

**Applications nos. 1874/13 and 8567/13**

***Isabel LÓPEZ RIBALDA against Spain  
and María Ángeles GANCEDO GIMÉNEZ  
and Others against Spain***

**Submission**

**by**

**the European Trade Union Confederation (ETUC) under Rule 44(5)**

**(20/07/2015)**

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## Introduction

1. The European Trade Union Confederation (ETUC) represents the interests of workers at European level. Founded in 1973, it now represents 90 national trade union confederations in 39 European countries, plus 10 industry-based federations. The ETUC's prime objective is to promote the European Social Model and to work for the development of a united Europe of peace and stability where working people and their families can enjoy full human civil and social rights and high living standards.
2. The ETUC attaches great importance to decent working conditions in combination with the protection of private and family life. This is all the more true in relation to the protection of

personal data in the employment relation. These issues are of grave concern to the ETUC which represents many workers in potentially similar situations. The ETUC is concerned that states will not sufficiently protect workers' privacy in the workplace.

3. Two human rights are at the core of the present applications which will be examined, as indicated by the Court in the Questions to the Parties, by starting with Article 8 followed by Article 6 of the Convention.

## Relevant international law and material

### *United Nations (UN) and International Labour Organisation (ILO)*

4. Within the **UN** context the International Covenant on Civil and Political Rights (ICCPR) guarantees the 'Right to privacy' (Article 17 ICCPR). In this respect para. 6 of the Human Rights Committee's General comment<sup>1</sup> states i.a.:

'Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited.'

5. Whereas the **ILO** has not yet adopted a legal instrument on the protection of personal data in the employment relationship it has elaborated in 1997 a 'Code of practice on the protection of workers' personal data'<sup>2</sup> dealing i.a. with 'Individual Rights' (11) and 'Collective Rights' (12).

### *Council of Europe*

6. Since the early 1980s important developments have taken place at the Council of Europe's level in order to protect personal data of persons in general and workers in particular. Especially, the information of the data subject (here the worker) by the controller (here the employer) is of increasing importance.

### **Convention No. 108 on protection of personal data**

7. As early as in 1981 the Council of Europe adopted Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108).<sup>3</sup> Article 8 provides:

#### **'Article 8 – Additional safeguards for the data subject**

Any person shall be enabled:

(a) to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file; ...'

8. In the meantime, the Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data has elaborated 'Propositions of Modernisation'<sup>4</sup> asking explicitly for 'Transparency of processing':

#### **'Article 7bis - Transparency of processing**

1 Each Party shall see to it that the controller ensures the transparency of data processing by informing the data subjects, unless they have already been informed, of at least the identity and habitual residence or establishment of the controller, the purposes of the processing carried out, the data processed, the recipients or categories of recipients

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<sup>1</sup> General comment No. 16 on Article 17 (Right to privacy) - Thirty second session (1988).

<sup>2</sup> Protection of workers' personal data - An ILO code of practice, 1997.

<sup>3</sup> CETS No. 108 – 28/01/1981.

<sup>4</sup> 18/12/2012 - T-PD 2012 04 rev4.

of the personal data, and the means of exercising the rights set out in Article 8, as well as any other information necessary to ensure fair and lawful data processing.

2 Where the personal data are not collected from the data subjects, the controller shall nonetheless not be required to provide such information where the processing is expressly prescribed by law or this proves to be impossible or involves disproportionate efforts.’

### **European Social Charter (ESC)**

9. Concerning the Right to Private Life (Article 1§2 ESC) the European Committee of Social Rights elaborated an Interpretative Statement in 2006<sup>5</sup> in which it extended its case-law to the protection of workers in respect of their privacy:

‘Individuals must be protected from interference in their private or personal lives associated with or arising from their employment situation. Modern electronic communication and data collection techniques have increased the chances of such interference. ...’

### **Opinion by the Venice Commission (2007)**

10. In 2007, the European Commission for Democracy through Law (Venice Commission) has adopted a study on video surveillance.<sup>6</sup> It covered also the workplace and required that people concerned should be entitled to qualified information:

‘18. For the purposes of this study, the private sphere will also include workplaces and the use of video surveillance in workplace premises, which raises legal issues concerning the employees’ privacy rights. ...’

91. People are entitled to access to the data collected concerning them. People are also entitled to be informed about the collection and the processing of those data, whether they have been transmitted to other persons or institutions, and about the use that will be made thereof.’

### **Handbook on European data protection law (2014)**

11. In 2014, the Court in cooperation with the Fundamental Rights Agency of the European Union (FRA) published a “Handbook on European data protection law” in which information requirements are highlighted. Under the description of the “Rules on transparency of processing” the first of the “Key points” refer to this obligation:

‘Before starting to process personal data, the controller must, at the very least, inform the data subjects about the identity of the controller and the purpose of the data processing, unless the data subject already has this information.’

12. Under point 4.3.1 the Handbook contains more precise requirements to be fulfilled to be able to qualify the information as sufficient for the purpose of data protection, in particular concerning the content of information and time of providing information.

### **Committee of Ministers’ Recommendation on the processing of personal data in the context of employment (2015)**

13. Most recently, the Committee of Ministers has adopted a Recommendation dealing with the specific issue of data protection in the employment relation<sup>7</sup> (Recommendation (2015)5).

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<sup>5</sup> CETS No. 35 - 18/10/1961. The same applies to Article 1§2 of the Revised ESC (CETS No. 163 - 03/05/1996).

<sup>6</sup> Opinion on video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection – 08/06/07 - Study no. 430 / 2007 - CDL-AD(2007)027

<sup>7</sup> Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment (Adopted by the Committee of Ministers on 1 April 2015, at the 1224th meeting of the Ministers’ Deputies). (It replaces the previous Recommendation (89)2E.)

14. Principle 10 in Part I states:

***'10. Transparency of processing***

10.1. Information concerning personal data held by employers should be made available either to the employee concerned directly or through the intermediary of his or her representatives, or brought to his or her notice through other appropriate means.

10.2. Employers should provide employees with the following information:

- the categories of personal data to be processed and a description of the purposes of the processing;
- the recipients, or categories of recipients of the personal data;
- the means employees have of exercising the rights set out in principle 11 of the present recommendation, without prejudice to more favourable ones provided by domestic law or in their legal system;
- any other information necessary to ensure fair and lawful processing.

10.3. A particularly clear and complete description must be provided of the categories of personal data that can be collected by ICTs, including video surveillance and their possible use. This principle also applies to the particular forms of processing provided for in Part II of the appendix to the present recommendation.

10.4. The information should be provided in an accessible format and kept up to date. In any event, such information should be provided before an employee carries out the activity or action concerned, and made readily available through the information systems normally used by the employee.'

15. In Part II Principle 15 on information systems, including video surveillance, reads as follows:

***'15. Information systems and technologies for the monitoring of employees, including video surveillance***

15.1. The introduction and use of information systems and technologies for the direct and principal purpose of monitoring employees' activity and behaviour should not be permitted. Where their introduction and use for other legitimate purposes, such as to protect production, health and safety or to ensure the efficient running of an organisation has for indirect consequence the possibility of monitoring employees' activity, it should be subject to the additional safeguards set out in principle 21, in particular the consultation of employees' representatives.

15.2. Information systems and technologies that indirectly monitor employees' activities and behaviour should be specifically designed and located so as not to undermine their fundamental rights. The use of video surveillance for monitoring locations that are part of the most personal area of life of employees is not permitted in any situation.

15.3. In the event of dispute or legal proceedings, employees should be able to obtain copies of any recordings made, when appropriate and in accordance with domestic law. The storage of recordings should be subject to a time limit.'

16. Principle 21 provides for additional safeguards:

***'21. Additional safeguards***

For all particular forms of processing, set out in Part II of the present recommendation, employers should ensure the respect of the following safeguards in particular:

- a. inform employees before the introduction of information systems and technologies enabling the monitoring of their activities. The information provided should be kept up to date and should take into account principle 10 of the present recommendation. The information should include the purpose of the operation, the preservation or back-up period, as well as the existence or not of the rights of access and rectification and how those rights may be exercised;
- b. take appropriate internal measures relating to the processing of that data and notify employees in advance;
- c. consult employees' representatives in accordance with domestic law or practice, before any monitoring system can be introduced or in circumstances where such monitoring may change. Where the consultation procedure reveals a possibility of infringement of employees' right to respect for privacy and human dignity, the agreement of employees' representatives should be obtained; ...'

## **European Union**

17. At the level of the **European Union** the protection of personal data has achieved great importance in primary and secondary legislation. This is supplemented by the respective jurisprudence of the Court of Justice of the European Union (CJEU).

### **Primary law**

18. According to Article 6(1)(1) of the Treaty of the European Union (TEU) the Charter of Fundamental Rights of the European Union (CFREU) has 'the same legal value as the Treaties'. Concerning the respect for private life and protection of personal data the relevant provisions state:

*Article 7*

**Respect for private and family life**

Everyone has the right to respect for his or her private and family life, home and communications.

*Article 8*

**Protection of personal data**

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

### **Secondary legislation (Directive 95/46)**

19. In 1995 the then European Communities have adopted a Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive 95/46).<sup>8</sup>
20. Under Article 2 of Directive 95/46:

'For the purposes of this Directive:

- (a) "Personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference ... to one or more factors specific to his physical ... identity;
- (b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by

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<sup>8</sup> Directive 95/46/EC of the European Parliament and of the Council of 24/10/1995 - OJ L 1995, 281 p. 31.

transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction; ...

(d) “controller” shall mean the natural ... person ... which alone or jointly with others determines the purposes and means of the processing of personal data ...

(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'

21. Article 3(1) of that Directive provides:

'1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.'

22. Article 7 of Directive 95/46 is worded as follows:

'Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or ...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'

23. Article 11(1) of Directive 95/46 provides:

'1. Where the data have not been obtained from the data subject, Member States shall provide that the controller ... must at the time of undertaking the recording of personal data ... provide the data subject with at least the following information, except where he already has it:

(a) the identity of the controller ...;

(b) the purposes of the processing;

(c) any further information such as

– the categories of data concerned,

– the recipients or categories of recipients,

– the existence of the right of access to and the right to rectify the data concerning him

insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.'

### Relevant jurisprudence of the CJEU

24. In its *Ryneš* judgment, the CJEU has recently explicitly qualified the video surveillance as “processing of personal data”.<sup>9</sup>

'25 Surveillance in the form of a video recording of persons, as in the case before the referring court, which is stored on a continuous recording device — the hard disk drive — constitutes, pursuant to Article 3(1) of Directive 95/46, the automatic processing of personal data.'

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<sup>9</sup> CJEU Judgment 11 December 2014 - Case C 212/13 – *Ryneš*.

## Article 8 of the Convention

25. Concerning Article 8 of the Convention the Court has asked:

‘Was the use of video surveillance at workplace without previously informing the employees in accordance with Article 8 of the Convention?’

### *Applicability of Article 8 ECHR*

26. In *Köpke v. Germany*<sup>10</sup> the Court has accepted the applicability of Article 8 of the Convention in this respect:

‘The Court notes that in the present case a video recording of the applicant's conduct at her workplace was made without prior notice on the instruction of her employer. The picture material obtained thereby was processed and examined by several persons working for her employer and was used in the public proceedings before the labour courts. The Court is therefore satisfied that the applicant's “private life” within the meaning of Article 8 § 1 was concerned by these measures.’

27. In the same judgment, the Court has acknowledged positive obligations in this respect:

‘The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition. In both contexts regard must be had to the fair balance that has to be struck between the competing interests – which may include competing private and public interests or Convention rights (see *Evans v. the United Kingdom* [GC], no. 6339/05, §§ 75 and 77, ECHR 2007-IV) – and in both contexts the State enjoys a certain margin of appreciation...’

### *Procedural safeguards*

28. The protection of privacy in general and in the employment relation in particular is a relatively new element in international human rights protection. The risks for privacy deriving from new technologies are increasing. International and in particular European Human Rights protection have developed in the sense that irrespective of the question of permitted processing of personal data as such the person(s) concerned have to be informed and, in principle, need to have given their consent. Moreover, the employment relationship requires information (and consultation) of the workers' representatives.

### **Right of the worker to be informed**

29. The right to information of the data subject (i.e. the worker) by the controller (i.e. the employer) represents a basic principle and a minimum procedural protection at the same time.

30. This right is expressly recognised in **national legislation** by Article 5 § 1 of the Constitutional Act 15/1999 on Personal Data Protection (see Statement of Facts under B.5.).

31. Moreover, several **European instruments** and materials address the protection of privacy, be it in the general form for protection of personal data or in the more specific issue of video surveillance at the workplace. For interpretation purposes, it will be recalled that the Grand Chamber has specifically drawn attention to the importance of international law in the interpretation of the European Convention on Human Rights (Convention):

The Court, in defining the meaning of terms and notions in the text of the Convention, **can and must** take into account elements of international law other than the Convention, the interpretation

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<sup>10</sup> Decision (Fifth Section) 5 October 2010 - Application no. 420/07 - *Karin KÖPKE v. Germany*. References to this decision will not include any further indication since the paragraphs of the decision are not numbered.

of such elements by competent organs, and the practice of European States reflecting their common values.<sup>11</sup> (Emphasis added)

32. At *EU* level besides the fundamental rights on protection of family life (Article 7 CFREU) and on protection of personal data (Article 8 CFREU, see above para. 18) in primary law, the secondary legislation in the Directive 96/45, see above paras. 19 - 23 refers explicitly to the principle of prior information of the data subject (here the worker) by the controller (here the employer) on the processing of personal data. In its Chapter II Section IV (Information to be given to the data subject) Article 11 sets out the minimum requirements for the information to make the processing of personal data permissible (see above para. 23).
33. At the level of the *Council of Europe* Article 8(a) Convention No. 108 (adopted as early as in 1981<sup>12</sup>) can be considered as the nucleus of the principle of prior information. However, recent developments show more recognition of this right in the context of Convention No. 108. Indeed, the propositions for modernisation contain a new Art. 7bis on “Transparency of processing” requiring again the information (see above para. 7). In 2007, the Venice Commission has adopted an Opinion on video surveillance by private operators in the public and private spheres and by public authorities in the private sphere and human rights protection (see above para. 10) including video surveillance at the workplace and also requiring prior information. Combining EU and CoE law (mainly the ECHR) the Handbook on European data protection law (see above para. 11) refers as a key point to the principle that before starting to process personal data, the controller must, at the very least, inform the data subjects. Most recently and specifically on the protection of personal data in the Employment Relation Recommendation (2015)<sup>5</sup> on the processing of personal data in the context of employment of 1 April 2015 stressed the principle of transparency in general (Principle 10: Transparency of processing, see above para. 14) addressed video surveillance in particular (Principle 15: Information systems and technologies for the monitoring of employees, including video surveillance, see above para. 15) and highlighted the need of information of the workers as well as the workers’ representatives (Principle 21: Additional safeguards, see above para. 16).
34. In conclusion, the right of the data subject to be informed before the processing of personal data is to be considered as a right derived from Article 8 ECHR as procedural safeguard.
35. This conclusion is enhanced by a further right, i.a. the principle of a prior consent before data processing.. In particular Article 7(a) of Directive 95/46 (see above para. 21) requires that ‘the data subject has unambiguously given his consent’.<sup>13</sup> Indeed, the right to consent requires prior information.
36. According to the Statements of Facts no such consent has been searched and even less achieved by the employer. Therefore, the Court should find a violation of Article 8 ECHR.

### **Rights of the workers’ representatives to be informed**

37. Independently of the right to information of the workers concerned it would have to be assessed whether Article 8 was also violated because of the failure to inform the workers representatives before using the video surveillance. This assessment is indispensable if the Court would under

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<sup>11</sup> ECtHR 12 November 2008 - no. 34503/97 - *DEMIR AND BAYKARA v. TURKEY*, [2008] ECHR 1345, § 85.

<sup>12</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28/01/1981.

<sup>13</sup> Article 7 of Directive 95/46 contains several further grounds of permissible data processing.



specific circumstances such as in the present case deny the obligation to inform the workers concerned.

38. In cases such as the present workers representatives are the ultimate procedural safeguard in order to ensure that the rights and interests of the workers concerned are not violated. Such a right has been developed in recent times in different international material:
39. Generally, several international instruments contain the right on information and consultation of workers representatives. Besides Convention No. 135 (Workers' Representatives Convention, 1971) the ILO has guaranteed information and consultation rights on specific issues such as safety and health. More generally, Article 21 of the Revised ESC (The right to information and consultation) and EU Directive 2002/14 on information and consultation.<sup>14</sup>
40. In particular, Principle 21 "Additional safeguards" of the Committee of Minister's Recommendation Rec(2015)5 (see above para. 16) requires that employers, for all particular forms of processing, set out in Part II of the this recommendation, should ensure the respect of the safeguards in particular:

'c. consult employees' representatives in accordance with domestic law or practice, before any monitoring system can be introduced or in circumstances where such monitoring may change. Where the consultation procedure reveals a possibility of infringement of employees' right to respect for privacy and human dignity, the agreement of employees' representatives should be obtained;'

As consultation requires prior information, this provision strengthens the interpretation of Article 8 ECHR in the sense of an additional procedural safeguards at collective level.

41. In conclusion, the ETUC is of the opinion that in respect of the employment relation the additional safeguard for the protection of workers' privacy should encompass the right of the workers' representatives to be consulted, but at least to be informed on any video surveillance at the workplace.

## **Article 6 of the Convention**

42. Based on the conclusion that Article 8 of the Convention was violated the present submission will now analyse the two question asked by the Court concerning Article 6 of the Convention.

### ***Violation of Article 6 because of the use of evidence obtained in breach of Convention rights (Group A):***

43. The Court's first question as regards Article 6 of the Convention concerns Group A of the applicants and reads as follows:

'Assuming that the videos submitted to the Granollers Labour Court no. 1 were in breach of Article 8 of the Convention, was there also a breach of Article 6 of the Convention in declaring the applicants' dismissals lawful?'

44. Because of the video having been taken in violation of Article 8 ECHR the question is whether the use of evidence (video) obtained in breach of Convention rights (Article 8) is an inadmissible means of evidence and a judgment being mainly based on this evidence would violate Article 6 of the Convention.

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<sup>14</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 2002, p. 29.

45. The Court's approach until now appears to be cautious in this respect of both civil<sup>15</sup> as well as criminal<sup>16</sup> limbs of Article 6 recognising certain impacts of evidence obtained in breach of Article 3 of the Convention.
46. The main reasons why evidence established in contravention with a right guaranteed by the Convention (here Article 8) is that it would leave the violated person without effective protection. Indeed, any permitted use of the video in a procedure challenging the (subsequent) dismissal would deprive the person concerned of the protection which the right to respect of private life seeks to guarantee. The right given by the right hand would be taken away by the left hand.
47. This is all the more true in the employment relation. In this respect the Court has acknowledged specificities for the application of Article 6 in requiring, for example, specific diligence concerning the length of procedure.

*Violation of Article 6 because of denying the access to court by means of a settlement agreement (Group B):*

48. The Court's second question concerning Article 6 of the Convention concerns Group B of the applicants and reads as follows:
- ‘Assuming that video surveillance at workplace without previously informing the employees was not in accordance with Article 8 of the Convention, was there also a breach of Article 6 of the Convention in declaring the settlement agreements valid?’
49. This is a very serious practical problem in labour relations. ‘Settlement agreements’ are often used - as in the present cases - when confronting workers with alleged misconduct. This is often a situation when they feel under specific pressure, are not advised properly and are not aware and even less dare to require the recognition of their procedural and substantial rights.”
50. In particular, the specificity of the employment relation requires a cautious approach in respect of recognising such agreements.

## Conclusions

51. Taking the domestic and international legal situation into account , the ETUC is of the opinion that Spain has violated:
- Article 8 ECHR in respect of all applicants and
  - Article 6 ECHR in respect of both Groups of applicants (A and B).

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<sup>15</sup> ECtHR (Research Division), GUIDE ON ARTICLE 6 – Right to a Fair Trial (civil limb), 2013, § 229.

<sup>16</sup> ECtHR (Research Division), GUIDE ON ARTICLE 6 – Right to a Fair Trial (criminal limb), 2014, §§ 134 – 140.