Illegal espionage devices: a risk for manufacturers and vendors?

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The Data Protection Commissioner for the State of Mecklenburg-Lower Pomerania pointed out in a recent press release that hidden camera videos are against the law and warned that operating minicameras is contrary to data protection law.

The occasion for the press release was an unfortunate incident at the "Monis Rache" festival in the County of Greifswald in Lower Pomerania in which a man hid cameras in the bathroom and filmed female festival attendees on the toilet. He then distributed the films on online pornography platforms, reportedly earning almost € 8,000.

But contrary to what one might presume from the State Data Protection Commissioner’s press release, the legal situation surrounding hidden spy camera videos and minicameras is complicated, and there could be legal repercussions for manufacturers and vendors as well.

The legal situation for the actual video recordings is relatively simple: those who make spy camera videos typically meet the elements of § 201a of the Criminal Code, which penalizes those who invade others' personal space by recording images with a prison sentence of up to two years or a monetary fine. The recording equipment and images may also be seized, along with the profits earned from such activity, in accordance with §§ 201a(5) Sentence 1 in conjunction with § 73(1) of the Criminal Code. The publication of such materials on pornographic portals may also represent a violation of § 184 of the Criminal Code (dissemination of pornographic materials) and § 33 of the Art Copyright Act.

But the legal situation with regard to the minicameras themselves is far more complex. Minicameras may be considered illegal transmitters in accordance with § 90 of the Telecommunications Act and therefore illegal, but this only the case if they are concealed in such a way as to make them particularly suitable for secretly recording images. The mere size of the cameras is not enough to make them illegal in accordance with § 90 of the Telecommunications Act; rather, they would have to be concealed within an everyday object, such as a watch,
alarm clock or smoke detector. If the devices qualify as illegal transmitters, it would be unlawful to possess, manufacture or distribute them in Germany and the competent authority, the Federal Network Agency, may initiate administrative proceedings to enforce this prohibition. This could affect commercial manufacturers and vendors of such devices, and may even cause the market to collapse overnight, as in the case of the "My friend Cayla" doll, which was banned in accordance with § 90 of the Telecommunications Act. There is also the threat of recourse claims from customers, as the devices in question would have to be destroyed. In addition to the consequences in administrative law, a violation of § 90 of the Telecommunications Act may also constitute a criminal offense, carrying a prison sentence of up to two years or a monetary fine in accordance with § 148(1) No. 2 of the Telecommunications Act.

As long as minicameras are not concealed, they may be manufactured, sold and operated in Germany. However, in addition to the provisions of criminal law explained above, other laws would also need to be taken into account, such as provisions of data protection law. In this context, it is interesting that the German Data Protection Conference's Short Paper on video surveillance in accordance with the GDPR defines no requirements with regard to camera size.

In light of this situation, those who manufacture or sell devices which may be affected by this prohibition, but also companies which use minicameras, e.g. to monitor suspicious employees, would be well-advised to carefully examine the legal framework for their activities.