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Assisted suicide: new Act on Death Directives

Preslmayr Attorneys at Law | Healthcare & Life Sciences - Austria



RAINER HERZIG

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Introduction

Section 78 of the Criminal Code prohibited assistance with and inducement of suicide. On 11 December 2020, the Constitutional Court⁽¹⁾ repealed the words "or provides assistance" in section 78 of the Criminal Code with effect from 1 January 2022. Since 1 January 2022, section 78 of the Criminal Code only prohibits the inducement of suicide. The Constitutional Court requested the legislature to establish protection instruments to prevent misuse and to ensure that a person wishing to die makes a decision about suicide without being influenced by third persons.

Since suicide is irreversible, the free self-determination of the person wishing to die must be based on a firm decision. The assisting third person must have a solid basis that the person wishing to die has made the decision in free self-determination.

Act on Death Directives

The Act on Death Directives⁽²⁾ states that a death directive can be established only by a person wishing to die who is either an Austrian citizen or domiciled in Austria. No natural or legal person is obliged to provide support, for example, by dispensing the preparation in a pharmacy, providing medical advice as a physician or establishing the death directive as a notary. On the other hand, no natural or legal person may be discriminated against for providing such support.

The death directive has to establish the decision of the person wishing to die to end their life. It must contain the express declaration that this decision is freely made and self-determined after extensive advice. The death directive may also include the names of one or more supporting persons.

A death directive may only be established by persons of age who are capable of making decisions. The decision to end their life must be free and self-determined. It must also be free of error, fraud, deception, physical or psychological force, or influence by third persons. The person wishing to die must be suffering from an incurable fatal disease or a severe, permanent disease with persistent symptoms causing a permanent impairment where the disease entails a suffering condition for the person affected that is not otherwise avoidable. The supporting person must not be the same person as the person providing the medical advice or documenting the death directive.

The medical advice must be provided by two medical persons. One must hold a palliative qualification and they must confirm independently from each other that the person wishing to die is able to make decisions and has made a free and self-determined decision. The medical advice must comprise possible alternative treatments or actions, the dosage of the preparation and the concurrent medication, the method of intake of the preparation, and the effects and possible complications. The person wishing to die must be offered psychotherapy and given suicide prevention advice and any other appropriate advice.

The notarial death directive can be established, at the earliest, 12 weeks after such medical advice is given. Exceptionally, the directive may be established after two weeks if the medical person has confirmed that the person wishing to die suffers from an incurable fatal disease and is in the terminal phase. If the death directive is not established within one year of the second medical advice, the person wishing to die must produce confirmation by a medical person that they are still capable of decision-making and have expressed a free and self-determined decision to die.

The death directive must be established by a notary public after citing the documentation on the medical advice and the legal aspects, the criminal boundaries of the support and further legal consequences. The notary also has to verify whether a death directive exists already. If the older death directive is still valid, it must be revoked prior to the new death directive.

The Ministry of Health has to establish an electronic register of death directives. It may use the registered data to ensure compliance with the provisions of the Act and in particular to prevent the person wishing to die obtaining the preparation multiple times as well as to obtain insight on the use of death directives for statistical and scientific analysis and investigation.

The notary must destroy the copy of the death directive five years after expiry of the 12-month period of validity if no preparation was obtained, or 10 years after its establishment. Upon the request of the person wishing to die, the notary must destroy the copy in the case of recall or upon expiry of the 12-month period only if no preparation was obtained and the original death directive has provably been destroyed.

The preparation and the necessary concurrent medication must be provided only by public pharmacies according to the dosage in the death directive to the person wishing to die or a supporting person named in the death directive. The dispensary and any return must be notified to the register of death directives. The person wishing to die and the supporting person who has received the preparation must safeguard the preparation, by appropriate means, to ensure it is not misused.

The preparation permitted by the Act is sodium pentobarbital; the Ministry of Health may also admit further preparations if they minimise concomitant effects or if the availability of sodium pentobarbital is limited.

Any advertising on providing assistance to suicide is prohibited. This comprises advertising, offering, announcing or promoting help or means, objects or processes suitable for suicide. It is permitted to point out the possibility of establishing a death directive, or to point out that medical advice is offered, or that a preparation can be provided.

It is prohibited to offer or provide support to persons wishing to die in exchange for economic advantage in excess of the reimbursement of disbursements.

Comment

The bill was adopted by a broad majority in Parliament. It tries to offer persons wishing to die the possibility of obtaining assistance, which was strictly prohibited until 31 December 2021. The moral aspects of the decision to allow assistance to suicide were heavily discussed, although there are already many countries in Europe that permit assisted suicide (eg, Switzerland, Germany and the Netherlands). The administrative process necessary to establish a death directive seems appropriate to safeguard that the irreversible decision is made only after due deliberation.

For further information on this topic please contact [Rainer Herzig](mailto:herzig@preslmayr.at) at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email (herzig@preslmayr.at). The Preslmayr Attorneys at Law website can be accessed at www.preslmayr.at.

Endnotes

(1) G139/2019 (VfSlg 20389).

(2) *Federal Law Gazette* I 242/2021 Sterbeverfügungsgesetz.