

Court rules on monitoring electronic communications during internal investigations

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White Collar Crime, Turkey

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Introduction

White collar crimes – such as bribery, corruption and fraud – have been and continue to be a major concern for businesses of all sizes, regardless of the industry in which they engage. Internal corporate investigations are key to combating white collar crime. They aim to determine whether a company and its employees have been involved in bribery, money laundering, fraud or embezzlement. Internal investigations not only serve to determine crimes committed, but are also significant reminders for employees that these risks are real and that the company in question places the utmost importance on ensuring compliance.

An indispensable stage of internal investigations is the monitoring of personal and corporate communications, which acts as a powerful tool for companies to understand what happened in a specific situation and remove suspicion. However, it is difficult to set rules for email monitoring, as this is an area where the fine line between employee and corporate interests becomes even finer.

At present, Turkey has no specific or well-developed legislation in this regard. This deficiency adds to the complexity of the subject. Although the complexity and challenging nature of monitoring electronic communications in the workplace are troubling, a recent Constitutional Court decision clarified questions in this regard.

Facts

A number of former employees claimed before the Constitutional Court that their rights to demand respect for their private lives and their freedom of communication had been violated when their employer had read their professional emails and used them as evidence.

In its evaluation, the Constitutional Court set the following criteria that should be addressed when determining whether reading employee emails is legitimate for a more important reason than detecting non-compliance:

- the extent to which the restricting and compelling provisions – including a review of personal and corporate emails – are stipulated under the employment agreements and whether such provisions violate the essence of employees' fundamental rights;
- whether the parties to the employment agreement have been informed about the provisions in order to assess whether employees have reasonable expectations regarding the monitoring of their emails;
- whether the legitimate interest for interfering with employees' fundamental rights are moderate compared to the intrusion itself; and

- whether the termination of an employment contract is reasonable and proportionate compared to the employees' actions.

In light of these principles, the Constitutional Court concluded that as the former employees had signed the regulations presented by the employer (eg, work place regulations, principles of fundamental management and behaviour, and a code of ethics and other workplace regulations on travel, discipline, employees and dress code) individually along with their employment agreements, they should have expected the monitoring of their emails and acted accordingly. As a result, the Constitutional Court decided that the employees' rights had not been violated.

Comment

The Constitutional Court decision highlights the importance of adopting clear and detailed corporate policies that inform employees about monitoring policies regarding emails, the Internet and other communication systems in case of an internal investigation. As provided by the Constitutional Court, employer's legitimate interests, which include the detection of white collar crimes, may take precedence over the fundamental privacy rights of employees, as long as the employees are informed of this fact and their consent is obtained.

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