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PER LA RICERCA FARMACOLOGICA
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Comments to the EMA Discussion Paper for Medicines Developers, Data Providers, Research-Performing and Research-Supporting Infrastructures "*The General Data Protection Regulation: Secondary Use of Data for Medicines and Public Health Purposes*"

Nowadays, the secondary use of data is widely increasing especially for research purposes and for regulatory decision-making processes. A large amount of initiatives on this topic promoted by the regulatory agencies (i.e. consultations and workshops), by the European Commission (i.e. calls for proposal) and others[1,2] already exist or are being released/developed.

Interestingly, the FAIR (Findable, Accessible, Interoperable and Reusable) data principles support the idea that data are a resource to be used to formulate and test scientific hypotheses and aim to increase the worth of data by enabling researchers to reuse existing data. In fact, it should be considered that, by increasing the linkage between different types of data (e.g., electronic health records, genetic data, patient-reported outcomes, data derived from clinical trials and studies) and their reuse, a lot of benefits could be produced including an increase of disease knowledge, an earlier diagnosis, a better choice of the treatment – possibly personalized – and a major involvement of patients in the decision process.[3]

Nevertheless, despite the significantly increased scale of health data processed and available to be reused, the huge spread of the FAIR data principles concept and application and the rapid technological development that could lead to fast scientific advances, challenges for the protection of personal data exist and need to be faced. Since the new European General Data Protection Regulation (GDPR) came into force in May 2018, additional obligations on the protection of natural persons with regard to the processing of personal data have been added to the existing ones.[4]

According to the H2020 Program Guidelines on FAIR Data, data should be "*as open as possible and as closed as necessary*", "open" in order to foster the reusability and to accelerate research, but at the same time they should be "closed" to safeguard the privacy of the subjects.[5]

Thus, we strongly agree in merging different types of data coming from different sources to foster scientific research, but, at the same time, we also suggest to provide responsible access to health data by reconciling benefits of data sharing with privacy rights and ethical and regulatory requirements.[4]

Therefore, considering the benefit deriving from the use of data for medicines development and public health purposes, we strongly encourage the setting up of sector-specific legislative and non-legislative measures by the European Health Data Space (EHDS), which aims to foster the access to and sharing of different kinds of health data

1 GDPR activities. ELIXIR-LU. Available at: https://elixir-luxembourg.org/gdpr-activities.

2 J.P. Woolley, E. Kirby, J. Leslie, F. Jeanson, M.N. Cabili, G. Rushton, ... & A.J. Brookes. Responsible sharing of biomedical data and biospecimens via the "Automatable Discovery and Access Matrix" (ADA-M). npj Genomic Medicine 3(1)(2018), Article No. 17. doi: 10.1038/s41525-018-0057-4.

3 C. Ohmann, R. Banzi, S. Canham, S. Battaglia, M. Matei, C. Ariyo, ... & J. Demotes-Mainard. Sharing and reuse of individual participant data from clinical trials: Principles and recommendations. BMJ Open 7(2017), e018647. doi: 10.1136/bmjopen-2017-018647

4 A. Landi, M. Thompson, V. Giannuzzi, F. Bonifazi, I. Labastida, L.O. Bonino da Silva Santos & M. Roos. The "A" of FAIR – As open as possible, as closed as necessary. Data Intelligence. 2(2020), 47–55

5 European Commission. Directorate-General for Research & Innovation. H2020 Programme Guidelines on FAIR Data Management in Horizon 2020. Version 3.0. 26 July 2016

(e.g., electronic health records, genomics, registries) in Europe, whilst complying with the GDPR provisions. Guidelines should be released as well in collaboration with the European Data Protection Board (EDPB). Moreover, we deem relevant to release regulatory guidance identifying criteria to define acceptability of evidence derived from data for regulatory- decision making. In fact, according to one of the latest EMA public consultation, studies based on existing data are very few and the regulatory bodies have limited experience with these assessment procedures.

Finally, we would suggest you particularly considering the processing of data collected from vulnerable populations, patients affected by rare diseases, minors as well as genetic data and data related to samples.

GENERAL COMMENTS & QUESTIONS

- Why "medical data" are considered apart from the "health data"? According to the GDPR definition, also included in section *5. Glossary of terms and definitions*, "data concerning health" means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.
- No reference in the title and in the main text is done to the Regulation (EU) 2018/1725 (EUDPR). This regulation is only mentioned in the summary and in the introduction.
- Which is the meaning of "consumers" in the text? Are you referring to "data subjects"?
- We would suggest adding "*deriving from the use/re-use of data for scientific and public health purposes*" to the sentence "*The potential for a strengthened evidence base for decision-making* […]." (Page 3)
- We would suggest replacing "medicines development" instead of "medicines" in the sentences "*the secondary use of personal data for medicines and public health purposes*".
- The sentence "*an interoperable infrastructure in support of the cross-border delivery of healthcare and to set up an appropriate infrastructure in support of the cross-border delivery of healthcare*" (Page 6) is repeated.
- We suggest revising the definition of "*Primary use*" in the glossary since the information on the purpose is missing (e.g. for a specific research or project purpose).
- Please revise the acronyms (e.g. Page 4: the acronym of electronic health records (EHRs) is explained two times, Page 5: the EU acronym is not explained).

SPECIFIC COMMENTS & QUESTIONS

- **Secondary use of health data**

  - We would suggest adding "*diagnose and prevent*" to the sentence "*the assessment of applications from sponsors for orphan designations to develop medicines designated to treat rare diseases (orphan medicines)".*
  - You might consider to include, in the last point of the list of information to be taken into account to ascertain whether a purpose of further processing is compatible with the purpose for which the personal data are initially collected (Page 9), " *i.e. de-identification measures applied to the data*".

- "*The context in which the personal data have been collected, in particular the reasonable expectations of data subjects based on their relationship with the controller as to their further use*". We strongly agree in considering the measures adopted to prevent the conflict of interest, the hierarchical link between the data subject and the controller as well as any type of stigmatisation, discrimination, harassment or intimidation.

- **Establishing the legal basis for processing personal data**

  - The footnote 34 is missing.
  - Reference might be also made to the EDPB "*Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak*", adopted on 21 April 2020, and, in particular, to section *4 Legal Basis For The Processing.*
  - Guidelines on the development and application of recontact policies in case of further uses of data or for incidental findings should be released and the criteria/examples establishing/showing when the re-contact is deemed impractical (the reasonable efforts to recontact patients) should be included as well.
  - We strongly suggest underlining that consent to the scientific research must be separated to the consent to the processing of personal data.
  - More clarifications on the use of "Broad consent" in scientific research are needed considering that according to the GDPR – Article 5 (1b) the purposes must be specified and explicit.
  - Considering the sentence "*It needs to be noted that Member States are allowed to maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health"*, it might be useful making this information public available and easily accessible, ideally an overview by topic, in order to be consulted to investigate if additional limitations/conditions have been introduced by the Members States involved in the research. Moreover, what happen in case of multinational research should be clarified too.
  - "For personal genome testing, 'tiered consent', where participants are invited to select from a set of options". The concept of granularity, as explained in the Recital 32 of the GDPR "(*…) Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided*." should be better explained.

- **Presumption of compatibility**

  - Some comments are the same of those reported in the *Secondary use of health data* section above on the de-identification measures and on the relationship with the controller.
  - Could the sharing of original data to third parties or the report of data breaches influence the decision-making process during the compatibility test?
  - Why does the guidance to be released by the EDPB aim to be referred only to the further processing for archiving purposes? We suggest the EDPB realising guidance also referred to other secondary research purposes.

- We strongly suggest adding examples and a flowchart explaining how the compatibility test should be performed on data already collected in the guidance to be released by the EDPB.

- **Pseudonymisation**

  - Reference to the genetic data and to the impossibility to anonymise this kind of data should be added.
  - Reference to the "*Article 29 Data Protection Working Party Opinion 05/2014 on Anonymisation techniques*" might be added.

- **Data Retention**

  - We strongly encourage controller performing a *Data Protection Impact Assessment* (DPIA) to well-establish conditions related to data retention and to ensure that the information collected respects the minimisation principle.
  - The importance of informing the data subject of the "*period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period*", according to the GDPR - Article 13 (2a), should be mentioned in this section.
  - Reference should be made to the data related to samples stored in biobanks and to what should be done after the end of the storage period (e.g. data anonymisation/destruction, notification to the controller once the data are anonymised or erased).
  - What do you mean with a "periodic review"?

- **Transparency**

  - We would suggest adding the reference to the GDPR - Article 13 for the first point of the list "*It should be transparent to the data subject as a natural person that his or her personal data are collected, used, consulted or otherwise processed*."
  - *"[..] in respect of your personal*". We suppose that something is missing. Maybe you might finish the sentence with "*"[..] in respect of his/her rights".*
  - We would suggest including the "*contact details of the data protection officer, where applicable"* besides the identity of the controller.
  - We would suggest replacing the sentence "*The data subject also has the right to obtain confirmation and communication about what personal data concerning **you** are being processed*" with "*The data subject also has the right to obtain confirmation and communication about what personal data concerning **him** are being processed*".
  - "*The specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data."* Reference to the further purposes and to the broad consent should be made here.
  - Reference to the EDPB/Article 29 Working Party "*Guidelines on Transparency under Regulation 2016/679 (wp260rev.01)"* should be made.

- **Rights of the "data subject"**

  - Reference to the "Right to be Informed" is missing.
  - We suggest adding this information "*That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay*" to the sentence stating that "*the controller should be obliged to respond to requests from the data subject without undue delay and at the latest within one month and to give reasons where the controller does not intend to comply with any such requests*", according to GDPR – Article 12(3).
  - It is clear that the data shall be no more collected following the withdrawn of a data subject. Nevertheless, should a data controller foresee the possible reuse of data already collected from a data subject who withdrawn from the research? If yes, under which conditions?
  - Reference to how data subjects can exercise their right if data are shared with third parties (also including reference to third countries) should be added in this section. What happen if there are different DPOs of different institutions participating in the research? To whom data subjects might address their requests?

- **Registries**

  - Registries can be of value also for rare diseases, beside widespread medical conditions. Interoperability could overcome data fragmentation that may affect local experiences in this setting.
  - Reference to the existing initiatives and principles aiming to make patients' registry interoperable and the related pro and cons should be included in this section. The benefit of merging data from different sources should be considered as well as the need to guarantee the protection of data subjects and the compliance with the GDPR.
  - Reference to the multidatabase studies and to the activities carried out by the *European Network of Centres for Pharmacoepidemiology and Pharmacovigilance (ENCePP) – Working group 3 on Inventory of European data sources and methodological approaches for multi-source studies*[6] might be added as well.

- **International Transfers**

  - We strongly agree in better clarifying the application type of the adequacy decisions adopted by the EC.
  - Reference to the need for Data Sharing Agreement might be useful.
  - Some examples might be helpful to better understand the safeguards listed in the GDPR - Article 46.

[6] R. Gini, MC. Sturkenboom, J. Sultana, A. Cave, A. Landi, A. Pacurariu, G. Roberto, T. Schink, G. Candore, J. Slattery, G. Trifirò; Working Group 3 of ENCePP. Different strategies to execute multi-database studies for medicines surveillance in real world setting: a reflection on the European model. Clin Pharmacol Ther. 2020 Apr 3. doi: 10.1002/cpt.1833.

- Reference might be also made to the EDPB "*Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak*", adopted on 21 April 2020, and, in particular, to section *7 International Data Transfers For Scientific Research Purposes*.
- We would suggest specifying the information in bold in the following text "*The controller should give particular consideration to the nature of the personal data **(e.g. genetic data)**, the purpose**/further purposes** and duration of the proposed processing operation or operations, as well as the situation in the country of origin **(i.e. local data protection provisions)**, the third country and the country of final destination, and should provide suitable safeguards to protect fundamental rights and freedoms of natural persons with regard to the processing of their personal data*."

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