

GZ: DSB-D550.084/0002-DSB/2018 from 27.9.2018□

To Mr□

Istvan O***□

A-**** ****city□

penal decision□

As the registered owner of the Audi brand motor vehicle, you operate with the official□

Hungarian license plate R***2*4□

at least from that□

05/09/2018□

around□

10:45 a.m□

anyway to□

until□

08/20/2018□

in the□

above motor vehicle and thus□

connected to public□

Traffic areas, at least in 1*** Vienna□

K**** alley opposite ONr 3*,□

as the person responsible within the meaning of Art. 4 Z 7 General Data Protection Regulation (GDPR).□

Image processing system (video surveillance) in the form of two in the interior of your□

Vehicle installed dash cams.□

1) The subject video cameras (dash cams) capture both the before and□

also the public space located behind the motor vehicle and thus the□

public road traffic.□

2) A suitable marking on the vehicle, which points to the two dash cams□

indicates missing. ☐

3) Regarding the allegation of violating the obligation to keep records ☐

§ 50b paragraph 1 DSG 2000 and § 13 paragraph 2 DSG becomes the administrative penal procedure ☐

according to § 45 Abs. 1 Z 1 (1st case) VStG. ☐

4) With regard to the allegation of violation of the obligation to delete according to § 50b ☐

Para. 2 DSG 2000 and § 13 Para. 3 DSG the administrative penal proceedings are carried out in accordance with ☐

§ 45 para. 1 no. 1 (1st case) of the VStG. ☐

By doing so, you have breached the following legal provisions: ☐

To 1): ☐

☐ Article 5(1)(a) and (c) and Article 6(1) of Regulation (EU) 2016/679 (data protection ☐

Basic Regulation – GDPR), OJ No. L 119 of 4 May 2016, p. 1 (for the period from ☐

May 25, 2018) ☐

To 2): ☐

a) Section 50d (1) of the Data Protection Act 2000 – DSG 2000, Federal Law Gazette I No. 165/1999 as amended in Federal La ☐

No. 83/2013 (for the period before May 25, 2018) ☐

b) § 13 Para. 5 Data Protection Act - DSG, Federal Law Gazette No. I 165/1999 as amended (for the period from ☐

May 25, 2018) ☐

The following penalty will be imposed on you for this administrative offence(s): ☐

fine of euros ☐

if this is irrecoverable, ☐

substitute imprisonment of ☐

imprisonment from ☐

according to ☐

To 1): € 220 ☐

26 hours ☐

- ☐

To 2): € 80 ☐

10 hours ☐

So in total: ☐

€ 300.00 ☐

36 hours ☐

1) Art. 83 (5) lit ☐

GDPR ☐

2a) § 52 para. 2 no. 4 ☐

DSG 2000 in conjunction with Section 69 ☐

Paragraph 5 DSG ☐

2b) § 62 para. 1 no. 4 ☐

DSG ☐

in connection with § 16 VStG ☐

Any other statements (e.g. on crediting prior detention, on forfeiture or ☐

about private law claims): ☐

Furthermore, you have to pay according to § 64 of the Administrative Penal Act 1991 - VStG: ☐

30.00 ☐

Euro as a contribution to the costs of the criminal proceedings, that is 10% of the ☐

penalty, but at least 10 euros (one day imprisonment equals 100 euros); ☐

Euro as a replacement for the cash expenses for ☐

The total amount to be paid (penalty/costs/cash expenses) is therefore ☐

330.00 ☐

Euro ☐

Payment term: ☐

If no complaint is lodged, this penal decision is immediately enforceable. the ☐

In this case, the total amount must be paid within two weeks after the entry into force of law ☐

Account BAWAG P.S.K., Georg-Coch-Platz 2, 1018 Vienna, IBAN: AT460100000005490031, ☐

BIC: BAWAATWW, in the name of the Data Protection Authority. When ☐

The reference number and the completion date may be given ☐

will. ☐

If no payment is made within this period, the total amount can be dunned. In ☐

In this case, a flat-rate contribution to costs of five euros must be paid. ☐

If no payment is made, the outstanding amount will be enforced and, in the case of his ☐

uncollectibility, the penalty of imprisonment corresponding to this amount is enforced. ☐

Reason: ☐

I ☐

The following decision-relevant facts are due to the carried out ☐

evidentiary procedure: ☐

I.1. Mr. Istvan O***, A-**** *stadt, J***gasse *8/*2, is the registered owner of the ☐

Motor vehicle of the Audi brand with the official Hungarian registration number R***2*4. ☐

I.2. At least since May 9th, 2018 (10:45 a.m.) are in the interior of the present ☐

Motor vehicle installed two video cameras (dash cams). The two - at the front and ☐

Rear window installed - video surveillance systems are each having one ☐

Motion sensor triggered in case of detected movements and be ☐

Captured images stored on an SD memory card. From the coverage of the two ☐

In any case, the public road traffic in front of and behind the vehicle is recorded by cameras. ☐

I.3. Mr Istvan O*** has one of the video cameras at issue (dash cams) ☐

removed from his vehicle on 08/20/2018; the camera mounted on the rear window ☐

was not taken out of service until the issuance of this penal decision. ☐

I.4. Those of the two video cameras (dash cams) within the subject ☐

Motor vehicle emanating image recording is not suitably marked. ☐

I.5. The accused is a Hungarian citizen, married and has three (not ☐

underage) children where one of the children is physically impaired and in this regard

duties of care exist; the accused has a marginal job and

receives a monthly net income of € 900.00. Furthermore

If the accused has no income or assets, there is a

Tax arrears at the tax office of around € 1,300.00.

[Proof: Notification of the LPD Vienna **, SPK ****,

** - PI U***straße to GZ.: PAD/*3/*9*23*5/001A/StV from 05/09/2018, transcript of the

Interrogation of the accused by the data protection authority on August 27th, 2018 and

insight into the act]

II. The determinations are made on the basis of the following assessment of evidence:

II.1. The data protection authority sets the content of the notification contained in the file through the LPD

Vienna **, SPK **** (GZ. PAD/*3/*9*23*5/001A/StV) from 09.05.2018 and the content of the im

Within the framework of the interrogation of the accused from August 27th, 2018

which the statements of the accused for his justification arise, their

Factual findings based.

II.2. When presenting the facts relevant to the decision, reference was made to the

specific evidence referred to in the file. The statements regarding the

Use and functioning of the two installed in the suspect's motor vehicle

Dash cams are based on those reproduced in the context of the LPD Vienna advertisement

Perceptions and incidents during a road police check of

09.05.2018, 10:45 a.m. in Vienna **, K**** Gasse opposite ONr 3*.

The following - relevant for the present proceedings - are verbatim

Perceptions of the police officers as part of their report in writing as follows

reproduced:

"[...] It should also be noted that Mr. O*** in the middle of the

Windshield, a camera (dashcam) installed inside the vehicle

had, which immediately started recording as soon as something happened in front of the

Camera moved or the sensor was triggered. The recording is according to Mr

O*** stored on an SD card. Another camera that

also recorded the traffic was located in the rear left area of the

Rear window, also in the interior of the vehicle. When asked why

he has cameras in the car and records and stores the traffic

indicate that he needs it and use it as evidence in the event of an accident

can. Mr. O*** went in front of the vehicle and ML could see how

the sensor was triggered and the camera started recording. [...]"

Accordingly, the accused himself stated on the occasion of the police check that the

image data generated by both dash cams are stored on SD memory cards

According to the purpose of the recordings, the accused stated that they would be used in the event of an accident

to need. Insist on the truthfulness of the ad content - especially in the light

the official and disciplinary responsibility of police officers - no doubt.

II.3. On the other hand, the interrogation of the accused by the

Statements made by the data protection authority on 08/27/2018, according to which the two of him

used dash cams were never operated in connection with a memory card and

therefore never had the opportunity to take pictures, in contradiction to the

made by the accused himself during the police check on May 9th, 2018

Statements to the police officers and the findings made by them.

With regard to his statement made during the interrogation, according to which

the dash cam originally mounted on the windscreen of his vehicle is about one

Week before his interrogation by the data protection authority - i.e. around August 20th, 2018 -

had broken off the holder and had therefore been removed from the vehicle in the meantime

been, the data protection authority in case of doubt for the accused of the

credibility of this statement. For his submission, however, according to which the two

Cameras were never operated in connection with a storage medium□

and therefore it was never possible to take a picture or that the□

The camera on the rear window is only used as a parking aid□

Accused do not present any evidence and this also otherwise not on convincing□

way to make it believable. Overall, therefore, the responsibility of the accused arose□

contradictory and unrealistic over large parts and was therefore considered implausible□

to qualify a claim of protection.□

II.4. Consequently, the data protection authority arrives on the basis of general life experience□

to the conclusion that the two dash cams at issue until□

08/20/2018 - the rear dash cam also beyond - the traffic situation before and□

behind the vehicle and the image data on a storage medium□

were recorded. Ultimately, running two dash cams would come without any□

Storage option has no practical use, the latter is regularly used in detention□

and storage of image data for evidence purposes in the event of an accident or similar□

be seen.□

II.5. The information provided by the accused with regard to his financial circumstances and□

Duty of care is deemed credible.□

III. Legally it follows:□

Regarding administrative criminal liability:□

III.1. Regarding the legal situation: According to § 62 Para. 1 Z 4 DSG, a fine of up to EUR 50,000 is payable□

punish anyone who carries out image processing contrary to the provisions of Section 3 of the□

Main piece (§§ 12 and 13 DSG) operates.□

Article 83 paragraph 5 lit□

6 GDPR fines of up to EUR 20,000,000 or in the case of a company of up to□

4% of its total worldwide annual sales for the previous financial year□

may be imposed, depending on which of the amounts is higher.□

According to § 69 paragraph 5 DSG are violations of the DSG 2000, which at the time of entry into force of the DSG have not yet been made pending, according to the legal situation after the entry into force of the DSG. A criminal offense that occurred before the DSG came into force is to be assessed according to the legal situation that affects the perpetrator in its overall effect is cheaper; this also applies to the appeal proceedings.

Because the subject conduct commenced prior to May 25, 2018 – the Effective Date of the DSG - lies, the possible maximum penalties according to § 62 Abs. 1 Z 4 DSG above those according to § 52 Para. 2 DSG 2000, come with regard to the amount of the penalty - insofar as there are violations of the DSG 2000 or the DSG concerns - the provisions of the DSG 2000 apply.

Regarding point 1:

III.2. In the present case lies with the operation of image recording by dash cams, starting from the suspect's motor vehicle that is the subject of the proceedings, undisputedly one Image recording in the sense of § 12 Para. 1 DSG. By collecting and storing the image data, material scope of Art. 2 GDPR.

In any case, the recorded image data constitute personal data within the meaning of Art. 4 Z 1 DSGVO and is also one due to the collection and storage of the same

Processing iSd Art 4 Z 2 GDPR given. The accused is responsible for to qualify the present data processing iSd Art 4 Z 7 DSGVO.

III.3. Art. 5 GDPR sets out the principles for the processing of personal data and determines its paragraph 1 lit. a that personal data in a lawful manner, according to processed in good faith and in a manner that is comprehensible to the data subject ("lawfulness, fair processing, transparency"); lit. c

leg.cit. establishes as a further principle that all processing is appropriate and appropriate for the purpose be substantial and limited to what is necessary for the purposes of the processing ("Data Minimization").

According to Article 6 GDPR, processing is only lawful if at least one of the

the following conditions are met: ☐

a) the data subject has given their consent to the processing of data concerning them ☐

personal data given for one or more specific purposes; ☐

b) the processing is for the performance of a contract to which the data subject is party ☐

person is, or necessary to carry out pre-contractual measures, ☐

which are made at the request of the data subject; ☐

c) the processing is necessary for compliance with a legal obligation imposed by the ☐

Controller is subject to; ☐

d) the processing is necessary to protect the vital interests of the data subject ☐

protect any person or other natural person; ☐

e) the processing is necessary for the performance of a task that is ☐

is in the public interest or in the exercise of public authority which ☐

responsible has been transferred. ☐

f) the processing is to protect the legitimate interests of the person responsible ☐

or a third party, unless the interests or fundamental rights and ☐

Fundamental freedoms of the data subject, the protection of personal data ☐

require, especially when the data subject is ☐

a child acts. ☐

Recital 47 leads, among other things, to the lawfulness of processing operations ☐

explanatory that this is due to the legitimate interests of a person responsible, also one ☐

Controller to whom the personal data may be disclosed, or one ☐

Third parties may be justified, provided that the interests or fundamental rights and freedoms of ☐

data subject do not outweigh; including the reasonable expectations of those concerned ☐

person based on their relationship with the controller. A ☐

legitimate interest could exist, for example, if a relevant and ☐

there is an appropriate relationship between the data subject and the controller, ☐

e.g. B. if the data subject is a customer of the controller or in its service□

stands.□

In any case, the existence of a legitimate interest would be particularly careful□

to be weighed up, whereby it must also be checked whether a data subject was a data subject at the time of the collection□

of the personal data and given the circumstances in which it occurs,□

can reasonably foresee that there may be processing for this purpose□

will take place. Especially when personal data is processed in situations□

where a data subject is reasonably unrelated to further processing□

must be taken into account, the interests and fundamental rights of the data subject could be the interest□

of the person responsible prevail.□

III.4. From the recording area of the dash cams that are the subject of the proceedings – as under point□

I.2. detected - the public road traffic recorded in front of and behind the motor vehicle. the□

Recording of image data is triggered in each case by a motion sensor□

Image data stored on storage media (SD memory cards).□

In this regard, it should be noted that dash cams were already□

DSG 2000 were inadmissible (see decision of the Administrative Court of□

September 12, 2016, ZI. Ro 2015/04/0011); in this case, the VwGH came to the conclusion that□

the registration of a data application in the form of permanent storage of image data□

by a video camera mounted in a motor vehicle should be rejected, the operation of the there□

dash cam that is the subject of the proceedings would therefore have been unlawful.□

III.5. Section 1 (2) DSG (fundamental right to data protection) is still valid without any changes.□

According to Article 5 (1) (c) GDPR, the principles of the GDPR also provide that□

personal data adequate and relevant to the purpose and to what is necessary for the purposes□

to the extent necessary for processing ("data minimization"). After this□

An examination shall be held as to whether a limitation to that for the purposes of the provision□

processing is necessary.□

III.6. According to Art. 6 Para. 1 lit. f GDPR, the processing is lawful if it is used to protect the legitimate interests of the person responsible or a third party, unless necessary the interests or fundamental rights and freedoms of the data subject requiring protection require personal data, especially when it comes to the data subject is a child.

Based on the present case constellation, this means that in particular when personal data are processed in situations where a data subject person does not reasonably have to expect further processing, the interests and fundamental rights of the data subject outweigh the interests of the controller could. In this respect, for the assessment of the question of the legality of the processing in A proportionality test must be carried out within the meaning of Article 6 (1) (f) GDPR. However, people who take part in road traffic do not reasonably have to do so reckon that their personal data, and this indisputably includes those associated with the processing related to the present processing, be processed in this way.

It cannot be said that storing image data using in video cameras attached to a vehicle are now common practice in road traffic corresponds (see also the warning of the data protection authority of 09.07.2018, GZ DSB-D485.000/0001-DSB/2018).

III.7. Because those captured by the recording area of the subject dash cams Road users, especially when there is no accident, reasonably do not have to expect to be recorded violates the operation of image recording contrary to the principles set out in Article 5. A the lawfulness of this data processing The supporting legal basis iSd Art 6 Para. 1 DSGVO is not apparent and was Accused also not put forward.

In summary, the data protection authority, in particular with regard to

Possibility of capturing images through movements detected by motion sensors

triggered independently of any accident happening, on the part of the person responsible□

no legitimate interest in the operation of the image recording recognized. Rather predominates in□

present case, the fundamentally protected right to secrecy within the meaning of § 1 DSG□

recorded road users a possible interest in the operation of the subject□

image capture.□

Regarding point 2:□

III.8. According to § 13 Para. 5 DSG, the person responsible for a picture recording has to use it appropriately□

mark. In any case, the person responsible has been clearly identified from the marking□

to emerge, unless this is clear to the persons concerned according to the circumstances of the□

If already known. The labeling must be done locally in such a way that everyone potentially□

Affected person who approaches a monitored object, if possible has the possibility of□

Avoid video surveillance. A similar arrangement provided for § 50d Abs. 1 DSG 2000.□

This is not the case in the present case, as there is no marking on the motor vehicle□

was attached, which refers to the image recording emanating from the vehicle interior.□

Consequently, the established non-compliance with this obligation violates § 13 in the present case□

Para. 3 in conjunction with Section 62 Para. 1 Z 4 DSG and for the period before May 25, 2018 against Section 52 Para. 2□

Z 4 in conjunction with § 50d DSG 2000 DSG 2000.□

III.9. In application of the requirements and obligations of Articles 5 and 6 GDPR and the□

§ 13 DSG on the facts at hand, the recognizing authority comes to the conclusion that□

that the person responsible would not have carried out the image recording that is the subject of the proceedings□

may.□

III.10. Against the background of the facts established as proven, the accused□

as the person responsible in accordance with Art. 4 Z 7 GDPR, the objective factual side of the charge against him□

administrative violation of Article 83 (5) (a) GDPR and Article 62 (1) no. 4□

DSG or § 52 Para. 2 Z 4 DSG 2000.□

III.11. In the case of administrative violations, the crime picture of which is a mere violation of a□

prohibition or non-compliance with a commandment and that no damage has occurred□

or a danger (disobedience offenses) - if not exclusively intentional□

is required - criminal liability assumed if the perpetrator is not credible within the meaning of Section 5 (1) VStG□

makes that he is not at fault for the violation of the administrative regulation (cf. VwGH□

from 13.12.2016, Ra 2016/09/0099). There is a presumption from the outset□

fault (e.g. VwGH, 06/26/2018, Ra 2016/05/0005). It is up to the accused□

to make credible that compliance with the administrative regulations without his□

fault was impossible. In order to substantiate a lack of fault, the□

Statement that the accused has taken measures that are below those foreseeable□

Circumstances that compliance with the legal regulations could reasonably be expected.□

III.12. On the part of the accused, it was not argued that compliance with the□

Provisions of Article 5 Paragraph 1 lit. a and c and Article 6 Paragraph 1 lit. f GDPR and Article 13 Paragraph 5 DSG□

and § 50d para. 1 DSG 2000 would not have been possible.□

Regarding points 3 and 4:□

III.13. Since in the course of the investigation the fulfillment of the objective facts of the□

Violation of the logging and deletion obligations with the for a□

Criminal proceedings required security could be established, was the procedure□

in this regard according to § 45 para. 1 no. 1 (1st case) VStG - in case of doubt for the accused -□

set.□

IV□

The following should be noted for sentencing:□

IV.1. According to Section 19 (1) of the VStG, the bases for determining the penalty are the□

Importance of the legal interest protected by criminal law and the intensity of it□

impairment by the act. Moreover, depending on the purpose of the threat of punishment, the□

forthcoming aggravating and mitigating reasons, insofar as they do not already constitute the threat of punishment□

determine to weigh against each other. On the extent of culpability is special□

to take into consideration. Taking into account the nature of administrative criminal law, the

§§ 32 to 35 of the Criminal Code to apply accordingly. The income and

The accused's financial circumstances and any duties of care are included in the assessment

of fines into account. Within the scope of the General Data Protection Regulation

- DSGVO are in this regard all circumstances of Art 83 Para. 2 DSGVO at the

sentencing into account. In the present case, the low income of the

Accused of € 900.00 per month and his duty of care for a child with physical

Restrictions in sentencing are taken into account accordingly.

IV.2. The provisions of §§ 12f DSG and Art. 5 and 6 DSGVO aim to

fundamentally protected legal positions of those affected from interference by public or

to protect images used for private purposes in a non-public space that are not

meet the requirements with regard to their admissibility and proportionality.

The obligations imposed on the person responsible for taking an image in § 13 DSG should

on the one hand enable the data protection authority to comply with the legal requirements in

to control cases of image processing and, on the other hand, to make it easier for those affected and

enable them to assert their rights or after (unwanted) image recording

possibility to avoid.

IV.3. In the specific case, when determining the penalty, it had to be taken into account that the

detected improper operation of the image acquisition is potentially suitable, a large number of

Those affected, here: coincidentally in the detection range of the dash cams in question

arriving road users, in their fundamentally protected rights - i in particular

to violate their right to secrecy within the meaning of § 1 DSG.

IV.4. The violation in question is due to the high level of wrongfulness and due to the

The fact that it is a systematic violation of the obligation of the

Responsible acts as difficult to assess. Finally, the image acquisition in

This case is triggered by motion sensors and is therefore constantly becoming a

unlimited number of road users who are naturally in motion□

recorded. As stated, image data can also be systematically independent of the presence of a□

Accident events are recorded.□

IV.5. This was therefore to be considered as an aggravating factor, with the intensity of the intervention increasing□

through the operation of an inadmissible and disproportionate image processing, which here is a□

unlimited number of participants in public road traffic recorded, in the present□

Fall on the penalty imposed for point 1 - in relation to point 2 - accordingly□

put down. Refraining from the imposition is therefore out of the question. the□

Duration of the violation – the image capture has been in place for at least several, as noted□

months in operation - is also to be considered as aggravating.□

IV.6. As for the degree of culpability or the degree of culpability of the responsible□

In any case, negligent behavior was assumed.□

Negligent behavior is considered neither mitigating nor aggravating.□

IV.7. Therefore and to protect the accused from further criminal acts of the same kind□

held, the imposition of a penalty in the specific case was necessary. The need for□

Special prevention also results from the fact that the image acquisition - at least by a□

of the two dash cams - is still in operation in the suspect's vehicle.□

IV.8. In the present case, mitigating consideration was given to the fact that the accused□

admitted his guilt, took part in the proceedings and thereby made a contribution to□

found the truth; moreover, there are none against him at the data protection authority□

relevant criminal record noted.□

IV.8. The specific penalty imposed therefore appears taking into account the□

Financial circumstances disclosed to the accused with regard to the realized□

Value of the offense measured against the available penalty range of up to €10,000 (§ 52□

Para. 2 Z 4 DSG 2000 in connection with § 69 Para. 5 DSG) or € 20,000,000 (Art. 83 Para. 5 DSGVO) actual and□

commensurate with their guilt and their imposition required to protect the accused and third parties from the□

committing the same or similar criminal acts.□