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Privacy of E-mail Correspondence of Employees in the Czech Republic

Introduction

The postmodern technology society has ushered in, during the last decade, several issues challenging long well established approaches and concepts of Labour Law. One of these issues emerging in the Czech Republic, along with other E.U. member countries, as well as in the U.S.A. and all developed countries genuinely recognizing fundamental rights, is the question of the privacy of the E-mail correspondence of Employees. In this context, the rights of privacy and the protection of personal life often conflict, or are at least hardly reconcilable, with the right on conducting business and its related responsibilities. Not surprisingly, it generates per se, as well as through its day to day operation, many topics and practical problems for ardent discussions involving more than merely legal professionals. The most recent fighting spot concerns the possibility of Employers monitoring and reading the E-mail correspondence of their Employees.

In order to fully appreciate and understand this issue, it is instrumental to first briefly review the legal framework for the privacy of correspondence valid and applicable in the Czech Republic (1.), and, in more detail, study some typical challenging issues and situations involving various levels of the privacy protection of the E-mail correspondence of Employees (2). Thereafter, it will be presented a concise summary of recent jurisprudence regarding the extent of the protection of the privacy in this respect along with a review of its interpretation, as well as academic and legal professional opinions on this topic (3). The conclusion, with several suggestions, will constitute a logical culmination of this article.

1. Legal framework concerning the privacy of the E-mail correspondence of Employees in the Czech Republic

The Czech Republic is a democratic and economically developed European country and the Czech Law appertains to the continental Codex systems. The Czech Republic is a party to a plethora of international conventions, treaties, and agreements designated to recognize and protect human rights and fundamental freedoms. In addition, the Czech Republic is a member of the European Union and thusly needs to observe and respect the EU Law. Therefore, the primary sources of the legal regime and regulations regarding the privacy of the E-mail correspondence of Employees to be observed in the Czech Republic are of three provenience types – the body of the International Law, especially in the form of concluded conventions, treaties and agreements, the body of the European Law predominantly in the form of regulations and directives, and the Czech national Law Acts

The Czech Republic belongs to the member states of the Council of Europe, and is a party to its cornerstone documents dealing with the protection of private life directly[1] as well as indirectly.[2] The protection of private life is further included in a number of international treaties and bilateral treaties signed by the Czech Republic. In addition, the Czech Republic is a regular member of the European Union since 2004, and it has respected the European commitments,[3] namely the conformity efforts, for over two decades. Therefore, it is absolutely instrumental to perceive the body of EU law as one of the sources of the legal framework applicable in the Czech Republic. Hence the EU legislation, especially

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[1] Convention for the protection of Human Rights and Fundamental Freedoms signed in Rome on 4.11.1950 which entered into force in the Czech Republic on 1.1.1993.

[2] Convention for the protection of Individuals with regard to Automatic Processing of Personal Data signed in Strasbourg on 28.1.1981.

[3] Announcement of the Ministerium for foreign affairs Nr. 7/1995 Coll., on the conclusion of the European Agreement establishing the association of the Czech Republic to the European Communities.

regarding labour law issues, the privacy of mail and the processing of personal data[4] and the protection of privacy in the electronic communications sector,[5] and its consequences, should not be underestimated.

The roots of Czech Law can be traced back to Roman Law and consecutively the major codes from the 19th century. Therefore, the Czech legal system is a typical example of the continental, European, regime relying on written Acts (statute), such as the Constitution,[6] the Bill of the fundamental rights and freedoms ("Bill of Rights"),[7] the Civil Code,[8] the Commercial Code,[9] and the Labour Code.[10] On one hand, the Bill of Rights explicitly proclaims the protection of the mail confidentiality[11] and on the other hand, the Labour Code stipulates that an Employer is allowed to monitor in a reasonable manner the use of computers by his Employees.[12] The Labour Code complicates the situation further by a recognition of the Employees´ privacy[13] and by a limitation of the Employer´s monitoring right.[14] In addition, based on the Data Protection Act[15] and the above mentioned EU legislation, the Czech Data Protection Office focuses on the protection of the privacy, and explicitly makes statements and expresses opinions regarding various situations involving the privacy of an employee, e.g. about the monitoring of the working place[16] and even the monitoring of the E-correspondence of employees.[17]

Despite the relative abundance of written Law sources and the rather explicit wording designed to cover the issue of the E-mail correspondence of Employees, it is inherently difficult to address many practical and constantly occurring situations in this arena.

2. Challenging issues involving the privacy of the E-mail correspondence of Employees

Over one decade ago, the Czech Constitutional Court took an extensive approach with respect to the interpretation of privacy while stating that the privacy of the personal life includes to some extent a right to create and develop relations with other human beings.[18] Therefore, privacy is considered to cover not only the space between four walls, but as well the area where the development of human relations happens, i.e. the natural person has a right on the protection of its privacy in the working place.[19]

This conclusion has appeared as one of the many proclamations and recognitions of fundamental rights genuinely appertaining to the democratic postmodern society. Nevertheless, this conclusion can be at the same time arguably perceived as the key which opens *Pandora's box* in certain settings, e.g.

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[4] Directive of the European Parliament and of the Council 95/46/EC from 24.October 1995 on the protection of individuals with respect to the processing of their personal data and on the free movement of such data.

[5] Directive of the European Parliament and of the Council 2002/58/EC from 12.July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[6] Act No. 1/1993 Coll., Constitution of the Czech Republic.

[7] Act No. 2/1993 Coll., Proclamation of the Bill of the fundamental rights and freedoms („Bill of Rights").

[8] Act No. 40/1964, Civil Code (CC).

[9] Act No. 513/1991 Coll., Commercial Code („ComC").

[10] Act No. 262/2006 Coll., Labour Code („LC").

[11] Art. 13 of the Bill of Rights:"*Nobody is allowed to breach the mail secret or the secret of other written documents or records …"*

[12] Art. 316 of the Labour Code:"*Employees are not allowed to use production and work instruments, including PC and telecomunication devices of the Employer without Employer´s consent to their personal needs. The Employer is allowed to monitor in a reasonable manner the observance of this prohibition*."

[13] Art. 316 (2) of the Labour Code:"*The Employer is not allowed without a serious reason consisting in the special nature of the activity of the Employer breach the privacy of Employees in the working place and in the common spaces of the Employer by submitting the Employees to an open or hidden monitoring … control of the electronic mail and mail addressed to the Employee*."

[14] Art. 316 (3) of the Labour Code:"*Provided there is serious mason of the Employer which consists in the special natrue of the aktivity of the Employer, which justifies the introduction of controlling mechanisms mentioned in 2nd paragraph, the Employer has a duty to directly inform the Employee about the extent of such a kontrol and about a manner of its conduct."*

[15] Act No. 101/2000 Coll., on protection of personal data ("Data Protection Act").

[16] Statement No. 2/2009 – 51/2009/4 from February 2009 on the protection of the employees' privacy in respect to the monitoring of the working place.

[17] Statement No. 1/2003 – 23/2003/2 from February 2003 on the monitoring of the e-correspondence of employees and personal data of employees.

[18] II. ÚS 517/99 *Hospital Prachatice* from 1.March 2000.

[19] Janečková, E., Bartík, V. (2009). Ochrana soukromí na pracovišti – emailová pošta (Protection of the privacy in the Working Place). Práce a Mzda, 11/2009, p. 28.

in the business environment where Employers, conducting business, entrust their Employees with computers, E-mail boxes and the internet connection. Then the conceptual question arises – who should be protected? The Employee as a human being enjoying the fundamental confidentiality right to the E-mail correspondence, or the Employer owning computers and entrusting third persons, Employees, to use these computers within the framework of business activities for which the Employer is responsible? If the Employer carries responsibility or is materially interested with respect to these E-mails, can the Employer move to a thorough, systematic and constant monitoring? *Cum finis est licitus, etiam media sunt licita*?[20]

The practical first cornerstone issue to be addressed with respect of the privacy of the E-mail correspondence of Employees reflects the difficulty, if not even the impossibility, to reconcile these potentially contradictory interests. Obviously, a good faith Employer feels a legitimate need to control, in a reasonable manner, how the Employee uses the E-mail access given for working reasons by the Employer. An Employer wants to be sure that his Employees do not use such E-mails for private reasons, or reasons even prohibited by the Law (which could even engage the Employer´s own responsibility) and thus becomes frustrated by learning that the protection of the privacy of his Employees *prima facie* eliminates the legally performed monitoring of the Employee´s E-mails and their contents, except in the extreme case of an Employer conducting a special nature of activity.

Logically, the second cornerstone issue is geared toward the definition of the special nature of the Employer's activity. In other words, assuming that in principle an Employer cannot monitor the E-mails of Employees, then it is absolutely critical to understand, interpret and apply the exception set directly by the Law for special nature businesses. At this point, there is not any crystal clear consensus about which businesses and activities will have such a special nature.[21] Despite several statements pleading for a broad interpretation,[22] the literal interpretation, as well as many unofficial opinions, suggests that the special nature needs to be truly exceptional. Thus, the following analysis will be restricted to Employers conducting regular activities and therefore not enjoying the benefits of the controlling exception based on the special nature.

It does not require any excessive imagination or practical experience to understand that these Employers carrying a tremendous responsibility and ultimate liability feel a strong urge to control both, the form and the content, i.e. they want to manage the E-mail boxes and related accessions as well as the E-mails themselves and their very content. Their motivation can go from an exigency to micromanage over a very logical goal to increase the working efficiency to their mandatory duty to fight against criminality, including money laundering. At the same time, Employees are human beings and citizens and so they enjoy fundamental rights granting them a protection of their privacy. A common consensus can be built around the premise that the Employer should be able to read working E-mails received and sent by Employees in their working capacity in the name of the Employer and should not be able to glance at the private E-mails of the Employees, even if they were received or sent from their working E-mail address and working E-mail box. However, no common consensus has been so far established about how to implement this premise to a day-to-day business operation. This fact illustrates conspicuously several court cases ultimately decided by the highest courts.

3. Recent jurisprudence and interpretation of rules about the Email correspondence of Employees

In 2004, the Czech Constitutional Court in the *Czech Post* case brought a new dimension to the classical perception of mail, including E-mail, as a document covered per se and in the entire extent by the privacy protection granted by the Bill of Rights.[23] This was a criminal case in which the accused person had been charged with the fraud committed by intentionally shipping parcels to non existing addresses and by then claiming and collecting an indemnity from the Czech Post. The Czech Post

[20] *The end justifies the means.*
[21] Janečková, E., Bartík, V. (2009). Ochrana soukromí na pracovišti – emailová pošta (Protection of the privacy in the Working Place). Práce a Mzda, 11/2009, p. 28.
[22] Bělina, M. and others (2010). Zákoník práce. Komentář (Labour Code. Commentary). 2nd edition, Prague: C.H.Beck, 2010, p. 1146.
[23] IV. ÚS 554/03 *Czech Post* from 29.April 2004.

joined as a victim the criminal proceedings and requested damages. The accused sender challenged the evidence presented against him suggesting all parcels, receipts and related paperwork are covered by the protection of his privacy.

The Czech Constitutional Court understood that the rejection of the paperwork related to these parcels, which was presented by Czech Post, would entirely destroy any possibility to prove the committed fraud and caused damage. Therefore, after having proclaimed the protection of mail confidentiality as set by the Bill of Rights, the Czech Constitutional Court moved to introduce a new distinction between the content of the mail and additional documents. The first is covered by the protection of mail confidentiality per se, but the second only if they include personal data. The Czech Constitutional Court did not hesitate to move one step forward, and it explicitly stated that the mail confidentiality does not cover the documents created by the Czech Post in relation to the shipment of the concerned parcels, and necessary to support the claim of the Czech Post, and thus these documents can be produced in court proceedings and can be used to establish the evidence.

The above mentioned *Czech Post* decision about the distinction between the legal regime of the content of mail inevitably leading to an absolute legal confidentiality protection and the legal regime of additional information and documents leading to a conditional legal confidentiality, applies to the regular "snail" mail as well as to electronic mail. As a matter of fact, this dual regime approach has been explicitly stated by the legislator with respect to the "snail mail"[24] and it is commonly accepted that each of these regimes operates differently and has not identical consequences and impacts in the Private Law domain as well as in the Public Law domain, including criminal matters.[25]

Consequently, it can be legitimately suggested that, except in a particular situation of a special nature, the Employers can not open and read any E-mails of their Employees which might be personal. The Czech Data Protection Office has provided guidelines[26] helping to distinguish between private and working E-Mails.[27] At the same time, it can be concluded that the Employers can always read information generated by them, i.e. by their automated systems (computers and IT connections) with respect to any and all E-mails sent to, or from, their computers, provided such information does not include personal data. In particular, the Employer has a right to monitor the internet access by the Employees[28] and the observance of the working hours. This inevitably leads to the Employer´s right to monitor the amount of Employee´s incoming and outgoing E-mails, provided the Employers inform their Employees about the monitoring intention or practice.[29] At the same time, Employers must maintain this monitoring within certain limits, and definitely cannot build up an information system with personal data about Employees in a breach with the Data Protection Act.[30]

This logical conclusion was confirmed by the Constitutional Court in the *Erotic Ad* case in 2009.[31] This criminal case involved an Employee who had used the computer of her Employer to access, during her working hours, erotic internet pages and place on them an erotic ad about a third person including a naked photo of this third person, and without her knowledge or consent. During the criminal proceedings, the accused Employee objected to the presentation of the internet protocol automatically generated and showing the names of internet pages and times of their access from her working computer. Her objection was based on the alleged breach of her fundamental rights on

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[24] Act No. 29/2000 Coll., on post services, especially Art. 8 and Art. 16.

[25] Mates, P., Smejkal, V. (2001). Právní ochrana a monitorování písemností a telekomunikací (Legal protection and monitoring of documents and telecommunication). Právní rozhledy 11/2001, p. 534.

[26] Statement 1/2003 of Data Protection Office published under 23/2003/2 effective since 28.2.2003 and Statement 2/2009 of Data Protection Office published under 51/2009/04 effective since 20.3.2009.

[27] Bělina, M. and others (2010). Zákoník práce. Komentář (Labour Code. Commentary). 2nd edition, Prague: C.H.Beck, 2010, p. 1146.

[28] Mates, P., Smejkal, V. (2001). Právní ochrana a monitorování písemností a telekomunikací (Legal protection and monitoring of documents and telecommunication). Právní rozhledy 11/2001, p. 534.

[29] Janečková, E., Bartík, V. (2009). Ochrana soukromí na pracovišti – emailová pošta (Protection of the privacy in the Working Place). Práce a Mzda, 11/2009, p. 28. Bělina, M. and others (2010). Zákoník práce. Komentář (Labour Code. Commentary). 2nd edition, Prague: C.H.Beck, 2010, p. 1146.

[30] Mates, P., Smejkal, V. (2001). Právní ochrana a monitorování písemností a telekomunikací (Legal protection and monitoring of documents and telecommunication). Právní rozhledy 11/2001, p. 534.

[31] I. ÚS 452/09 *Erotic Ad* from 31.March 2009.

privacy protection provided by Art. 13 of the Bill of Rights. Without any hesitation or reserve, the Constitutional Court rejected this objection and declared that the performance of working functions at the working place does not belong to the private and family sphere and that an Employer is not deprived of the capacity to obtain detailed reports about internet pages accessed from an Employer's computers during the working hours of the Employer's Employee. This very clearly stated conclusion can be easily interpreted with respect to the outgoing or incoming E-mails into the Employee's working Email box.

Therefore, from a practical point of view, it can be with some exaggeration stated that the Employees have the right to control their privacy by managing and reading their E-Mails and the Employers have the right to control Employees[32] by monitoring the use of the Employers' computers, E-Mail boxes and internet access. Both controls are relative, and neither the Employee can always prevent the Employer from reading the Employee´s E-Mails, nor is the Employer allowed to constantly and globally monitor a detailed flow of all E-Mails from the working E-mail addresses of Employees.[33]

Conclusion

Quo vadis? Who wins? Employer or Employee? What takes precedence? Business responsibility or Confidentiality of E-mail? Well, maybe this angle of view is unnecessarily conflicting. Maybe new technologies coupled with deeper and out-of-box legal thinking and to day-to-day consistence and persistence can lead to commonly accepted solutions without any need to struggle over the primacy selection.

Firstly, there should not be left space for misunderstanding and false expectations. The Employers should make it crystal clear that they are providing their Employees with computers, E-mail boxes and internet access for satisfying employment duties and if a private E-mail arrives or leaves such E-mail boxes, for whatsover reason, then it either needs to be deleted promptly, e.g. within 24 hours, or within the same timeframe filed in an E-mail box folder named "Private" or "Personal".

Secondly, Employers need to inform through appropriate documentations, such as employment contracts, internal regulations, etc., as well as their acts and actions, that Employers are allowed and have chosen to perform ad hoc monitoring or otherwise limited monitoring of the use of provided working instruments (computers, E-mail boxes, internet access) and of the observance of working hours.

Thirdly, Employers should generously understand the occasional use of working computers, E-mail boxes and Internet Accesses given to Employees for not completely work-related reasons. This is a fact endorsed by a fundamental rights view and a direct fight against it appears in vain, at least at this point in time.

Fourthly, Employers and Employees should closely cooperate and stay within the mandatory legal framework. For this reason, Employers should not succumb to the temptation and should not try to circumvent the Law by manipulating Employees and forcing them to give a permission for a constant monitoring, opening and reading of all E-mails, and so on. Such a renunciation on future rights (fundament right for privacy protection) is not only immoral, but even directly prohibited by the Czech Law.[34] In addition, Employers should wisely and reasonably process and maintain the collected information, especially while considering the Data Protection Act.

Saepe nihil inimicius homini quam sibi ipse.[35] Therefore, do we really have a dilemma here? Would it not be sufficient merely to behave with dignity and respect, i.e. Employers should respect the privacy

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[32] Bělina, M. and others (2010). Zákoník práce. Komentář (Labour Code. Commentary). 2nd edition, Prague: C.H.Beck, 2010, p. 1146.

[33] Janečková, E., Bartík, V. (2009). Ochrana soukromí na pracovišti – emailová pošta (Protection of the privacy in the Working Place). Práce a Mzda, 11/2009, p.28.

[34] Art. 19 of the Labour Code, Art. 39 of the Civil Code.

[35] *Often the biggest enemy of a man is himself (Cicero).*

of Employees and Employees should wisely spend their working time and responsibly use the working instruments provided by their Employers?

Quod fors offert arripiendum.[36] Well, it appears that even after two decades of the democratic regime in the Czech Republic, there are still way too many citizens, from both sides of the employment barricade, not understanding or not wanting to understand how to behave honestly. Therefore, we may expect a plentitude of legal disputes over semi-private working E-mails with flamboyant pleadings and dramatic statements … Sadly, too much time and resources are wasted on maintaining and defending completely unnecessary behavior attitudes and confused beliefs. *Fiat lux!*[37]

Summary:

As with other developed countries, the Czech Republic recognizes and proclaims a myriad of fundamental rights and democratic principles. However, their application can generate challenges, especially in the case of prima facie contradicting and well-preserved interests. During the last decade, judges from the highest Czech courts and well-known Czech legal experts have spent significant efforts to interpret the Czech Law with respect to the very sensitive and important issue of the E-mail correspondence of Employees. This topic inherently involves privacy and responsibility concerns streaming from the Czech national Law along with the Czech mandate to comply with EU law and other international obligations. Despite the resulting complexity, a unified approach aiming to their reconciliation needs to be determined. An overview of the applicable legal framework and recent jurisprudence are instrumental for the interpretation of pertinent rules about the E-mail correspondence of Employees and leads to the basic distinction between the right to control the E-mail box and the right to control E-mail messages per se. This conclusion is further projected in concrete recommendations enlightening practical aspects and offering day-to-day advice for operating in this vibrant arena covered by Constitutional and Labor law, by national and international Law, and by the Law and by the Economy.

Key Words:

E-mail, Correspondence, E-mail Box, Employer, Employees, Privacy, Confidentiality, Monitoring, Control.

[36] *Let´s use what the destiny offers.* (Cicero).
[37] *Le there be a light.*(Bible – Book of Genesis).