescu's right to respect for his private life and correspondence under Article 8 was not adequately protected by the national authorities.

- **Does the Court's finding mean that employers cannot monitor employees' communications when they suspect them of using the internet at work for private purposes?**

It does not mean that employers cannot, under any circumstances, monitor employees' communications or that they cannot dismiss employees for using the internet at work for private purposes. However, the Court considers that States should ensure that, when an employer takes measures to monitor employees' communications, these measures are accompanied by adequate and sufficient safeguards against abuse.

The Court specifies the criteria to be applied by the national authorities when assessing whether a given measure is proportionate to the aim pursued and whether the employee concerned is protected against arbitrariness (paragraph 121 of the judgment). In particular, the authorities should determine the following:

- **whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of**

such measures. For the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should be clear about the nature of the monitoring and be given in advance;

- **the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy.** In this regard, a distinction should be made between monitoring of the flow of communications and of their content. Whether all communications or only part of them have been monitored should also be taken into account, as should the question whether the monitoring was limited in time and the number of people who had access to the results;

- **whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content.** Since monitoring of the content of communications is a distinctly more invasive method, it requires weightier justification;

- **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.** There should be an assessment in the light of the particular circumstances of each case of whether the aim pursued by the employer could have been achieved without directly accessing the full contents 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,** in particular whether the results were used to achieve the declared aim of the measure;

- **whether the employee has been provided with adequate safeguards, especially when the employer's monitoring operations are of an intrusive nature.** Such safeguards should in particular ensure that the employer cannot access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality.

- **Why did the Grand Chamber decide differently from the Chamber?**

The Grand Chamber (composed of 17 judges instead of seven in the Chamber) has the task of deciding afresh, fully and freely, on the complaints raised in the cases referred to it. Where a case is referred to the Grand Chamber after a Chamber judgment, it is possible that the Grand Chamber decides differently, in terms of the approach followed, its reasoning or its findings.

In its judgment of 12 January 2016, the Chamber held, by a majority, that there that there had been no violation of Article 8. It found that Mr Bărbulescu's private life and correspondence had been engaged. However, the Chamber concluded that the monitoring of his communications by his employer had been reasonable in the context of disciplinary proceedings.

- **Is this the first time that the Court had to decide a case concerning the monitoring of an employee's electronic communications?**

It is the first time that the Court examined a case concerning the monitoring of an employee's electronic communication *by a private employer*. In the case of *Copland v. United Kingdom* (no. 62617/00) the Court found a violation of Article 8 of the Convention on account of the fact that the monitoring of the applicant's telephone communications, e-mail and internet usage was not "in accordance with the law", there having been no domestic law at the relevant time to regulate

monitoring. Furthermore, the Court has already decided a significant number of cases concerning the surveillance of telephone communications or the seizure of electronic data by State authorities in the context of law enforcement or the protection of national security. For more information, see the [factsheet on the Court's case-law on personal data protection](#).

- **What does the Court's finding mean for other member States?**

The Court looks at applications brought before it on a case by case basis. However, the other member States draw the necessary consequences from a judgment of the Court and may bring their systems into compliance with it, in order to avoid findings of similar violations of the European Convention against them. In its judgment in the case of *Bărbulescu v. Romania* the Court specifies the criteria to be applied by the national authorities when assessing whether a measure to monitor employees' communications is proportionate to the aim pursued and whether the employee concerned is protected against arbitrariness (see above).