

DATA PROTECTION FOR VIDEO CONSULTATIONS

An analysis of the data protection policies of telemedicine platforms and doctor consultation portals

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Since the coronavirus pandemic, the use of video consultations has risen sharply. According to McKinsey (eHealth Monitor 2021), around 3,000 digital doctor-patient consultations were conducted in 2019 compared to 2.67 million at the end of 2020, owing in particular to COVID-19.¹ This increase is also evidenced by the number of online consultations billed by the National Association of Statutory Health Insurance Physicians (NASHIP, German abbreviation: KBV).² Since video consultations have been used much more frequently in recent years and will also play a role on the future of healthcare³, it is key that providers develop and implement video consultation services that are consumer-friendly and compliant with data protection requirements. In a recently published comparative test, the German consumer organisation Stiftung Warentest examined four private telemedicine platforms⁴. In the test, the organisation examined the respective platforms' data protection policies and general terms and conditions (GTCs) from a legal perspective. In the area of data protection, Stiftung Warentest found one "minor" and three "significant" deficiencies among the providers, thus pointing to a problem area that the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) analyses in more detail in this report. vzbv's aim with this study of the data protection and processing policies of telemedicine and doctor consultation portals that offer video consultations, is to set the right course for a consumer-friendly approach, point out regulatory gaps at an early stage and stop possible legal violations.

A representative online survey conducted by vzbv in December 2022 on the topic of "e-health services", which complements the present study, also underlines the relevance of data protection in the context of health data.⁵ Just over three quarters of respondents (76 percent) rate data protection in e-health services as rather important or very important. For almost half of respondents (49 percent), poor data protection is a reason not to use e-health services. A good level of data protection is thus both unavoidable for healthcare providers to fulfil legal requirements, and essential to ensure consumer acceptance and use.

¹ Cf. McKinsey, eHealth Monitor 2021, p. XIII (2021).

² Cf. KBV Praxisnachrichten (4 February 2021): https://www.kbv.de/html/1150_50419.php

³ Cf. McKinsey eHealth Monitor 2022; p. 72ff (2022): https://www.mckinsey.com/de/~/_media/mckinsey/locations/europe%20and%20middle%20east/deutschland/news/presse/2022/2022-11-22%20e-health%20monitor%202022/mckinsey%20ehealth%20monitor%202022_vf.pdf

⁴ Cf. Stiftung Warentest (22 June 2022): <https://www.test.de/Videosprechstunde-beim-Arzt-Diese-Moeglichkeiten-haben-Versicherte-5604836-0/>

⁵ Cf. Verbraucherzentrale Bundesverband e.V. (6 February 2023), <https://www.vzbv.de/publikationen/befragung-videosprechstunde>

This study analyses nine selected telemedicine platforms and doctor consultation portals that offer video consultations on the basis of test categories. The test categories in turn are based on the provisions of the General Data Protection Regulation (GDPR) and analyse the providers' data protection policies while taking into consideration the special need to protect health data. The content analysis took place on the basis of the data protection policies and associated documents of the selected providers.

A video consultation is in general a useful addition for consumers. However, the results of the total of 37 test categories highlight various points that are problematic from a consumer's point of view, for example with regard to explicit consent to the processing of health data, the use of tracking providers, the naming of data recipients and information about the storage period for personal data. As a consequence of these findings, vzbv issued cease and desist letters to two providers and is considering further legal steps. In both cases, proceedings were settled out of court by the submission of a cease and desist declaration.⁶

Based on the available results, vzbv makes the following recommendations:

- ❖ Doctors should offer **video consultations to complement** on-site consultations.
- ❖ Medical societies and the Association of Scientific Medical Societies (AMWF) should develop more subject-specific **guidelines** for remote treatment and telemedicine standards.
- ❖ Legislators should better protect consumers from tracking/profiling in health-related contexts.
- ❖ Video consultation providers must obtain **explicit consent** for the processing of health data.
- ❖ Video consultation providers should refrain from using unnecessary third-party providers for **tracking and profiling** for marketing purposes/analysis.
- ❖ Video consultation providers should name **third party providers** in the data protection policy, rather than simply listing categories of recipients.
- ❖ Video consultation providers should offer **guest access** to video consultations.
- ❖ Video consultation providers should have a clearly defined **deletion policy for when an account is not used**.
- ❖ Video consultation providers must provide transparent information about the **storage period** or comprehensible criteria for determining the storage period.
- ❖ Video consultation providers should provide **transparent information on the transfer of personal data to third countries**.

⁶ The following information on cease and desist letters sent to providers is valid as of 1 February 2023.

CONCLUSION

vzbv's supplementary online survey generally shows a (very) high satisfaction level among respondents with the video consultations used (79 percent). Not only can 75 percent of video consultation users quite likely or very likely imagine using a video consultation again, but 45 percent of non-users would also consider becoming users in the future. Another advantage of video consultations according to the consumer survey is that the waiting time for a consultation is shorter than for in-person consultations in a little over four out of ten cases (42 percent): more than half of respondents (51 percent) get an appointment for a consultation within 24 hours to three days.

Video consultations are generally viewed positively by vzbv as a **supplementary tool within the spectrum of healthcare services**. When used appropriately, they can complement and optimise the treatment process, improve access to medical care for patients and reduce the risk of infection in medical practices. They also save time and resources.

However, the gold standard in most cases remains in-person doctor-patient contact. More than four out of ten non-users of video consultations surveyed also prefer to talk to doctors in person, but just over a third of them (34 percent) nevertheless complain about the lack of a video consultation service by doctors. 59 percent of all respondents would like video consultations to be part of the complementary standard service provided by each practice. In fact, according to a survey of doctors carried out by Bitkom Research, only 17 percent of practice doctors offer video consultations, with 40 percent able to imagine offering such consultations in the future⁷.

It would be good to see more established doctors offer video consultations as a **complementary option to in-person consultations**, while at the same time maintaining high data protection standards in the interest of patients.

Video consultations can be viewed as part of the digitalisation process in healthcare and an opportunity to ensure patient-centred care in the future, the benefits of which are obvious and have been underlined in other studies⁸.

Likewise, as shown in this report, data processing is particularly important, especially in the digital field. When booking video consultations, sensitive data is generated that according to the GDPR is particularly worthy of protection. When it comes to video consultation providers or platforms, sensitive health data is processed directly or indirectly. This data may arise not only in the video stream with the doctor, but also prior to or after the video consultation. Depending on the provider and its services, sensitive data is generated, for example, when searching for a doctor for a video consultation, when specifying symptoms for which treatment is desired, when registering with the provider, when booking and recording the appointment history of the video consultation and when uploading medical docu-

⁷ Cf. Bitkom Research, Medizin 4.0 – wie digital sind Deutschlands Ärzte? (Medicine 4.0 – how digital are Germany's doctors?) (2021): https://www.bitkom.org/sites/default/files/2021-02/charts_digitaemedizin_arzte.pdf

⁸ Cf. Stiftung Gesundheitwissen, Press Release (12 May 2022): <https://www.stiftung-gesundheitswissen.de/presse/videosprechstunde-nur-die-wensten-haben-den-arzt-auf-dem-schirm>

ments. Here in particular – also as a confidence-building measure for the digitalisation of the healthcare system – it is essential to handle data with particular care. This also means only collecting and processing data that is necessary for the provision of medical services.

So far in the context of statutory health insurance, there are requirements within the framework of Appendix 31b Federal Master Treaty for Medical Practitioners (Bundesmantelverträge für Ärzte – BMV-Ä) (based on § 365 German Social Code Part V (SGB V)) that address data processing in video consultations. The intention here is clear: consumers should be strongly protected if they make use of video consultations. However, the regulations on data protection and data security contained in Appendix 31b BMV-Ä, which go beyond the GDPR, only apply to the technical video transmission channel (“Requirements for the technical procedures for video consultations”), i.e. the video stream, and not to other possible services and data processing related to the video consultation platforms and access to them. As a consequence, tracking providers were found in the data protection policies of eight of the providers examined. These providers can track, collect and analyse the behaviour of users online – for example, for marketing purposes and profiling.

Especially in the context of sensitive health data and due to the possibility of regulated billing via statutory health insurance or on a self-paying basis, vzbv believes doctor consultation portals and telemedicine platforms should not use unnecessary **third-party providers for tracking/profiling** and associated marketing purposes on their platforms for video consultations.

Under the Digital Services Act (DSA), from February 2024 onwards, special requirements will apply to operators of digital platforms, as well as to video consultation platforms. For all providers of telemedicine platforms and doctor consultation portals with video consultations, not only the video transmission but also access to the video consultation should be free of tracking and advertising.

Should data protection gaps emerge after the DSA enters into force – for example, because not all providers of telemedicine platforms are considered to be online platforms as defined by the DSA – the national legislator must take steps above and beyond the current regulations to ensure that **patients are protected from tracking** and manipulation by advertising.

On the whole, all the platforms examined have areas in which they could improve. In this investigation, vzbv broadly interprets health data in accordance with Art. 9 GDPR. Accordingly, an explicit declaration of consent to the processing of health data is expected from all examined providers when booking a video consultation. Seven of the examined providers display deficiencies in this regard.

In order to inform consumers well and to comply with the GDPR, vzbv recommends that **explicit consent** be obtained for the processing of health data.

Consumers are generally interested in knowing how long their data will be stored. However, five providers remain vague in this respect. Only three also have a clearly defined deletion policy in the event of prolonged account inactivity. Five providers see the sole responsibility for data deletion as lying with consumers, which vzbv considers an inadmissible shift of responsibility to consumers.

vzbv recommends that providers define a **deletion policy** in the event of prolonged non-use of an account as well as **transparent information on the storage period** or comprehensible criteria for determining the storage period.

From the consumer's point of view, it would be desirable if the data protection policy were clearer regarding which data processing purposes are based on which legal frameworks and how these are actually connected with each other – instead of listing various purposes and legal frameworks separately and without reference to each other. The providers could also describe more clearly in some places the purposes for which they process data and what their legitimate interest is.

In the case of three providers, the rule of thumb that the process by which consumers can revoke their consent to process data should be as simple as the previous process to grant consent is not apparent in practice. In order to take into account consumers' right to self-determination regarding personal information, sovereignty over the processing of data should always lie with consumers. Providers should not undermine this right with complex revocation methods.

Only one of the providers tested does not transfer data to a third country; all the others send data to the USA. The providers state this in the fine print, but in vzbv's view they could state it more transparently.

There are also positive results. The data protection policies of all the audited providers are easy to find in German and all providers satisfactorily state the rights of the data subjects. In addition, the contact details of the controller or data protection officer are clearly visible and consumers can transmit possible complaints or questions to the controller and data protection officer digitally.

Five providers already grant guest access to video consultations, while one withdrew this option in the course of the investigation. In vzbv's online survey, 44 percent of respondents would like to have the choice whether to register for an e-health service or not. Approximately a quarter of respondents either prefer not to register if it is not necessary (24 percent) or consider it useful in principle (26 percent).

In vzbv's view, it should be obligatory that consumers have the option to use video consultations with **guest access** in addition to registration and without any disadvantages, as this ensures simple and low-threshold use of the service and complies with the principle of data minimisation.

Patients still have some doubts about video consultations. Even if a clear majority (82 percent) of video consultation users surveyed by vzbv already feel very or rather well informed about how video consultations work and the possible range of services, almost half (48 percent) would like more information. The latter finding is also in line with the survey results of Stiftung Gesundheitswissen (44 percent)⁹.

Patients' desire for more information also shows an awareness that extensive knowledge is important for the correct and safe use of video consultations. According to a study by Stiftung Gesundheit, doctors who have yet to offer video consultations are most likely to cite reservations about digital doctor-patient interaction as

⁹ Cf. Stiftung Gesundheitswissen, Press Release (12 May 2022): <https://www.stiftung-gesundheitswissen.de/presse/videosprechstunde-nur-die-wensten-haben-den-arzt-auf-dem-schirm>

the reason for not using them¹⁰. A broader use of the tool for healthcare purposes only makes sense if remaining issues are clarified, the added value is apparent to both groups and it is clear when it can be used in a worthwhile manner. More guidelines for standards of remote treatment and telemedicine could help in this regard. The medical associations for the respective field are developing such guidelines, while the Association of the Scientific Medical Societies in Germany (AMWF)¹¹ is coordinating them.

More **telemedicine guidelines from medical societies** would be helpful as a regulatory framework for digitalisation in healthcare and nursing. They can help doctors and patients make decisions about diagnosis and treatment, and offer treatment security.

¹⁰ Cf. Stiftung Gesundheit, Ärzte im Zukunftsmarkt Gesundheit (Doctors in the Future Healthcare Market, 2020): https://www.stiftung-gesundheit.de/pdf/studien/aerzte-im-zukunftsmarkt-gesundheit_2020_1.pdf, p. 46

¹¹ For example, the German Dermatological Society (DDG) and the Professional Association of German Dermatologists (BVDD) have developed a guideline for telemedical care in dermatology, cf.: Augustin, M.; Strömer, K., et al. (2020) S2k-Leitlinie Tele Dermatologie (S2k Guideline for tele dermatology), https://www.bvdd.de/fileadmin/BVDD/BVDD-Download/S2k_Leitlinie_Tele Dermatologie_2021-03.pdf

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