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Autoritat Catalana de Protecció de Dades

Opinion in relation to the inquiry made by a hospital about the communication of pseudonymised data of patients treated with compassionate use medicines to the pharmaceutical laboratory that supplies them

A letter from the Data Protection Delegate (hereinafter, DPD) of a hospital is presented to the Catalan Data Protection Authority, in which it raises the legal basis on which the pseudonymized data of patients treated with drugs could be provided. compassionate use in the pharmaceutical laboratory that supplies them.

Having analyzed the query and the documentation that accompanies it, in view of the applicable regulations in force, and in accordance with the report of the Legal Adviser, I issue the following opinion.

I

(...)

II

In order to understand the context in which we find ourselves with regard to the compassionate use of medicines, it is necessary to refer, at the outset, to the revised Text of the Guarantees and rational use of medicines and health products law, approved by the Royal legislative decree 1/2015, of 24 July (hereinafter, RDL 1/2015).

Article 24 of this Law regulates the guarantees of availability of medicines in specific situations and special authorizations, while establishing in its section 3 that *"the prescription and application of medicines not authorized to patients not included in a clinical trial with the aim to attend as compassionate use special needs for the treatment of clinical situations of concrete patients will be regulated by regulation, with full respect for what is established in the legislation in force regarding patient autonomy and the rights and obligations regarding information and clinical documentation. (...)".*

In this sense, you must bear in mind Royal Decree 1015/2009, of 19 June, which regulates the availability of medicines in special situations (hereinafter, RD 1015/2009).

Article 2.1 of RD1015/2009 defines the compassionate use of investigational drugs as *"the use of a drug before its authorization in Spain in patients suffering from a chronic or seriously debilitating disease or that is considered to be life-threatening and that cannot be treated satisfactorily with an authorized medication. The medicine in question must be subject to a marketing authorization request, or it must be undergoing clinical trials."*

It should be noted that the same RD 1015/2009, in regulating the procedures for accessing the compassionate use of investigational drugs (articles 8 and 9), establishes that it is essential before the administration of the drug in question to have informed consent and to written by the patient, in accordance with current legislation regarding patient autonomy, and rights and obligations regarding clinical information and documentation.

In view of this, the consultation would raise, with respect to those patients who have consented to be administered a certain medication as compassionate use, the possibility of providing their pseudonymized data to the pharmaceutical laboratory that supplies said medication in order to examine it results and follow up. In particular, it is considered on what legal basis such data communication could be carried out.

III

The health care that patients receive in health centers involves the processing of data relating to their health (Article 4.15) of Regulation (EU) 2016/679, of the Parliament and of the European Council, of April 27, 2016, General of Data Protection (RGPD)), which remains subject to the principles and obligations of personal data protection legislation.

Point out that these principles and obligations are also fully applicable to pseudonymised data, which, unlike anonymised data, are, for all intents and purposes, personal data (Article 4.1 GDPR). This is clear from Recital 26 of the RGPD:

> *"The principles of data protection must be applied to all information relating to an identified or identifiable natural person.* ***Pseudonymized personal data*** *, which could be attributed to a natural person through the use of additional information,* ***must be considered information about an identifiable natural person*** *. To determine whether a natural person is identifiable, all means, such as identification, that can reasonably be used by the data controller or any other person to directly or indirectly identify the natural person must be taken into account. To determine whether there is a reasonable probability that means will be used to identify a natural person, all objective factors must be taken into account, such as the costs and time required for identification, taking into account both the technology available at the time of the treatment as technological advances. Therefore , the principles of data protection should not be applied to anonymous information, that is, information that is not related to an identified or identifiable natural person, nor to data converted into anonymous data in such a way that the interested party is not identifiable, or to be Consequently, this Regulation does not affect the treatment of said anonymous information, including for statistical or research purposes."*

The RGPD establishes that all processing of personal data (such as, in this case, the communication of data to the pharmaceutical laboratory) must be lawful, fair and transparent (Article 5.1.a)).

Article 6.1 of the RGPD regulates the legal bases on which the processing of personal data can be based, in the following terms:

> *"1. The treatment will only be lawful if at least one of the following conditions is met:*

*a) the interested party gives his **consent** for the treatment of his personal data for one or several specific purposes;*
b) the treatment is necessary for the execution of a contract in which the interested party is a party or for the application at the request of this pre-contractual measures;
c) the treatment is necessary for the fulfillment of a legal obligation applicable to the person responsible for the treatment;
d) the treatment is necessary to protect the vital interests of the interested party or another natural person;
e) the treatment is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers conferred on the person responsible for the treatment;
*f) the treatment is necessary for the **satisfaction of legitimate interests** pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require the protection of personal data, in particular when the interested party is a child.*

The provisions in letter f) of the first paragraph shall not apply to the processing carried out by public authorities in the exercise of their functions."

Therefore, it must be borne in mind that the processing of personal data must have, to be lawful, a legal basis, which can be the consent of the persons affected or any other of the legal bases indicated in this article 6.1 of the RGPD

This is also clear from recital 40 of the RGPD establishing that *"in order for the treatment to be lawful, personal data must be processed **with the consent** of the interested party **or on some other legitimate basis established in accordance with the law** , either in the present Regulation or by virtue of another Law of the Union or of the Member States referred to in this Regulation, including the need to fulfill the legal obligation applicable to the person responsible for the treatment or the need to execute a contract to which the interested party is a party or in order to take measures at the request of the interested party prior to the conclusion of a contract."*

But, in addition, when the treatment affects special categories of data, as is the case with data relating to health, it is also necessary to count on one of the exceptions established in article 9.2 of the RGPD, in order to be able to consider this data processing lawful

Article 9 of the RGPD provides the following:

*"1. The processing of personal data that reveal ethnic or racial origin, political opinions, religious or philosophical convictions, or trade union affiliation is **prohibited** , and the processing of genetic data, biometric data aimed at uniquely identifying a natural person, data relating to the health or data relating to the sexual life or sexual orientation of a natural person.*

2. Section 1 will not apply when one of the following circumstances occurs:

*a) the interested party gives his **explicit consent** for the treatment of said personal data with one or more of the specified purposes, except when the Law of the Union or of the Member States establishes that the prohibition mentioned in section 1 cannot be lifted by the interested party;*
(...)
*j) the treatment **is necessary** for archival purposes in the public interest, **scientific** or historical research purposes or statistical purposes, in accordance with article 89, paragraph 1, on the basis of the Law of the Union or of the Member States, which must be proportionate to the objective pursued, essentially respect the right to data protection and establish appropriate and specific measures to protect the fundamental interests and rights of the interested party.*
(…).”

It should be noted that the term *"scientific research",* referred to in article 9.2.j) of the RGPD, is not defined in the regulatory text itself. Recital 159 of the RGPD only points out that *"the processing of personal data for the purposes of scientific research **must be interpreted** , for the purposes of this Regulation, **in a broad way** , which includes, for example, technological development and demonstration, research fundamental, applied research and research financed by the private sector. In addition, it must take into account the objective of the Union established in article 179, paragraph 1, of the TFEU to create a European research space. The purposes of scientific research also include studies carried out in the public interest in the field of public health. (...).”*

The explicit reference in this recital 159 to the field of public health in the matter of scientific research, as well as in recitals 52, 53, 156 or 157 of the RGPD, show, for the purposes that are now of interest, that the treatment of special categories of data for the purposes of "scientific research" would also cover research carried out in the field of health in all its possible modalities (biomedical, clinical, epidemiological, etc.).

In the present case and due to the information available, the communication of data from patients treated with compassionate use medicines to the pharmaceutical laboratory that supplied the medicine in question would have the purpose of examining the results and monitoring them , purpose that could correspond to the realization of an observational study.

In accordance with article 2.1.a) of Royal Decree 957/2020, of November 3, which regulates observational studies with medicines for human use (hereafter, RD 957/2020), it is understood by observational study with drugs:

"any investigation that involves the collection of individual data relating to people's health, as long as it does not meet any of the conditions required to be considered a clinical trial established in article 2.1.i) of Royal Decree 1090/2015, of December 4 , which regulates clinical trials with medicines, the Ethics Committees for Research with Medicines and the Spanish Registry of Clinical Studies, and which is carried out for any of the following purposes:

1. To determine the beneficial effects of medicines, as well as their modifying factors, including the patients' perspective, and their relationship with the resources used to achieve them.

2.º Identify, characterize or quantify the adverse reactions of medicines and other risks for patient safety related to their use, including possible risk factors or effect modifiers, as well as measure the effectiveness of management measures risks
3.º Obtain information on the patterns of use of medicines in the population.

The observational studies with medicines must have the purpose of complementing the information already known about the medicine without interfering with the usual clinical practice."

Observational studies are, together with clinical trials, the essential instruments of clinical research with medicines for human use, as is apparent from RDL 1/2015, already cited (article 58).

In view of this, the treatment of data relating to health for the purposes of scientific research, such as clinical research, could be reduced by article 9.2.j) of the RGPD, which lifts the prohibition to treat special categories of data (article 9.1 RGPD), as long as this treatment is carried out *"on the basis of the Law of the Union or of the States of the Member States"* , in this case, in accordance with what is established in the applicable sectoral regulations and the additional provision seventeen of the LOPDGDD (DA 17a), which we mention below.

This, without prejudice to the fact that this treatment of data for clinical research purposes could also be enabled, as we will also see below, based on the explicit consent of the persons affected (Article 9.2.a) RGPD).

IV

DA 17a of the LOPDGDD provides, in its section 1, the following:

"1. The treatments of health-related data and genetic data that are regulated in the following laws and their provisions are covered by ***letters*** *g), h), i) and* ***j) of article 9.2*** *of Regulation (EU) 2016/679 of development:*

a) Law 14/1986, of April 25, General Health.
b) (…)
c) Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of clinical information and documentation.
(...)."

Article 105 bis of Law 14/1986, of April 25, general health (LGS), introduced by the fifth final provision of the LOPDGDD, establishes that *" the processing of personal data* ***in health research*** *will be governed by the provisions of the seventeenth additional provision of the Organic Law for the Protection of Personal Data and Guarantee of Digital Rights."*

Article 16.3 of Law 41/2002, of November 14, basic regulation of patient autonomy and rights and obligations in the field of information and clinical documentation, modified by the ninth final provision of the LOPDGDD, provides access to the clinical history, among others, for research purposes. It establishes, as a general rule, that it is necessary to ensure the anonymity of the information (separating the identification data of the patient from the clinical

care data, unless the patient himself has given his consent), and the foreseen cases are excepted in section 2 of DA 17a of the LOPDGDD.

In line with these legal provisions, article 5.3 of RD 957/2020, cited above, provides, in relation to the protection of personal data of participants in an observational study, the following:

"3. The promoters of studies that use any source of information that includes the processing of personal data must take into account the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016, regarding the protection of natural persons with regard to the processing of personal data and the free circulation of this data and by which Directive 95/46/CE is repealed, and in Organic Law 3/2018, of December 5, of Protection of Personal Data and guarantee of digital rights and, in particular, the following:

a) The promoter must have evaluated and mitigated, by means of the appropriate measures in each case, the impact that the realization of the study may have on the protection of personal data.
b) The promoter and the researchers of the study must guarantee the confidentiality of the data of the participating subjects.
c) Without prejudice to what is provided in section 1, ***the consent of the participating subject will be necessary unless another legitimate basis*** *for the treatment of their personal data from* ***among those referred to in articles 6.1 and 9.2*** *of Regulation (EU) 2016/679 of the European Parliament and of the Council, of April 27, 2016.* ***In addition*** *, the promoter and the researchers must* ***apply the criteria*** *that govern the treatment of data in health research in accordance with the* ***seventeenth additional provision of the Law Organic 3/2018*** *, of December 5.*
d) The conditions of access to personal data must be detailed in the protocol, including the conditions of its international transmission outside the scope of the European Economic Area, if this is foreseen."

Section 2 of DA 17a of the LOPDGDD, to which the precepts examined refer, regulates the treatment of data in health research, based on consent or based on pseudonymized data, in the following terms :

"2. The ***treatment of data in health research*** *will be governed by the following* ***criteria*** *:*

a) The interested party or, as the case may be, their legal representative may grant the ***Consent*** *for the use of your data for research purposes in health and, in particular, biomedicine.*
Such purposes may include categories related to general areas linked to a medical or research specialty.
(…).
d) The use of pseudonymized personal data for health and, in particular, biomedical ***research purposes is considered lawful .***
The use of pseudonymized personal data for the purposes of public health and biomedical research ***will require*** *:*

1.º A technical and functional separation between the research team and those who carry out the pseudonymization and keep the information that makes re-identification possible.
2.º That the pseudonymized data are only accessible to the research team when:
i) There is an express commitment of confidentiality and not to carry out any re-identification activity.
ii) Specific security measures are adopted to avoid re-identification and access by unauthorized third parties.
The re-identification of the data at its origin may be carried out, when due to an investigation that uses pseudonymized data, the existence of a real and concrete danger to the safety or health of a person or group of persons is appreciated, or a serious threat para sus derechos or necessary to guarantee adequate health care. (…).”

Section 2.a) of DA 17a of the LOPDGDD foresees a case in which the consent of the affected persons would legitimize the processing of health data for research purposes in the field of health, in accordance with the provisions of articles 6.1.a) and 9.2.a) of the RGPD, examined, and of the applicable sectoral regulations.

As we have seen, the patient autonomy legislation (Article 16.3 Law 41/2022) starts from the general rule of having consent to process patient data for research purposes so that they are identifiable. And also the regulations governing observational studies (article 5.3 RD 957/2020).

Therefore, the explicit consent of patients who are administered a compassionate use medicine could be the legal basis and enablement (articles 6.1.a) and 9.2.a) RGPD) that legitimizes the communication of their health data to the pharmaceutical laboratory that supplies said medicine, for the purposes of carrying out an observational study on it, under the terms of RD 957/2020.

However, it should be borne in mind that in cases such as the one examined, the consent of the affected persons may not be the most appropriate legal basis (Article 6.1.a) RGPD), taking into account the concurrent circumstances and the requirements of the article 4.11) of the GDPR in this regard.

In accordance with this article 4.11) of the RGPD, the consent of the affected person must be informed, free, specific and must be granted through a manifestation that shows the will of the affected person to consent or through a clear affirmative action. In addition, when the treatment affects special categories of data, as happens in the present case, the consent must be explicit (Article 9.2.a) RGPD).

Regarding the adequacy of consent as a legal basis for data processing in a context similar to the one we are in, such as that of clinical trials, Opinion 3/2019 on *"questions and answers about the relationship between the Regulation on clinical trials (REC) and the General Data Protection Regulation (RGPD)”,* of January 23, 2019, of the European Data Protection Committee (hereafter CEPD).

According to the CEPD, it is necessary to start from the premise that, in order to constitute a valid legal basis, the consent of the affected persons must be freely given and must involve a real choice and control by the affected persons respect of your data (Article 4.11

RGPD). The CEPD points out that, depending on the circumstances of the trial and the participation of the people affected, situations of imbalance may occur which would not allow the consent given to be considered as meeting the said requirements (for example, the participant is in particularly poor health conditions, belongs to economically or socially weak groups or is in situations of hierarchical or institutional dependency). The CEPD thus points out that, in these cases, consent might not be an adequate basis for the treatment, since the requirements of article 4.11) of the RGPD would not be properly complied with, so it would be appropriate to take into account account of other alternative legal bases that may enable said treatment.

Although in the present case we are not dealing with a clinical trial, it must be taken into account that the patients eventually subject to participation in the observational study would be people who suffer from a chronic or seriously debilitating disease or that endangers their life and who do not have authorized therapeutic alternatives. In other words, people who are in a very delicate position and it could be questionable to give their consent fully freely.

For this reason, following the criteria set out by the CEPD, it could be more appropriate in a case like the one examined to base the intended data processing on some other legal basis other than the explicit consent of the affected patients.

v

At this point, and in view of the terms of the consultation, it is of particular interest to mention the case provided for in section 2.d) of DA 17a of the LOPDGDD, which, we recall, establishes that the treatment of pseudonymised data for research purposes in the field of health, as long as appropriate safeguards are applied, is considered lawful.

This section 2.d) does not make any mention of the need to have the consent of the affected persons, therefore, and taking into account the considerations that have been made previously, it is necessary to understand that the legal basis that enables the treatment in this case it can be a different and independent basis from that of consent.

In this sense, the considerations made by the CEPD in the document are relevant *" Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679"* , dated May 10, 2018 . The CEPD analyzes, among others, the processing of data for the purposes of scientific research (section 7.2) and points out that *"(...), the RGPD does not restrict the application of article 6 solely to consent in relation to the processing of data for research purposes. As long as the adequate guarantees are present, such as the requirements contained in article 89, paragraph 1, and the treatment is fair, lawful, transparent and conforms to the rules of data minimization and individual rights, other legal bases may be available as those contemplated in article 6, section 1, letters e) of). This also applies to special categories of data in accordance with the exception contained in article 9, section 2, letter j).*

Thus, the processing of data for research purposes in the field of health may be lawful if it is necessary for the fulfillment of a mission carried out in the public interest or in the exercise of public powers by the data controller (Article 6.1. e) RGPD), or also if it is

necessary to satisfy the legitimate interests of the controller or a third party (Article 6.1.f) RGPD).

For a case like the one proposed, in which the treatment (communication) would be carried out for the purposes of clinical research carried out from the private sector (pharmaceutical laboratory), it would be possible to base this treatment on the legal basis of article 6.1.f) of the RGPD, relating to the *"satisfaction of legitimate interests pursued by the person responsible for the treatment or by a third party, provided that these interests do not prevail over the interests or fundamental rights and freedoms of the interested party that require protection of personal data, in particular when the interested party is a child."*

It should be noted that the application of this legal basis requires, in any case, the prior weighing of conflicting interests. Regarding this, recital 47 of the RGPD points out that *"the legitimate interest of a person responsible for the treatment, including that of a person responsible to whom personal data can be communicated, or of a third party, can constitute a legal basis for the treatment, always that the interests or rights and freedoms of the interested party do not prevail, taking into account the reasonable expectations of the interested parties based on their relationship with the person in charge. (…). In any case, the existence of a legitimate interest would require a meticulous evaluation, including whether an interested party can reasonably foresee, at the time and in the context of the collection of personal data, that the treatment for that purpose may occur. (...)."*

In the weighting that would require the application of article 6.1.f) of the RGPD, the criteria defined in " *Opinion 06/2014 on the concept of legitimate interest of the person in charge of data processing under of article 7 of Directive 95/46/CE"* , of April 9, 2014, by the Working Group of Article 29. These criteria would be transferable to the regulation contained in article 6.1.f) of RGPD to determine whether, in view of the specific circumstances of the case (the rights and interests involved, the reasonable expectations that those affected may have in their relationship with the controller and the safeguards offered by the controller), it is appropriate or not to go to this legal basis.

Thus, to carry out the weighting of interests and determine whether there is a legitimate interest that can justify the processing of the data, the legitimate interest of the pharmaceutical laboratory, the impact of the treatment on the patients and finally the additional guarantees that apply to the treatments.

With regard to the legitimate interest that the pharmaceutical laboratory may have, it must be borne in mind that the intended purpose of requesting patient data from the hospital, based on the information available, would fit with a purpose of clinical research. Specifically, it would be a matter of examining the results of a certain medicine, produced and supplied by the same laboratory, which is either pending authorization for its commercialization or is undergoing a clinical trial, for which knowing the behavior of this drug (clinical, pharmacological effects, adverse reactions, etc.) in other subjects in the real context of health care could be relevant from the point of view of safety and effectiveness of the investigational drug and, ultimately, improve clinical practice for the benefit of patients and/or facilitate decision-making in this regard.

With regard to the consequences of the treatment for the affected persons, the impact on their privacy is undeniable as it is a communication of health-related data, which deserves special protection. However, it must be borne in mind that this would, in any case, be pseudonymised data (Article 4.5) RGPD), that is to say, subjected to a previous coding process, so the identity of the patients would not be known by the pharmaceutical laboratory , thereby mitigating the risks that could arise from its treatment.

According to article 4.5 of the RGPD, it is necessary to understand by pseudonymization *"the treatment of personal data in such a way that they can no longer be attributed to an interested party without using additional information, provided that said additional information appears separately and is subject to technical measures y organizativas destined to guarantee that the personal data are not attributed to an identified or identifiable natural person;*

Pseudonymization becomes a relevant technique in the context of data protection by design, by allowing the data controller to guarantee more secure data processing, as well as compliance with the rest of the data protection requirements.

Remember, at this point, that for the authorization provided for in section 2.d) of DA 17a of the LOPDGDD to operate, the treatment of pseudonymized data for research purposes in the field of health must carry out with certain conditions or guarantees, provided for in the same section. Specifically:

> *"1.º A technical and functional separation between the research team and those who carry out the pseudonymization and keep the information that makes re-identification possible.*
> *2.º That the pseudonymized data are only accessible to the research team when:*
> *i) There is an express commitment of confidentiality and not to carry out any re-identification activity.*
> *ii) Specific security measures are adopted to prevent re-identification and access by unauthorized third parties."*

Thus, in the design of the clinical research or observational study (article 25 RGPD and article 5.4 RD 957/2020), it would be necessary to determine how the pseudonymization will be carried out, so that the treatment subject to consultation conforms to the requirements of the RGPD (principle of proactive responsibility, article 5.2 RGPD).

In this sense, in application of the conditions imposed by section 2.d) of Day 17a (technical and functional separation), it is important to bear in mind that the pseudonymization process of personal information could not be carried out by pharmaceutical laboratory, but must have been carried out prior to the communication of the data. In other words, the laboratory should receive the personal information already pseudonymized by the hospital that has this information and is responsible for it.

It would also be necessary to articulate measures so that the people who, from the laboratory, have to process the information, cannot re-identify the affected people, and to avoid improper communications of personal information outside the intended research purpose. The systems used to pseudonymise the information at source must be effective enough to prevent re-identification also by any third party, even after the conclusion of the study, without disproportionate efforts (it is advisable to use codes random without any

link to any data directly or indirectly linked to the person, but which at the same time allow the traceability of information about the same individual, if applicable, to make the study viable).

Apart from this, it would be necessary to foresee commitments of confidentiality and non-re-identification on the part of the staff who will handle the pseudonymised information or, among others, the commitment of these staff to immediately communicate the cases in which it is detected that there may be a risk of re-identification, or any improper access, so that the appropriate measures can be taken.

In view of all this, in the present case the legal basis of article 6.1.f) of the RGPD could apply, so the treatment (communication) of pseudonymized data for research purposes in the field of health in the pharmaceutical laboratory could be carried out on the basis of section 2.d) of DA 17a of the LOPDGDD in line with the enablement of article 9.2.j) of the RGPD.

Point out that if the observational study is carried out under the auspices of section 2.d) of DA 17a of the LOPDGDD, the treatment of pseudonymized data for health research purposes should be subject to prior report of the corresponding ethics committee or, in its absence, of the data protection delegate or person expert in data protection of the pharmaceutical laboratory (section 2.g) DA 17a LOPDGDD).

It would also be necessary, prior to the start of the research, to carry out a data protection impact assessment (AIPD) that specifically includes the risks of re-identification linked to the pseudonymization of data (section 2.f) DA 17a LOPDGDD), under the terms of article 35 of the RGPD.

To carry out the AIPD, the Practical Guide on impact assessment relating to data protection of this Authority can be taken into account.

Finally, and also from the point of view of offering adequate guarantees, it must be taken into account that, although in the case of research with pseudonymised data the consent of the affected person would not be required, the consent would indeed be required of in accordance with RD 1015/2009. For this reason, informing the affected persons beforehand about the communication of pseudonymized data would without any doubt constitute an adequate guarantee in this case.

conclusion

The communication of pseudonymised data relating to the health of patients treated with compassionate use medicines for clinical research purposes to the pharmaceutical laboratory that provides the medicine could be enabled by article 9.2.j) of the RGPD, in connection with the section 2.d) of DA 17a of the LOPDGDD, and be carried out on the basis of article 6.1.f) of the RGPD.

Barcelona, November 2, 2022