

Video surveillance versus privacy in Portugal

A glimpse at the Portuguese legal framework and main trends followed by the Portuguese DPA. By **Magda Cocco** and **Carolina Nascimento Neves**.

We have witnessed in recent years an overwhelming increase in the use of surveillance technologies, both by public and private entities, inspired in general by the need to increase security.

In the modern world surveillance is a well-discussed topic in all jurisdictions, and Portugal is no exception.

Portugal seems, however, to be an exception, when compared with other EU Member States (and when compared with the United States), on the approach to the balance between protection of privacy and security. In fact, contrary to leading trends, the Portuguese authorities – especially the Portuguese Data Protection Authority (Comissão Nacional de Protecção de Dados Pessoais, hereafter “DPA”) and Portuguese courts tend to favour the protection of privacy over security when deciding on matters concerning video surveillance.

ABSENCE OF ADEQUATE GENERAL LEGAL FRAMEWORK

The general Portuguese legal framework on data protection is currently laid down in Law 67/98 of 26 October 1998 (“APPD”), which transposed Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, into the Portuguese legal framework. This law, being clearly applicable to video surveillance (as a type of processing of personal data), does not, however, contain specific provisions on video surveillance.

The absence in the APPD of specific regulation on video surveillance has left the door open to different interpretations of its legal regime. In 2002, the Portuguese Constitutional Court considered that the data obtained with resort to video surveillance systems constituted information regarding a person’s private life, the permission to use such systems representing therefore a limitation or a restriction on image

rights and the protection of the intimacy of private life. This principle has also been reinforced in the DPA’s guidelines on video surveillance, issued in 2004, and is still followed by the DPA.

According to the APPD, information regarding private life is classified as sensitive data.

Under the APPD the processing of sensitive data, and consequently video surveillance, is only permitted when authorised by a legal provision or by the DPA.

Video surveillance requires the DPA’s prior authorisation, except whenever authorised by law. This means that data controllers who need to install and/or operate a video surveillance system must request and wait for the DPA’s authorisation prior to the beginning of the relevant processing.

The DPA’s authorisation may be granted when an important public interest is at stake and the processing is essential for exercising the legal or statutory rights of the controller, or when the data subject has provided his explicit consent for such processing, in both cases with guarantees of non-discrimination and with the implementation of the security measures provided for in the APPD.

The DPA may, in particular, authorise video surveillance whenever it is aimed at ensuring the prevention of unlawful activities. However, such authorisation may only be granted provided that the use of video surveillance is crucial in pursuing the legitimate purposes of the data controller and that the fundamental rights and freedoms of the data subjects are not overriding.

MAIN TRENDS: THE DPA AND COURT DECISIONS

The DPA’s approach regarding the granting of authorisations to install and monitor video surveillance systems has been quite strict (ie. the DPA has in

general, when balancing the interests at stake, favoured privacy over security) and such a strict approach has also been followed by Portuguese courts.

During the international football tournament, Euro 2004, the DPA was requested to authorise the collection of images at the sports events due to take place in Portugal. In some cases, the DPA had not granted authorisation to install video cameras, alleging that such cameras could violate the privacy of people living near the venues of sports events. In other situations, the DPA had imposed the adoption by the controller of certain technical measures to avoid the capture of images of the houses near the football stadiums.

In September 2004 the DPA refused to authorise a company responsible for the management of a kindergarten to install a video surveillance system in the areas used by children under the age of five. The company indicated that the purpose of the processing was to allow the parents and the school directors to supervise the activities performed by the children. In fact, and even though the images were meant to be viewed live (and would not be recorded), the DPA considered that such video surveillance was excessive, disproportionate and inappropriate. According to the DPA’s understanding, the proposed processing would imply an unjustified constraint on the children’s right to intimacy.

Recently, the Portuguese Supreme Court issued a decision ordering a pharmaceutical company to remove video surveillance cameras from premises “where the employees carry out their professional tasks”, considering the activity to be disproportionate. Even though the company had alleged the importance of the cameras in the prevention of the theft of pharmaceutical products, the Supreme Court determined that the company could not

permanently subject its employees to what it has considered to be a police measure, with violation of their fundamental rights, especially taking into account that the employer could resort to less grievous legal mechanisms to prevent illegal conduct by its employees.

In 2005 the DPA conducted inspections of motorway operators in which it became aware that most of them had installed video cameras to monitor traffic and ensure the safety of motorway users. The DPA considered that monitoring of traffic conditions by motorway operators is a data processing operation (since it is possible, at least in theory, to identify the persons inside the vehicles on the motorways) and thus subject to its prior approval. Since the motorway operators had not obtained approval, the DPA ordered the immediate blocking of the processing of images.

Last month, the Portuguese Parliament requested the DPA's opinion on a draft law regarding the installation and use of video surveillance in taxis. The collection of passengers' images in public buses had already been considered legitimate by the DPA. However, regarding taxis, the DPA considered that video surveillance should not be used in every trip, but only in cases of risk or potential or imminent danger, so as to safeguard citizens' privacy.

SPECIFIC LEGAL PROVISIONS ON VIDEO SURVEILLANCE

Decree-Law on Private Security Services (Decree-Law nr. 35/2004, of 21 February 2004) sets forth the terms and conditions applicable to the processing of personal data collected through video cameras monitored by companies duly authorised/licensed to provide private security services. According to the Act, companies providing security services are allowed to install video cameras and to record images and sounds. Such records may only be kept for 30 days and may only be used under the terms of criminal procedure law, i.e. access to the relevant images is limited to the police and judicial authorities. In the DPA's guidelines on video surveillance and in almost all of its authorisations on this matter, this aspect has been highlighted. It should be noted that the rule at stake has caused serious problems in

the context of labour law. In fact, in the event that the cameras capture images of an employee committing a certain criminal act that may give rise to fair dismissal, the employer is denied access

seemed completely legitimate, the following legislation has been enacted by the Portuguese Parliament:

- Law 1/2005 of 1 January 2005 authorises security forces to use

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to the images (as corroborating evidence in the dismissal procedures), at least during the period in which all information pertaining to the criminal investigation is subject to judicial secrecy, as a matter of criminal law (it should be noted that the secrecy period may be a very lengthy one).

Article 20 of the Labour Code establishes that the employer may install video surveillance cameras for the purpose of protecting persons and property but it may not use remote surveillance methods at the workplace aimed at controlling the professional performance of employees.

Gambling Law (Decree-Law nr. 10/95, of 19 January 1995, as amended), expressly authorises the use of video surveillance equipment in casinos, more specifically in gambling rooms, for inspection purposes only and as a security measure.

Law 16/2004, of 11 May 2004 establishes preventive measures to be adopted in case of violence associated with sports, compelling the promoters of sports competitions to implement video surveillance systems in stadiums.

Decree-Law 139/2002 of 17 May 2002 imposes on establishments where explosives are produced and/or stored an obligation to adopt a permanent surveillance system to ensure detection of intruders.

RECENT INCREASE IN LAWS ON VIDEO SURVEILLANCE

Due to the absence of an adequate legal framework on video surveillance, we have recently witnessed in Portugal an increase in specific legislation on video surveillance. In order to facilitate video surveillance in certain circumstances in which the use of video surveillance

video cameras in public places for the protection and security of people and public or private property and the prevention of crime in places "where there is a reasonable risk of its occurrence".

- Decree-Law 207/2005 of 29 November 2005 defines the procedures to be adopted by security forces when installing motorway electronic surveillance systems, as well as the procedures to be adopted for the processing of the collected information and efficient register of accidents, infractions or any other illicit behaviour.
- Law 51/2006 of 29 August 2006 governs the implementation of motorway electronic surveillance systems by motorway operators. The enactment of this law had great significance because, as mentioned above, the DPA blocked video surveillance by motorways operations. According to this law, video surveillance on motorways is not subject to the DPA's prior authorisation.

Although these laws have contributed to remedy some of the inadequacies of Portuguese legislation on video surveillance, the enhancement of a comprehensive legal framework on video surveillance remains necessary. Such a comprehensive legal framework may contribute significantly to a more adequate balance between privacy and security.

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