European Court of Justice undermines German Law

Free disclosure of medical records

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In his decision (C-307/22) dated 26 October 2023, the European Court of Justice (ECJ), following a referral from the German Federal Court of Justice (BGH), has ruled that a patient is entitled to the free (!) disclosure of a copy of their medical records. This has thus far been foreign to German law, as the German legislator, in section 630g (2) sentence 2 of the Civil Code (BGB), stipulates that the patient is obliged to reimburse the person providing treatment for the costs incurred in this regard.

This ruling follows the provisions of the General Data Protection Regulation (GDPR), which is intended to take precedence over national law even for purposes unrelated to data protection. Considering the growing bureaucratic challenges provided by the GDPR, and the increasing demands for disclosure of records, this will negatively impact medical practices and hospitals.

The case

The matter in dispute was a dental treatment. Suspecting that his treatment had been incorrectly performed, the patient asked his dentist to provide him with a copy of his medical records free of charge, aiming to prove, based on that information, that a treatment error had been made. The dentist referred to section 630g (2) sentence 2 BGB and stated that he was willing to provide the copy against reimbursement of the associated costs. In response, the patient refused to pay and filed a lawsuit for the free disclosure of the copy of his medical records.

The lawsuit was successful in the first two instances. The BGH eventually referred the issue to the ECJ, which ultimately agreed with the lower courts.

The judgement

The ECJ had to resolve the conflict between German national law and European law. While section 630g (2) sentence 2 BGB assigns the cost-bearing obligation for copies of patient records to the patient, Article 15 (3) of the GDPR stipulates that the controller shall provide a copy of the personal data that is the subject of the processing and only the costs for (all) further copies shall be borne by the data subject.

One problem is the chronological aspect of the regulations: While section 630g (2) sentence 2 BGB has been in force in its current form since 2013, the GDPR only came into effect in 2018.

Another problem with the case is, that, in its wording, recital 63 of the GDPR subordinates the right of access, which gives rise to the costs of copying, to purposes related to data protection, particularly concerning awareness of processing and the verification of its lawfulness.

Lastly, it is also problematic why the significant effort required to provide copies of patient records should be borne solely by the person providing treatment.

However, the ECJ ignored or countered all these valid criticisms by stating that Article 15 (3) GDPR should be interpreted as follows:

"The controller is under an obligation to provide the data subject, free of charge, with a first copy of his or her personal data undergoing processing, even where the reason for that request is not related to those referred to in the first sentence of recital 63 of that regulation."

"In the context of a doctor–patient relationship, the right to obtain a copy of

personal data undergoing processing means that the data subject must be given a faithful and intelligible reproduction of all those data. That right entails the right to obtain a full copy of the documents included in his or her medical records and containing, inter alia, those data if the provision of such a copy is essential in order to enable the data subject to verify how accurate and exhaustive those data are, as well as to ensure they are intelligible. Regarding data relating to the health of the data subject, that right includes in any event the right to obtain a copy of the data in his or her medical records containing information such as diagnoses, examination results, assessments by treating physicians and any treatment or interventions provided to him or her."

Critical appraisal

The judgement may seem internally consistent, but it overlooks various legal and factual aspects. It thus misses the opportunity to interpret the right of access and its cost provisions in a practical way.

The interpretation of Article 15 (3) GDPR to the effect that the reason for the patient's request for documents is irrelevant, whether for data protection purposes or other reasons, fails to convince. While it may be justified from the literal wording of Article 15 (3) GDPR, it falls short of reaching the objective of the GDPR: data protection. The GDPR primarily serves the purpose of data protection and is not an instrument for the preparation of follow-up processes, such as medical liability lawsuits.

The interpretation of Article 15 (3) GDPR in this decision, that the data subject must be provided with a complete copy of the documents containing their personal data in their patient records, rather than just the right to be provided with a copy of that data, is consistent given the ruling that the reason for the request is irrelevant. However, it ignores purely practical problems: particularly with electronically managed patient records, there are significant and well-known issues with EDP. A lot of data can only be seen on the screen because the software is designed primarily as a billing programme rather than a documentation programme.

As a result, the effort required for the medical practice is therefore enormously high, so the demand for document disclosure entails massive personnel, organisational, and technical effort, significantly infringing on entrepreneurial freedom.

Ultimately, one should be aware of the incentives that are created: the threshold for requesting a copy of the patient records is lowered for the affected individual considering the judgement, while for the controller, not only personnel, organisational, and technical effort but also financial expenses are added.

The German government is therefore well advised to consider amending the GDPR.

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