Higher Regional Court of Brandenburg denies right of possession to data

Article by Dr. Carlo Piltz and Johannes Zworschke

In a recent judgment, the Higher Regional Court of Brandenburg found that a right of possession to data does not exist.

This judgment was issued in a case of a dispute between a law firm and one of its attorneys. The law firm has several offices and the attorney handled insolvency cases at one of them. After the parties decided to end their relationship, the law firm copied all the data about the insolvency cases from the server at the office where the attorney had previously worked on the firm's behalf. The attorney wanted to continue working on the cases after his departure from the firm, so he went to court to prevent his former employer from taking them over, arguing that he has a right of possession to the copied electronic data.

The Higher Regional Court of Brandenburg rejected this argument. In particular, the court found that electronic data is not an "object" in terms of § 90 of the Civil Code, which is a fundamental prerequisite for the assertion of rights of possession. The court also ruled out the possibility that the statute could be applied analogously to this case, in the absence of an unintentional omission. The court pointed out in this context that the legislators who drafted the Civil Code (which took effect on 1 January 1900) clearly did not intend for data to be regulated as an "object" in terms of this statute as there was no need for such regulation given the state of technology at the time. And even if one were to assume that legislators at the time did intend to regulate data as "objects" in terms of § 90 of the Civil Code, the fact remains that data lacks the physicality which is required by the statute. On the other hand, (written) records and documents would fall under the statute.

The court also make reference to an extensive report from the "Digital Reset" working group concluding that data ownership, or an absolute right to digital data, does not exist under current law.

This ruling demonstrates that contracting parties should not rely on a statutory right of ownership or possession in case of dispute. After all, many questions in this regard have yet to be clarified under current law, and may be answered in a way which is unfavorable to the parties. For example, there is a question as to what
rights a person has if he or she is caught by a traffic enforcement camera, and the camera data is then analyzed by the manufacturer and the camera user. In order to avoid the uncertainties of this ongoing debate, the parties should therefore make comprehensive contractual arrangements and establish clear rules governing rights to data.

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Company contact: Melanie Schaumann | Head of Marketing & Communications | T: +49 30 / 2332895 0 | E: melanie.schaumann@reuschlaw.de