SECOND STUDY COMMISSION QUESTIONNAIRE 2010

CIVIL ISSUES REGARDING THE PROTECTION OF PRIVACY
(WITH PARTICULAR FOCUS ON SUCH MATTERS AS AFFECTED BY THE INTERNET

**REPORT BY THE PORTUGUESE ASSOCIATION OF JUDGES**

A. Laws and Regulations

1) What laws apply to protection of privacy issues in your legal system? Are there civil code/legislative/common law provisions that protect individuals against privacy violations regarding:

In Portugal, data protection is regulated by a programmatic principle of the constitution which stipulates in its article 35 :

"1. All citizens have the right of access to computerized data concern them, and may require its correction and updating, and right to know the purpose for which they are intended, in accordance by law.

2.The law defines personal data as well as the conditions applicable to automatic processing, connection, transmission and use, and ensures its protection by means of independent administrative body.

3.The Informatics Technologies can not be used for treatment of data concerning the philosophical or political convictions, party or trade union, faith religious, ethnic and private life, except upon consent express proprietor or authorization provided by law with guarantees of non discrimination and processing of statistical data does not individually identifiable.

4.It is prohibited to access the personal data of third parties, except in exceptional cases provided by law.

5.It is prohibited to assigned a single national number for citizens.

6. Everyone shall be guaranteed free access to computer networks for public use, the law will define the rules applicable to transborder data flows and appropriate forms of

protection of personal data and others whose protection is justified on grounds of national interest.

7. Personal data kept on manual files shall benefit from protection identical to that provided in the preceding paragraphs, under the law

Then there is the Law No. 67/98 of 26/10 called Law for the Protection of Data which transposed the Directive No 95/46/EC

In Health Law there is the law nº 12/2005 - Genetic information of health individual information.

In electronic communications we have the Law nº32/2008 - transposing the Data Retention Directive on Data Retention Electronic Communications.

In terms of video surveillance, we have:

Decret-Law nº 35/2004 - use of video surveillance by private security services and self-protection

Decret- Law nº 1 / 2005 - regulates video surveillance by security forces in public places of common use

Decret-Law nº 207 / 2005 - Adjust the means of electronic surveillance road used by security forces

Decret-Law 51/2006 - regulating the use of surveillance systems by road and by EP-road concessionaires

Decret- Law 33/2007 - regulates the installation and use of video surveillance systems on cabs.

Ordinance 1164-A / 2007 - approving the model notice of video surveillance in cabs

In Portugal was not yet implemented the Directive 2006/24/CE

a) <u>In the Public Sector</u>

- Access by individuals to information collected by various government agencies about them?

In the Portuguese system art. 11 of Law No. 67/98 (which transposed the Directive 95/46/EC) allows access:
Free, periodic, without delays and cost overruns on:
a) availability of data
b) origin, purpose and recipients
c) information about the rationale of treatment
d) rectification, erasure or blocking
e) notification to third parties such rectification, erasure or blocking
If the data concern the State Security access is done through the National Commission for Data Protection

- Protection from disclosure of that information to third parties?

In the Portuguese system the citizen has the right, in theory, to require that data not being processed by invoking weighty and legitimate reasons (art. 12, al. A) of Law No. 67/98), except if the data concern the security of the State and the prevention or investigation of crime.

- Access by the media or members of the public to government records, for example, those regarding government decision-making and action, and limitations put on that access?

The access rights, prohibition and correction can be restricted, when:

a) data are not used to making decisions regarding a particular individual,
b) when the data are used solely for scientific research
c) and where they are used solely for compiling statistics.

In the remaining cases applies to the normal constraints

- Limitations put on information sharing between government agencies?

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| There can be only share data if both entities are authorized to do so. The administrative body always required to maintain the confidentiality of data (art. 14), prevent access to third parties (art. 15) and ensure the secrecy (art. 17).<br>In the Portuguese system citizen has the right, in theory, to require that data not being processed by invoking weighty and legitimate reasons (art. 12, al. A) of Law No. 67/98), except if the data concern the security of the State and the prevention or investigation of crime |

b) In the Private Sector

- Protection from disclosure to third parties of personal information collected in the world of e-commerce, for example
    - ✓ personal information provided through the use of credit/debit cards and other electronic transfers of funds;
    - ✓ personal information in relation to credit reporting and banking transactions;
    - ✓ records of a customer's usage (telephone; online activity);
    - ✓ records kept for insurance coverage and other social services benefits provided by the private sector?

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| In the Portuguese system, when we face direct marketing there is the right, free of charge, to object that their data are collected and processed (Art 12, al. B), without invoking any reason.<br>The person may also require to be informed before the data are transmitted to third parties (art. 12 al. B).<br>The person may require without any pay that data are not disclosed to third parties.<br>See also response below. |

- Protection from surreptitious collection of information via the internet, for example, through internet electronic surveillance technologies such as "spyware" or "adware"?

Where there is e-commerce we apply the law No. 41/2004 18.8 (transposed the Directive No. 2002/58/EC) that requires firms providing public services and electronic communication to:.

a) adopt technical and organizational measures to ensure safety;

b) report the existence of security risks;

c) ensure the inviolability of communications

d) restrict the storage and access information

e) delete the data traffic or ensure that they become anonymous with the exception of paragraphs address and type of the subscriber station (arts. 4, 5, and 6 of Law No. 41/2004)

f) prohibit listening, installing listening devices, storage or other kinds of interception or surveillance of communications and related traffic data

2) What laws apply with respect to the investigation and enforcement of privacy rights?

The two laws mentioned above (nº 67/98 and nº 41/2004), and the general clause of non-contractual liability under Article 483 of the Civil Code as well as protection of personality rights through the arts. 70 et seq of the Civil Code.

In some cases there may still be criminal liability

a) non-compliance with obligations relating to data protection - up to one year imprisonment penalty (Art. 43, Law No. 67/98)

b) unauthorized access to data - imprisonment up to one year imprisonment penalty (art. 44, Law No. 67/98)

c) Forgery or destruction of data (Rule 45 of the Law No. 67/98)

d) inquiry through computer (spyware) up to two years imprisonment penalty art. 193 of the Criminal Code)

e) Use of data by computer without authorization - up to three years imprisonment penalty art.221 of the Criminal Code

f) disseminate of racist messages via informatic technologies up to five years imprisonment penalty - Article 240 of the Criminal Code

- How strong is the protection?

Theoretically strong enough, the same as the other personality rights.

- Are the laws binding or advisory?

Binding.

- How does an individual make a complaint when a private actor or government breaks privacy laws?

There is an administrative body (National Commission for Data Protection) whose function is to monitor and control the business activity (art. 21 and 22 of Law No. 67/98) and has a duty to "comply with the request made by any person or by an association that represents, for the protection of their rights and freedoms with regard to data processing" (art. 23, paragraph 1, al. i, of Law No. 67/98).

You can still use the normal legal means (the civil action and criminal charges, in general terms).

- Who prosecutes or enforces – for example, a privacy commissioner, administrative body, such as a privacy tribunal?

See previous answer.
The decisions of Administration are contested in the general courts, and there is no specific court for crimes or civil actions concerning data protection.

- Is there a right to a court remedy?

Yes See previous answer.

Based on personality rights is possible to obtain provisional remedies to avoid injury or aggravation of injuries.

- Are there out-of-court dispute resolution options?

In general terms the parties may constitute an arbitral court concerning civil maters. But there is no such single court for this type of litigation.

B. Private-Sector Initiatives

1) Do particular companies, industries or professional associations in your country govern themselves regarding the protection of privacy? For example, are there privacy policies, professional codes, voluntary industry standards?

Yes, several.
For examples:
a) Code of Conduct electricity supply company (EDP SA)
b) code of conduct for direct marketing companies (http://www.amd.pt/codigoconduta.pdf)
c) Code of Conduct of the Association of Portuguese contacts centers
www.apcontactcenters.com / cod_etica_conduta.htm
d) code of professional conduct of the market research association
www.apodemo.pt / codigo.pdf

2) Who or what body, if any, ensures that these standards are met?

Like all codes of practice standards are in many cases platonic, but usually there is one vigilance committee whose function is to ensure compliance with these standards by its members, under penalty of several measures, including warnings and in the most serious cases they can decided the expulsion of the member who committed the injury to these standards.

C. International and Cross Border Issues

1) How is privacy protected when information is exchanged or transferred to other countries?

Within the European Union the transfer is unrestrained (art. 18 of Law No. 67/98).

For countries outside the union transfers are prohibited, unless:
a) the state comply with the provisions of Law 67/98 (art. 19, Law No. 67/98)
b) the state is able to ensure an adequate level of protection (art. 19, Law No. 67/98)
c) if the data subject has given unambiguous consent to such transfer (art. 20, Law No. 67/98)
d) if such transfer is necessary for execution of contracts with certain requirements (Article 20, paragraph 1, als. A, b, c)
e) if such transfer is necessary to protect vital interests of the data subject
f) if such transfer is necessary to protect public interest
g) if such transfer is made from a public record or is intended to inform the public

2) Are there any agreements, laws or international treaties or protocols, to protect privacy issues in this situation?

In addition to the agreements that bind the Portuguese State in the European Union, we have:

a) The Council of Europe Convention nº 108 from 28/01/1981
b) The article nº8 from the European Convention of human rights
c) The convention from the European Council concerning the cybercrime nº 185 from 23/11/2001.

There are no specific agreements in this area, but its common in cooperative agreements (eg resolution of the Assembly No. 9 / 2002: Agreement of Friendship andCooperation between the Portuguese Republic and Ukraine, signed in Lisbon on 25 October 2000) to

established a generic clause of cooperation in scientific research which may include data transfer.

In the agreements that include criminal investigation is common to exchange data on the subject (eg Agreement on Cooperation in the Field Officer with South Africa signed on 22.04.2002 Law No. 23/2002 of 10.7.

3) Does your country limit its exchange of information to countries with similar protections of privacy?

Yes, with the exceptions already mentioned in previous answers.

Note that the similar level of protection is decided exclusively by the administrative body.

The transfer will not authorized when the European Commission has considered that that state do not enjoy similar level of protection (Art. 20, paragraph 3, 4, and 5 of Law No. 67/98).