‘Just more surveillance’: The ECtHR and workplace monitoring

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Abstract
This contribution analyses the European Court of Human Rights’ (ECtHR) decision on workplace surveillance, Florindo De Almeida Vasconcelos Gramaxo v Portugal (2022) App no 26968/16 (ECtHR 13 December 2022). This is a case of interest as it introduces a new surveillance technology into the Strasbourg jurisprudence: the Global Positioning System (GPS). The movements of Mr. Florindo’s company car were constantly monitored by GPS for three years, during and outside working hours. We criticise the stance taken by the majority of the judges, which we summarise as a ‘just more surveillance’ approach. This approach led them to value the GPS’ efficiency in pursuing a legitimate employer aim, and failed to engage in a critical analysis of this tool and of the alternative (less invasive) means available. We argue that the Court did not effectively protect the employee’s right to privacy (Art. 8 European Convention on Human Rights) through a proper ‘least intrusive mean test’, which can be found in previous ECtHR case law on the subject.

Keywords
Workplace surveillance, European Court of Human Rights, Art. 8 ECHR, Privacy at work, Digitalisation

1. Introduction
The case law on workplace surveillance and Article 8 of the European Convention on Human Rights (ECHR) has had no significant development since López Ribalda and others v. Spain

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This changed on 13 December 2022, when the European Court of Human Rights (ECtHR) ruled on the case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal.* The (majority of the) judges again endorsed covert surveillance of workers, following up the López Ribalda’s case, but with one distinguishing factual element: if Ms. López Ribalda and colleagues were under covert video surveillance inside the company premises, Mr. Florindo’s movements were continuously tracked via two GPS devices (one known, and one unknown) for three years, during and outside working hours.

With *Florindo,* GPS as a means of workplace surveillance makes its way into the ECtHR’s case law. This case reflects upon an issue of great importance to ‘workplace’ rights as informed by the experience of work during the Covid-19 pandemic, namely, workers’ privacy and employers’ increasing surveillance capabilities (see further Sections 2 and 4).

In Section 3, we argue that if the ECtHR applied the test developed in *Bărbulescu v. Romania,* we would have a different outcome in *Florindo* today. In the joint dissenting opinion, Judges Motoc, Pastor Vilanova and Guerra Martins pointed to what we define here as the ‘just more surveillance’ approach. For the majority in *Florindo,* the GPS was deemed to be a more efficient way for the employer to pursue the legitimate aim of controlling company expenses. However, this majority neglected to consider whether there was an alternative and less intrusive surveillance tool – which was available. Only by failing to focus on anything less than 24/7 data collection for three years could this GPS surveillance be justifiable and not constitute a disproportionate reduction in Mr. Florindo’s privacy.

In Section 3 we jointly analyse the dissenting opinions in *López Ribalda and Others v. Spain* (2019) and *Florindo.* These opinions provide a ‘least intrusive means test’ for workplace surveillance. Its application by the Court in future cases is of utmost importance given the growing availability of surveillance tools at work. The future impact of Art. 8 ECHR in the datafied workplace is at stake. While we focus here on the negative potential of the ‘just more surveillance’ approach, we also situate our argument within the larger context of setting precedents for the deployment of technologies now which may be difficult to dislodge in the future (Section 4).

### 2. The context of the *Florindo* decision

GPS came under the scrutiny of the ECtHR for the first time in *Florindo,* although it has been used privately since the 2000s. Prior to *Florindo v Portugal,* essentially three main surveillance

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1. *López Ribalda and Others v. Spain,* App no 1874/13 and 8567/13 (ECtHR, 17 October 2019). In January 2022 the ECtHR delivered *Adomaitis v Lithuania,* App no 14833/18, (ECtHR, 18 January 2022). The case was about phone wiretapping of a prison warden suspected of corruption. His phone was monitored for a year in the course of criminal proceedings, which, however, ended without charges being brought due to lack of evidence. The ECtHR therefore found that the applicant’s right to private life had not been violated. The reasoning of the Court did not significantly develop the law from *López Ribalda.*


5. A Global Positioning System (GPS) provides geolocation and time information to a GPS receiver at or near any point on Earth where there is an unobstructed line of sight to four or more GPS satellites.
measures could be found in the case law: phone wiretapping and reading of emails,6 monitoring of activities on company devices (reading employees’ communications or opening saved files)7 and video surveillance on company premises.8 From an operational point of view, all these were occasional surveillance activities: someone was needed to listen in on the telephone conversation, or someone to open the files stored on the computer. Video surveillance on company premises has a spatial limitation: when I leave work, I am no longer visible.

GPS overcomes all these limitations, as the case of Mr. Florindo shows. His car movements were tracked 24/7, for three years, by the company. The software that monitored the data flow was always active and independently noticed discrepancies in the data collected (paras. 17–19). Moreover, GPS tracks the most unavoidable activity: movement. By contrast, for any reason a worker could choose not to communicate by email or talk on the phone. GPS also insinuates itself into a worker’s private life; a pervasive intrusion for which the worker has no opt-out choice in his private sphere.9

This case anticipates the litigation of the future of data-intensive surveillance at work. The present case law introduces factual elements of the much-debated intensive surveillance in the ‘datafied’ workplace.10 The Court itself pointed out that this is an atypical case when compared to previous case law, acknowledging further that it raises a question of ‘what type and level of surveillance is acceptable on the part of the employer’ (para. 93).

2.1. The case before the ECtHR

From 1994 to 2014, Mr. Florindo worked as a medical representative for a Portuguese company. He was busy. His tasks involved planning, preparing and visiting doctors and clinics in the Vila Real district. Due to the need to travel quickly, the company assigned him a vehicle for both personal and work purposes. However, kilometres travelled outside normal working hours had to be reimbursed to the company at a rate of EUR0.15 per kilometre up to 6600 km and EUR0.40 beyond that distance. From 2002 to 2011, the extra kilometres were reported directly by Mr. Florindo via an internal management system. From November 2011, the company activated GPS as an additional verification system on all company cars. It was only in January 2012 that the company distributed a document setting out the purposes of the GPS tracking (para. 11), namely, ensuring the safety of users and the equipment; the optimisation of the routes to make sales; the calculation of the kilometres travelled during and after working hours; and the monitoring of discrepancies between what was declared on the system to account for the extra kilometres travelled and what was detected by the GPS. The Portuguese Labour Code bans surveillance of work performance, unless it is for

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security reasons relating to individual or company assets (Art. 20(2)). It is then subject to authorisation by the Data Protection Authority (Art. 21). In the Florindo case, the company notified the Data Protection Authority on 24 November 2011 and the surveillance was authorised (para. 14).

In May 2014, a second, hidden GPS tracker was installed in Mr. Florindo’s car. Following a technical inspection in April 2014, the company found there was interference with the main GPS. By cross-referencing the data from the main GPS, the second hidden GPS and those entered into the system by the worker, the company concluded that Mr. Florindo was turning off the main GPS on weekends and public holidays (para. 21). He was reporting fewer kilometres on the system and working less than the contractually agreed eight-hour working day. For these reasons, on the 5 September 2014, Mr. Florindo’s employment with the pharmaceutical company was terminated (paras. 20-26).

3. The reasoning of the EctHR

According to the EctHR, Mr. Florindo was informed that his vehicle was tracked via GPS, and he had signed the agreement distributed on 5 January 2012. Thus, there was no doubt, according to the majority in Strasbourg, that the applicant knew that his movements were being tracked by the company. He was therefore aware that disciplinary measures could be taken against him, implying that there was no reasonable expectation of privacy regarding GPS mileage monitoring. This lack of reasonable expectation of privacy, in the Court’s reasoning, justified the employer’s decision to withhold from him the fact that a second GPS tracker was installed for investigative purposes. The notification to the employee, therefore, was compliant with the test developed in Bârbolescu: Mr. Florindo was informed of the surveillance measures and their purpose (para. 116).11 We view the majority’s reasoning as an example of reasonable expectations being questioned as technologies create a greater sense of openness and transparency, particularly through monitoring technologies.12

The ECtHR then stressed that the Court of Appeal of Guimarães rightly deemed the GPS data to have been unlawfully collected when the purpose was to check compliance with working hours, as it was against Article 20(1) of the Portuguese Labour Code (which prohibits remote surveillance of

11. In the case Bârbolescu v. Romania, 2017 (para. 121), the Court established a set of criteria to be met for proportionate and necessary interference with Art. 8 ECHR. To do so, national authorities must answer a number of questions, including:

1. whether the employee was informed about the possibility of the employer implementing monitoring measures and the implementation of such measures;
2. the extent of employer monitoring and the degree of intrusion into the employee’s privacy;
3. whether the employer had valid reasons for monitoring the employee’s communications;
4. whether a monitoring system using less invasive methods could have been established instead of directly accessing the employee’s communication content;
5. the consequences of the monitoring for the employee; whether the employee was provided with adequate safeguards, especially in the case of highly intrusive monitoring operations;
6. and finally, whether the domestic authorities ensure that an employee whose communications have been monitored has access to a remedy before a judicial body that can determine, at least in substance, the extent to which the aforementioned criteria were met and whether the measures in question were lawful (ibid., paras. 121–122).

work performance), while it had considered the GPS data on the kilometres travelled (also outside working hours) as a legitimate expression of monitoring the company’s property and its proper use. By considering legitimate only the data on kilometres travelled, and the data relating to the monitoring of the work performance as illegitimate, the ECtHR held that Articles 20 and 21 of the Portuguese Labour Code had not been violated. Therefore, according to the test developed in Bârbulescu, the applicant’s right to private life had been proportionally reduced to safeguard the employer’s right to control his expenses (paras. 119–125). The majority of the judges supported the Court of first instance’s conclusion (Court of Vila Real) that less invasive surveillance tools than a 24/7 GPS tracking were not available for investigating inconsistencies in the reporting of kilometres travelled (para. 40 and para. 122).

3.1. The dissenting opinion(s)

The three dissenting judges, including the Portuguese judge, Guerra Martins (together with Judges Motoc and Pastor Vilanova), argued that the judgment of the majority was not sufficiently comprehensive: a case of 24/7 employer intrusion into an employee’s private life for three continuous years had not yet been scrutinized by the court. In addition, the reasoning offered in the judgment showed important contradictions.

The majority deemed legitimate 24/7 surveillance for protecting company property, including the permanent monitoring of employees outside working hours. The recourse to a permanent monitoring was justified by ‘great difficulties’ the employer would have faced in verifying the work performance, compliance with working time, and the kilometres travelled (paras. 40 and 122). Yet, at the same time the ECtHR deemed the GPS data relating to working hours and working performance illegitimate because it was contrary to the Portuguese Labour Code (para. 124). It considered legitimate only the GPS data relating to the kilometres travelled (see the Section 3 above).

This reasoning is contradictory and based on a (wrong) assumption that in this case, GPS tracking was absolutely necessary for verifying the kilometres travelled. Mr. Florindo was also dismissed on the basis of work performance data. The grounds for dismissal stated that the GPS had detected an average of less than the contractually agreed eight-hour working day. Would Mr. Florindo have been fired if the employer had not had access to illegally collected data? The plaintiff was subject to the most severe sanction, dismissal, based upon unlawfully collected data. The majority of the judges justified the recourse to the GPS for performance assessment and accounting reasons (paras. 40 and 122), only to recognise afterwards that the data relating to

13. Bârbulescu (n 11), points, 2, 3, 5, 6.
14. In all the cases dealt with by the ECtHR so far, none has ever dealt with continuous surveillance of a worker for three consecutive years. All cases have involved surveillance for weeks or months – all for periods of less than one year. ‘Factsheet - Surveillance at Workplace’ (European Court of Human Rights 2023) <https://www.echr.coe.int/Documents/FS_Workplace_surveillance_ENG.pdf>.
15. The ECtHR has held that hidden and constant surveillance of working premises is a legitimate means of protecting company assets: Veljko Turanjainin, Video Surveillance of the Employees between the Right to Privacy and Right to Property after Lopez Ribalda and Others v. Spain, 5 University of Bologna Law Review 268 (2020).
16. The ECtHR endorsed the assessment of the Court of First Instance (Court of Vila Real), which stated, in paragraph 36 of its judgment (paras. 40 and 122 of the ECtHR judgment), that without the GPS system, the employer would have great difficulty in verifying the performance of duties, compliance with working time, the places visited and the kilometres travelled during and outside working hours, considering that the latter are an additional expense to be charged to the employee.
work performance was unlawfully collected (para. 124). Such complex and contradictory reasoning is built upon a key premise: the Court failed to consider alternative means and dubiously supported its contention that the use of GPS tracking was unavoidable. Without the GPS system operating, it would have been ‘more difficult’ for the employer to verify the kilometres travelled (para. 122). Against such a ‘just more surveillance’ approach, the Court could have reflected on the question of whether less intrusive means of surveillance could have been employed (paras. 11–16, Dissenting opinion).

The majority took an ambivalent approach towards the surveillance technology involved, as well as the company’s failure to consider (any other available) less invasive alternatives. The judgment illustrates that the majority overlooked the fact that the Portuguese Data Protection Authority acknowledged that less intrusive solutions, other than permanent tracking of the employee, existed (paras. 81 and 17, Dissenting opinion). They also failed to enforce the established principle of using alternative, less intrusive means of surveillance which could have resulted in a less serious outcome for Mr. Florindo, other than him losing his job after a (partly illegitimate) intrusion into his private life (Art. 8 ECHR). For instance, the Portuguese DPA, in its resolution n. 7680/2014, indicated to the company that the installation of a switch to distinguish professional use of the car from private use was an option. This way, the GPS could have been activated during working hours and switched off when the car was used for private purposes (paras. 81 and 17, Dissenting opinion).

This dissenting opinion is not new: the dissenting judges in the López Ribalda case (De Gaetano, Yudkivska and Grozev) warned of the relevance of the least intrusive means test in a world with ‘increasing electronic surveillance’ (para. 4, Dissenting opinion). As early as 2019, part of the Court was already calling for a proper application of point 4 of the test developed in Bărbulescu (‘whether a monitoring system using less invasive methods could have been established’). Therefore, although belonging to a minority, the ECtHR appears to have a clear and replicable ‘least intrusive means test’ to complete the overall proportionality test in cases of datafied workplace surveillance.17

4. Conclusion: the ‘least intrusive means test’ in cases of workplace surveillance and the future of Art. 8 ECHR

For many years, labour law literature has been addressing the emergence of data-intensive surveillance at work and its impact on Art. 8 ECHR.18 Hence, the ECtHR should be equipped to deal with this new technological scenario in its future case law. In Florindo – and previously in López Ribalda – the least intrusive means test was not properly applied. The majority in Florindo held that GPS tracking was a given and unchallengeable element, even though its use provided extensive data and in any case was contrary to Portuguese law. Instead, the fourth point of the Bărbulescu test – the least intrusive means test – should play (at least) a greater role in adjudication of today’s data-driven workplace. As effectively summarised in the dissenting opinion in the López Ribalda case (para. 9), the national courts have ‘to assess what alternative measures could have been used by the employer in pursuit of its legitimate aim, measures which would have had a less intrusive impact on the employees’ right to respect for their private lives’.

18. Mangan (n 10); Molè (n 3); Hendrickx (n 12).
Assessing the effectiveness of alternative means of surveillance certainly requires a constructive effort on the part of the ECtHR, but not an extraordinary one. The Court can find, as in this case, possible alternatives among the documents brought by the parties and the facts coming from the proceedings in the Member state. From there, a comparative assessment on more or less harmful means of surveillance can be completed.\(^{19}\) A specific focus on less invasive technological means would increase the Court’s awareness of the contemporary technological scenario, where the growing influence and control that technology has in our world, and the collection and use of our personal data in our everyday activities in particular, is apparent. As a living instrument, the Convention, and therefore the Court, not only needs to recognise the influence of modern technologies, but must also develop more adequate legal safeguards to secure respect for the private life of individuals (para. 2, Dissenting opinion López Ribalda).

The safeguarding of the scope of Article 8 ECHR, as Florindo well demonstrates, relies on the ECtHR’s more informed decision-making procedure, with a systematic analysis of the specific surveillance means available and needed. In this way, we cannot respond to the emergence of new means of surveillance with a ‘just more surveillance’ approach simply because it is more efficient or user-friendly. Rather, we must respond with the introduction of measures that truly serve employer interests without exacerbating the information asymmetry of today’s data intensive surveillance.\(^{20}\)

As it stands, the ruling in Florindo suggests that some technologies (here GPS) that are deemed necessary to protect an employer’s interests are beyond scrutiny. We contend that the law is capable of greater nuance than this blunt assessment. Employers have legitimate interests to be protected, but the means by which these interests are protected (particularly the technologies used to effect this aim) should not be beyond scrutiny. A procedural approach\(^{21}\) (whether the worker has been notified of the surveillance), as endorsed by the majority in Florindo, should be seen as inadequately protecting Article 8 ECHR rights.

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\(^{19}\) Gerards (n 17) 486–488.

\(^{20}\) Riso (n 10) 3; Molè (n 3) 100.