German administrative court specifies how the GDPR applies in the field of vehicle telematics and location data

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Today, a recent judgment by a German court about data protection in the field of vehicle telematics became public. As this is the first German court decision on this topic since the GDPR became effective (and, if I am correctly informed, also the first European one), I share a short summary of the decision together with some observations. The full text of the decision (in German) is available here.

This decision is important for:

- The question when and how **vehicle telematics services** can be used in companies in compliance with the GDPR (e.g. for the purpose of fleet management)
- The question how **valid consent by employees** can (not) be given.

Facts of the case

The conflict pertains to the lawfulness of the use of a GPS-enabled vehicle tracking system.

The plaintiff runs a cleaning company that deploys vehicles to its employees. The employees use the vehicles to reach their places of assignment; some of them are also permitted to use the vehicles for private purposes. The company's vehicles are equipped with GPS systems, which continuously monitor the vehicle conditions (ignition switched on/off) and the location. Location and distance traveled are stored for a period of 150 days.

The data protection authority had issued a decision stating that the collection and processing of employee position data by this system was unlawful and ordered the plaintiff to cease from using

the system, except if it was ensured that ”location tracking of persons” was not carried out during the normal use of the vehicles. Location tracking in case of theft was expressly permitted.

The plaintiff challenged this decision before the local administrative court.

Reasons for the court decision

The court holds that the decision of the supervisory authority is lawful.

According to the court, the plaintiff breached Sec 26 of the Federal Data Protection Act (BDSG), which is a provision that makes use of the opening clause in Article 88 GDPR. Sec 26 BDSG states that employers can process personal data about their employees if this is necessary for the performance of the employment relationship. The court held that there was no lawful basis for the processing. Neither was the processing necessary for the purposes of the employment relationship nor was there valid consent given by the employees.

In the present case, the court argued that the GPS-based system, in particular the storage for 150 days, was not necessary for the performance of the employment relationship, for the following reasons:

1. The processing of data collected outside working hours was not necessary to control the (partial) prohibition of the private use of the vehicles. This could have been done by asking the employees to leave the keys at their workplace.
2. The storage for 150 days was not necessary in order to prevent theft or to retrieve company vehicles that may have been stolen, as the vehicles can still be located in case of theft.
3. The processing of data generated during working hours is not required to plan tours or coordinate employee and vehicle deployment. In that regard the court mentions that cleaning services are not as time-critical such as, for example, logistics or passenger transport. This was also underlined by the fact that the cleaning services company had stated that it used the location system only for 3 to 4 times per year.

In summary, the court was not convinced that usage of the system was really necessary for the employer to provide the cleaning services, and therefore came to the result that Sec. 26 BDSG / Article 88 GDPR were not applicable. The court also briefly discussed whether Articles 6(1)(c) or 6(1)(f) GDPR could lead to a different result, but answered this in the negative.

The court also discussed whether the employees had given their valid consent (Article 6(1)(a) GDPR), as they had accepted and signed some “agreements” that the cleaning company gave to them. The court held that only some variants of these agreements had been phrased as a clear

consent. Other variants did not actually lead to consent of the employee, but rather indicated that the employee was *informed* about the data processing – without leaving the employee a choice. Therefore the court considered the latter variants of these "agreements" not specific enough to be a valid consent. In addition the court also noted that the consent was not informed enough, because the employees had not been informed about all purposes of the processing and about their right to withdraw consent.

In consequence the court did not assess these agreements as valid consents. The court therefore did also not discuss whether consent can be valid in an employment relationship at all (the data protection authority had argued that consent by employees was generally not possible, as consent needs to be "freely given").

Learnings

1) Companies using GPS-based vehicle tracking systems must be able to prove a clear need for such systems.

Not any type of company has such a need, at least not in a case where the vehicle tracking is always switched on, where private use is permitted and where location data is stored for 150 days. Much depends on the circumstances and on the validity and quality of the arguments of the respective company.

2) If possible, such systems should have the following features (and companies should make use of them):

- A button for the employee/driver where he can disable the tracking function
- A functionality to "see" vehicles, if possible, without accompanying ID data (i.e. only vehicles, but not the assigned drivers)
- A functionality where the user of the system can determine how long location data is stored. The user of the system should configure it so that data is stored for a time period much shorter ~~as~~ than 150 days. The court did not state which time might have been appropriate, but we consider that for most purposes one week or less would be sufficient.

3) Consent of employees is an uncertain legal basis at best.

In order to be valid employees need to be properly informed in line with the GDPR requirements, which include information about their right to repeal such consent. And in any case it remains an open question whether consent can be validly given in an employment context at all.

(Side note: While the court did not discuss the issue of "freely given" consent, this question can be answered on the basis of the GDPR itself, while also taking guidance by the data protection authorities into view, such as the Working Paper on Data Processing at Work of the Article 29 Working Party. In a nutshell, consent can only be "freely given" by employees if they can refuse to give their consent without suffering any detriment. In other words, consent would only have been valid if the cleaning company had offered an alternative to the employees, which would have been the option to answer "no" to the agreements and then to use a vehicle without tracking, without any hindrance or discrimination.)