

# IT use and abuse in the workplace

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Hogan Lovells in partnership with the Association of Corporate Counsel Europe



# Your speaker panel

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# UK – Case Study

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Alison, a Marketing Manager, has raised concerns about comments posted on her Facebook page by another employee. Alison had uploaded some of her recent holiday photos, to share with her "friends" online. Unfortunately, these have attracted lewd comments, from Dan, in Accounts, who wrote "What a lovely pair of coconuts!"

Alison thinks this is harassment and she would like her employer to take action against Dan.

# Social Media in the Workplace

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- Significant growth in the use of IT and social media
  - Facebook, MySpace, Bebo, Twitter, LinkedIn, Blogs
  - overlap between home and work life
- Accessibility
  - blocked sites
  - permitted use outside working hours
  - use of company equipment
- Advantages and Disadvantages

# Use of Facebook at work

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- Facebook "friends" – including work colleagues?
- Posts
  - timing of entries
  - sharing personal photographs
  - profile page and "wall"
  - personal information (birthday, location, name of employer)
  - status updates (derogatory comments about employer/colleagues, absence from work)

# Online Bullying and Harassment

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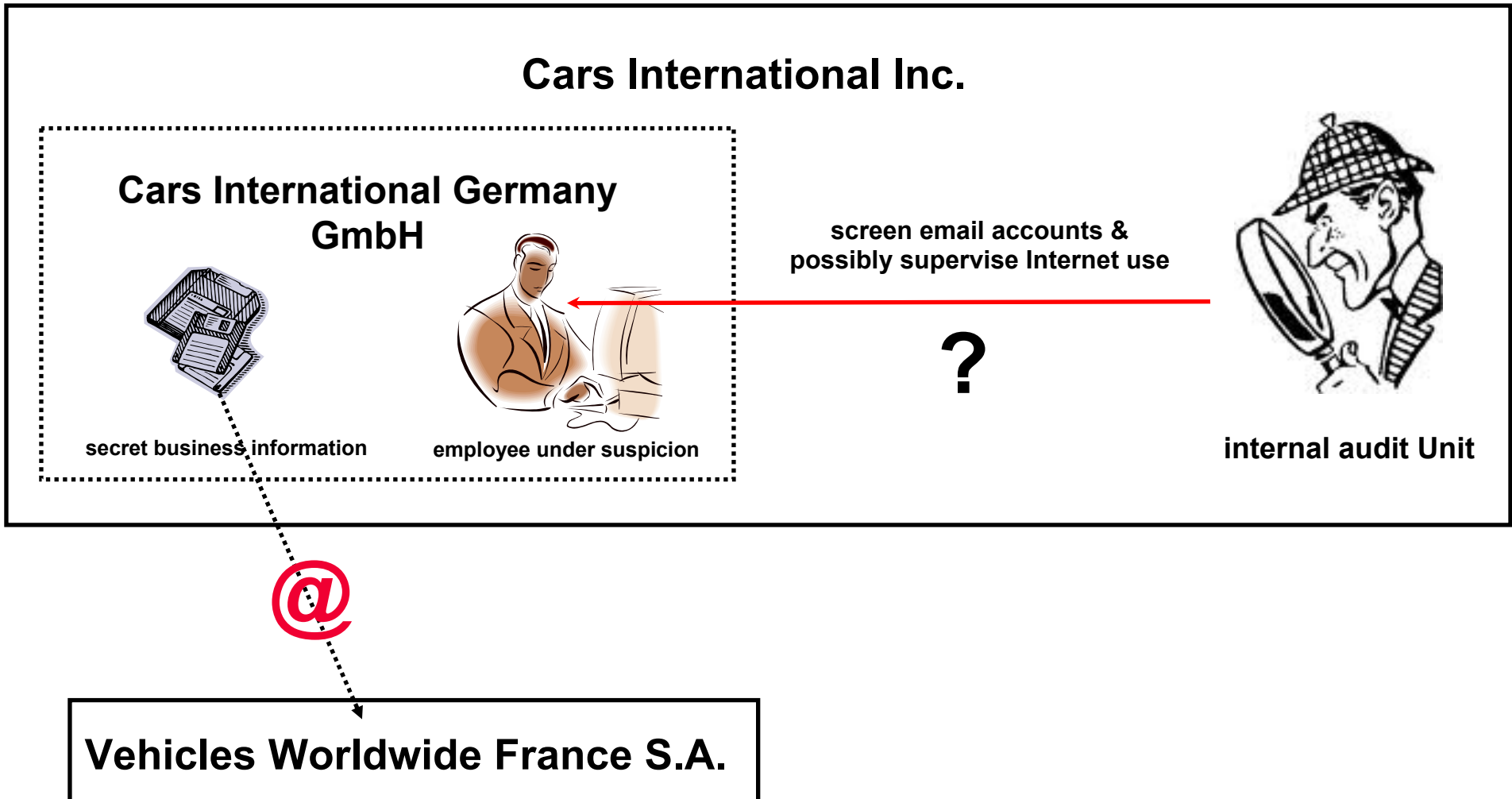
- Prevalence of online bullying and harassment
  - Examples: YouTube, Facebook
- Employers may be liable for actions of employees
  - in the workplace
  - steps to prevent bullying and harassment
  - does this mean policing personal use of Facebook?
  - discrimination (sex, race, disability etc.)
  - constructive dismissal
  - Protection from Harassment Act 1997

# Action by Employers

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- Plan in advance
- Policies and Training
  - Bullying and Harassment Policy
  - Equal Opportunities Policy
  - Disciplinary and Grievance Procedures
  - IT Policy

# The Scenario





# Normal approach

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- Employee privacy policy (globally implemented)
  - employer has the right to access and supervise Internet and email
  - employee privacy policy drafted under US law
  - shall be valid for all companies of the group
- All problems solved?
  - requirements of local data protection/employment law

# Works Council

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- Involvement of local works council
  - information and/or approval required?
  - Germany: (+) means to control employees

## Agreements with works council?

- covering such control rights
- Germany: typically agreements on the use of IT
- Powers of works council
  - seek injunctions

# Difficult statutory approaches: Germany

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- Monitoring of IT use → Distinction between (only) business and (also) private use by employees
  - (restricted) private use permitted
    - informed prior consent in writing by employee; or
    - indication of crime or severe breach of employment contract, based on documented facts
    - (public prosecutor has statutory investigation powers)
  - Only business use permitted
    - easier balance of interest test, but no unlimited access and control
    - new rules to be adopted by legislation in 2011

# Workers' Representatives

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- Types of representation
- Workers' Representatives are guaranteed some general rights such as the right to inform the employees regarding any measure or actions that can affect labour relations or employment conditions
- In most of the EU countries, the employer is obliged to provide the Workers' Representatives with some tools to carry out their functions and duties

# Workers' Representatives

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- International Labour Organization - R143 Workers' Representatives Recommendation
  - Facilities to be Afforded to Workers' Representatives
    - Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
    - In this connection the characteristics of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned, should be taken into account.
    - The granting of such facilities should not impair the efficient operation of the undertaking concerned.

# Workers' Representatives

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- Obligation to tolerate the use of the IT systems of the company by the Employee Representatives?
- Obligation to provide IT equipments or tools (computers, e-mail, Internet, etc.)
- Case Study
  - Works' Council of one of the largest banks in Spain (BBVA) uses the corporate e-mail accounts to provide information to the employees

# Workers' Representatives

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- Case Study
  - The e-mails sent by the Works' Council affect the internal server and cause delays in the company's e-mail delivery
  - The company restricts the use of the e-mail to the Works' Council
  - The Works' Council alleges the breach of the right to inform the employees

# Workers' Representatives

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- Case Study
  - Conclusions of the Spanish Constitutional Court:
    - The workers' representatives have the right to use corporate e-mail accounts to inform the employees with certain limits
    - The Works' Council communications can not interfere the normal activity of the company. This does not imply that the employees can not receive e-mail during the working hours since e-mail could be read by the end of the working day
    - The use of the e-mails accounts for professional purposes prevails in case of conflict.
    - The company can establish the limits of the use by the workers' representatives of the corporate e-mail account
    - The company is not obliged to assume any cost due to the use of the corporate e-mail by the Works' Council



# France : Data transfer - Facts

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WorldWide France is an affiliate of WorldWide Inc., a company based in Phoenix, Arizona.

WorldWide Inc. has decided to implement a new Employee Appraisal Process (EAP) applicable in all the group's affiliates in the world.

In order to manage the EAP, each affiliate will transfer HR data concerning its employees to the data base located in Phoenix headquarters.

The data will be directly processed by WorldWide Inc. IT Department in Arizona.

However, part of the data will be transferred to Data Treatment, a sub contractor which does not belong to the WorldWide group and is based in Bangalore, India.

All the companies of the group will need to send directly to Data Treatment part of the data necessary to create the EAP data base.

# Legal issues

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- Obligations with the CNIL (data protection French authority)
  - Relevant regulations:
    - EU Directive 95/46/CE of October 24th, 1995 relating to data transfers
    - EU Decisions 2001/497/CE as modified on December 24th, 2004 regarding the Standard Contractual Clauses
    - French Decree n°2005/1309 of October 20th, 2005

# Legal issues

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- Obligations with the CNIL (data protection French authority)

If the EAP data base was managed exclusively in the U.S. (directly or indirectly by WorldWide Inc.), a declaration to the CNIL would have been sufficient (Safe Harbour).

Since part of the data will be treated in India, a country which is not regarded as providing an "adequate level of protection", a prior authorisation of the CNIL will be necessary to transfer the French data.

In order to obtain such authorisation, WorldWide France will have to comply with the strict protection rules established by the CNIL:

- No transfer of the Social Security Number,
- No transfer of data relating to the private life of the employees (family situation, bank account numbers, etc.)
- Etc.

In practice, the only way to obtain an authorization will be for the WorldWide France (and Inc.) to comply with the Standard Contractual Clauses.

# Legal issues

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- Obligations with the Works Council
  - Relevant regulations:
    - Articles L.2323-27 and L.2323-32 of the French Labour Code
    - Article L.4612-8 of the French Labour Code
  - WorldWide France's Works Council will have to be informed and consulted prior to the data transfer on two different grounds:
    - Introduction of a new data process management allowing to control the employees' activity
    - Indirect modification of a remuneration mechanism (the EAP having an impact on the employees' remuneration)
  - WorldWide France's Health and Security Committee (CHSCT) will also have to be informed and consulted (potential impact on the mental health of the employees)

# Legal issues

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- Obligations with the employees
  - Relevant regulation:
    - French Decree n°2005/1309 of October 20th, 2005
    - CNIL Decision dated December 8th, 2005
  - Each employee will have to receive individually the following information, drafted in French:
    - Countries to which the data will be sent
    - Nature of the data transferred
    - Aim of the transfer
    - Categorie(s) of addressees
    - Right of access and modification

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# Q&A

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Thank you for your participation