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LAW SHOOTER

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HAPPY NEW YEAR!

We are pleased to say that 2013 was a very successfully year for our law firm! In the beginning of the year our managing partner Dr. Arne Gobert was elected the president of the German Business Club, a prestigious position which he very much enjoys. While our Labour and Litigation Partner Dr. Andrea Soós was elected as a board member of the European Employment Lawyers Association! Our firm also won numerous awards this year such as Law firm of the year (for two consecutive years) , Real estate and construction law firm of the year as well as Full service law firm of the year 2013! To keep our clients informed and updated we held a row of legal seminars but also organized great charity events such as the family golf event and the poker boat where we were able to raise money for the organization Csodalámpa. Finally our firm increased its online presence by creating a very successful online blog and starting our own Facebook page (for more information please visit www.gobertpartners.com)! Thus although 2013 was a great year for BWSP Gobert and Partners, we are positive that 2014 will be even better!

We hope that you will enjoy this month's newsletter edition. Should you have any questions to any of the articles, please do not hesitate to contact us.

Dr. Arne Gobert
Managing Partner

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COMMISSION CONTRA HUNGARY (CASE: C-288/12)

Independence of DPAs to be further strengthened by ECJ?

On 24 May 2012 the Commission brought an action against Hungary regarding the premature dismissal of the data protection commissioner and

setting up a new DPA instead of the commissioner. In its argument the Commission points out that the premature dismissal is in itself the possible breach of "complete independence" of the data protection authorities required by article 28 of the directive. On 10 December 2013, advocate general Wathelet submitted his opinion which fully supports the argumentation of the Commission.

Advocate General Wathelet points out that in his view the claim of the Commission is well-based and makes a reference to the previous landmark case of Germany v Commission. The advocate general argues that the mandate of the current president of the DPA is against the European laws. Consequently: if the independence of the previous DPA is declared by the ECJ, the mandate of the new president is continuously against the laws of the European Union. According to the opinion, the premature termination of the mandate of any DPA without objective reasons is against the requirements of article 28 of the Directive; otherwise, governments could be able to influence the operation of DPAs anytime.

If the Court would share the opinion of the advocate general in its upcoming decision, the independence of DPAs will be significantly strengthened in the member states, since governments will not be able to remove DPAs criticizing their data protection policies. With the possible failure of the data protection reform (which would set out guarantees of independence of national DPAs), the decision of the ECJ might have even greater relevance.

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SCANNER DARKLY

At the beginning of the year the dataprotection authority issued a resolution on electronic monitoring devices, which suggests that according to the new regulations the employees consent is not necessary for the monitoring at the workplace, moreover, different electronic monitoring systems can be legally operated. The resolution was (ironically)made public on the day of dataprotection andon the same day it was already spread in the press that according to the authority the monitoring is undoubtedly legal.

The reality is fortunately not this.

Outlook

In the international practice, the legal assess of the various monitoring systems is very multicolored; the Canadian higher court's practice constitutes a notable new trend, according to which the employee has a right to privacy even through the employer's means, which may not be supervised by merely claiming that the „device is the employer's property". A similar approach is also in Brazil, where employers monitoring employees are penalized in line, with the difference that according to the Brazilian practicethe monitoring does not raise concerns, if the employer unambiguously prohibited every private use. As a further example, the German practice can be mentioned, where the first criminal proceedings have already been initiated against those company leaders, who controlled their employees e-mail messages in an unlawful way.

According to the practice of numerous European data protection authorities the concept of consent in case of employment relationship may not be interpreted with the lack of volunteering (that is: even if the employee grants consent, it must be regarded invalid), exclusively the legal bases defined by the EU data protection directive may be applied in employment relationship. It includes the cases of mandatory data controlling (for example payroll) or data controlling upon other legal basis.

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Right of monitoring

During the legal inspection of monitoring of employees two interests are pushing against each other (out of which one is a fundamental right ensured in the Fundamental Act):

- The employee's fundamental right is his privacy (personal data) respected by others. This fundamental right may only be restricted in exceptional cases, as the Labour Code declares. The employee's own photographic images, and numerous data (what time he/she go to work, how many cigarettes does he/she smoke a day, whom he/she makes phone call to, where he/she goes with the company car) is protected by the civil code as well within the frame of personal rights. The employer may limit the personal rights.
- The employer's economic interest and limited controlling right.

It might as well be seen from the above that apart from the extreme life situations (for example the co-workers of the national security service) there is no „right to monitoring". However, the Labour Code defines such obligations of the employees (permanent presence, availability, capability to work, refrain from conduct suitable for the economic infringement of the employer's good reputation outside the working time as well). The employer forms „interest" for the monitoring of these employee's obligations. Question is how the employer may, based on this interest, restrict the employer's personal rights within the limits of legality.

Pursuant to Section 9 § (2) of the Labor Code the personal right of the employee may be restricted if deemed strictly necessary for reasons directly related to the intended purpose of the employment relationship and if proportionate for achieving its objective. The means and conditions for any restriction of personal rights and the expected duration shall be communicated to the employees affected in advance.

Thus, in case of electronic monitoring two fundamental principles must be taken into account:

- the monitoring may not extend to private life,
- the cognition of the data and the use of photographic images is legal only, if the restriction is „deemed strictly necessary for reasons directly related to the intended purpose of the employment relationship and if proportionate for achieving its objective".

With a simple example, preserving the image of the employee consuming his/her snack can in no circumstances be regarded as necessary and proportionate restriction (except of workers working on consumer protection tests). Every such electronic monitoring system is contrary with the law, during which either of the two fundamental principles is injured.

Data protection commissioner and the judicial practice

The currently effective Hungarian regulation does not provide an easily applicable guideline for the employers, and the practice of the former data protection commissioner was rather strict:

According to the old practice (Resolution No. 1805/A/2005-3.) in no circumstances can a camera be placed in a work place. According to this resolution: *„For the control of discipline and intensity of work, a camera system may not be operated at the work place, not even in such important work places, as an on-call room of the city fire brigade. According to the European data protection practice, the legally forwarded photographic images may not be used for the monitoring of slighter work irregularities. However, in a workplace of such character, of which uninterrupted operation is required inter alia by public security, the supervision may be of a wider scope, of which legality may be judged always in the knowledge of details of the given procedure." * The above opinion has already become superseded by the resolutions of the third data protection commissioner, the judicial practice has even accepted the monitoring of the workplace by hidden camera, namely: the employer had used hidden

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camera recordingsfor the proof of breach of lawsuccessfully in many cases.

The Resolution of the National Authority for Data Protection and Freedom of Information (NAIH)

Compared to the practice of the third data protection commissioner, the current recommendation represents a step backwards; however, it is still more permissive than the foreign practice. Although the title of the recommendation mentions electronic monitoring systems, the recommendation is narrowed to the CCTV.

According to NAIH, the employer's supervising right is a "legal interest", which is founded by Section 42. § (2) of the Labour Code. According to the recommendation, the employer's supervising possibility based on Section 11. § (1) of the Labor Code, allows the supervision of the conduct related to the employment relationship, even with the assistance of an electronic monitoring system.

Albeit the authority accepts the opinion (of the so called 29 Working Party) of the forum of the European Data Protection Supervisors, according to which data controlling based on consent is unintelligible within the frame of an employment relationship, the monitoring is legal pursuant to the opinion, if the conditions of Article 7 of the Directive are given(thus other legal basis for data controlling, e.g. "legal interest" of the employer justifies the data controlling). However, it is a problem that the Hungarian legislation has not adopted the possibilities ensured in Article 7 entirely. The authority overcomes this doctrinal controversy by stating that according to its standpoint Article 7 of the Directive is directly applicable in every member state, regardless of the national legislation. It bases its conclusion on an ECJ Judgment brought against Spain (case C-478/10). The opinion referring to the direct applicability of the directive, does not examine the legal basis according to the Hungarian act, but adopting the directive's language use "legitimate interest", introduces a test pertaining to the "deliberation of legitimate interest" and states that it must be investigatedwhether the monitoring happens from a purpose being unconditionally necessary and fair.

A good HR professional at this point of the test gives up the deliberation, because only in very extreme cases may the camera at workplace be regarded "unconditionally necessary", for example in storage premises. According to the conclusions of the NAIH the "legitimate interest", with referring to the principle of "accountability",does exist on the side of all employers.Namely, pursuant to the conclusions of the authority,the employer may lawfully install a camera on the ground of documenting a later damage.

The next step of the test is already a simple examination: the place of the camera may not violate human dignity. That is: the camera may not be placed in the dressing room, resting place (in other words not as an end to itself). The authority bases its conclusion on the Decree No. 36/2005 (X.5.) of the Constitutional Court. The legal preservation of the recordings may be 3 days in a general case, which may question the legal interest based on the "accountability". We mention also that the authority's recommendation, although compared to the former onesis more permissible regarding the conditions of monitoring, in case of a legal dispute it may be a mere base for reference, but it does not bind the courts, in this respect it is advisable to wait for the judicial practice to become clear.

Final touch: proper informationand administrative obligations

According to the authority's recommendation, the introduction of the workplace monitoring is lawful with the above two-step test; however, apart from that and together with it the employer is bound by strict information requirements. The authority encourages the data controllers that the information shall be provided in the form of a policy. The monitoring by camera -if not only the employee is seen on the records (e.g. postman or the pizza delivery man) - must be reported to the registry. According to the authority, if a monitoring of a security guard is involved as well, it must be reported separately. The recommendation does not deal with those practical issues, which usually arise in

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connection with the reporting to the registry:

- the exact place and the angle of view must be indicated as well;
- if an external system operates the monitoring system, the operator of the system is data processor, but in case of a separate service may be even an independent data controller.

For the decrease of employer's risk, if an employer decides on the introduction of a monitoring by camera, it is advisable to do so through subcontractor, to turn this task to security professionals, who may also give advice in placing the cameras properly.

Other monitoring systems

The recommendation may be regarded rather a recommendation on CCTV, because it does not deal with the issue of geographical location or the monitoring of the use of e-mail, internet and social media. In the case of these electronic monitoring systems the data protection commissioner's practice gives guide in this respect, according to which the monitoring on the employer's devices in working time may be solely regarded to be legal, namely, the continuous operation of GPS, or a cell information'scontinuous monitoring and legal operation of spywares installed on laptops, cannot even arise.

In the field of monitoring the use of internet, social media and the e-mail, most of the foreign judgments regard the elimination of the human filter as legal, that is, the deliberation of such monitoring systems is suggested, which perform filtering on IT bases - to specified key words, or even to defined pages, addresses.

One of the most important principles of the Labour Code, according to which both parties must act as it might normally be expected in the given circumstances, is true for the monitoring as well. Even in the case of legally installed monitoring systems it may occur that they produce counterproductive operation for reasons other than legal. Thus the employers must decrease to minimal electronic monitoring,not only to respect the employee's fundamental rights, but to preserve the good mood and the trust in the work place.

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THE PAYROLL PERIOD IS COMING

A new labour law legal instrument, aimed to reduce costs, the so-called payroll period indicates a longer period of time beginning with the concerned working week determined by the employer during which employees fulfil the working week. It has been introduced by the Act No. I of 2012 on the new Labour Code (hereinafter referred to as the "LC"), however, many companies have not yet received this information. Given that this new form of work schedule is able to reduce employment costs of employers without the need on termination of employment relationships, may be beneficial for both of the parties, thus we consider it important to present the essence of this legal instrument, and provide you with a brief description on the practical benefits.

In the Hungarian labour law the payroll period is considered to be a new legal instrument, but not without any example on international level and is a well -established time-schedule method in the event of companies using unequal work schedule. The root of this legal instrument can be found in the U.S. ("working time bank" or "working time account"), but it also has a long tradition in Germany and Austria ("Arbeitszeitkonto") as it is a flexible system that works well in practice. Compatibility of this legal instrument with Community law – with special regard to the

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Directive No. 2003/88/EC of the European Parliament and the Council on concerning certain aspects of the organisation of working time – is debatable, in a profit-oriented approach; however, employers consider it as an opportunity for a technical solution in practice, which will greatly facilitate their operation.

The work schedule shall be laid down by the employer. As a general rule, employers lay down the working time of their employees according to the general working arrangement, from Monday until Friday that is to say equal for 5 working days. However, the economic conditions often require a different work schedule, as there are “busy seasons” when a tight schedule shall be kept, and other times when there is less work, but eventually working time of the employees would be equalized in average.

In the event of unequal work schedules employers may decide in the future to use either (i) working time frame, or (ii) payroll period.

The legislator aimed by introducing the payroll period the facilitation of the effective operation of economic operators. According to the reasoning of the LC „in the course of determining the conditions of the duration of the length of the working time frame the same applies, however this time-schedule method is radically different from those on the time-frame. While the application of the time-frame is particularly the determination of the amount of working hours on the basis of longer period, the solution of this § is purely a schedule rule. With its application the employer has the opportunity to define for all working hours of a working weeka longer period."

Rules of the duration of the time-frame, as well as the payroll of the absence, further the procedure to be followed upon the termination of employment relationship before the expiry of the payroll period shall apply regarding the payroll period accordingly.

The choice of the payroll period means the application of a time-schedule rule. The main difference compared to the working time-frame is that there is always only 1 frame, but the payroll period is multi-threaded. It may offer an optimal solution for those employers planning on introducing working-time frame, used working time-frame previously, or need even more space for scheduling their employees working time.

At the working time schedule in a payroll period it can be seen that the employer always schedules the working week, which is determined by the daily working hours and general work schedule on the basis of a longer period of time always beginning in a given week and does so every week. The amount of the working time shall always be averaged in relation to the given payroll period. Accordingly, in the event of a payroll period, these periods restart every week and are running next to each other side by side, therefore this new system requires a precise and continuous administration as precise payroll can only come true this way in connection with the fulfilled working time. In lack of a precise administration the system would get impossible to follow.

The employer has above the unequal working time schedule the opportunity to schedule the days of rest unequal as well. After 6 performed days of work, however, 1 day of rest must be issued even in the event of application of payroll period. The rule also applies for the protection of workers that 1 day of rest per month should fall on a Sunday. However, working time on Sundays as regular working time can be scheduled –if further legal conditions are met - if the employer schedules the working time in a payroll period.

Experiences from other countries show that after overcoming initial difficulties associated with the introduction of the payroll period it may facilitate a more economical operation for the companies.

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