EMA/240810/2013

Submission of comments on 'Policy 0070 on publication and access to clinical-trial data'

Comments from:

Name and affiliation
BIO Deutschland e.V., the German Biotechnology Industry Association

Please note that these comments and the identity of the sender (not contact details) will be published unless a specific justified objection is received.

When completed, this form should be sent in Word format (not PDF) to: ctdatapolicy@ema.europa.eu

EUROPEAN MEDICINES AGENCY
SCIENCE MEDICINES HEALTH

General Comments

BIO Deutschland, the German Biotech Association, representing research-based biotech SMEs, welcomes the opportunity to submit comments on the draft 'Policy 0070 on publication and access to clinical-trial data'.

The small and medium-sized research companies are the backbone of the EU. With their innovative ideas and research driven approach they are fostering the development of new product that lead to significant improvements for patients. This R&D should not be slowed down or made impossible by regulations.

BIO Deutschland supports responsible transparency. However, we feel that the current proposal diminishes the protection of personal data and of commercially confidential information (CCI), in a way which would be detrimental to the innovation and growth potential of European biotech companies, large and small. The data from pre-clinical and clinical development are the core value of a drug approval. To gain such data costs hundreds of millions, if not billions, and this process are therefore the most important investment in the industry. Most of the SME active in the field of pharma biotechnology Many SMEs are dependent on venture capital to fund this costly research and development. Therefore the obtained data are of great importance for these companies. By publishing this data the Agency could destroy the business model of innovative biotech SMEs. No investor would provide money if the intellectual property and know-how couldn't be protected.

The sharing of clinical-trial data with qualified scientific and medical researchers for conducting legitimate research is clearly an issue that needs to be discussed and requires a solid regulatory framework. In this regard it has to be observed that, at the time being, two court cases are pending with the General Court of the European Union, which, inter alia, address the question of the legal definition of commercial confidentiality and whether or not EMA was entitled to give access to clinical trials documents submitted in the marketing authorisation dossiers for Humira (adalimumab) by AbbVie and Esbriet (perfidenone) by InterMune. In April, the Court granted interim injunctions to AbbVie and InterMune, preventing the disclosure of those documents to third parties. It has to be expected that the Court will give in its decision in the main proceedings of these cases general guidance on the publication of clinical-trial data by the Agency.

In order to avoid a situation where the EMA has to revise its Policy on the publication and access to clinical-trial data after these decisions have been taken and becomes liable to damages, BIO Deutschland strongly suggests to pause the development of the new Policy until the ruling of the court are into force. In case the Agency believes that it is necessary to have a Policy in backhand we strongly suggest to let the new Policy only enter into force after the court proceedings are finalised.

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Comments on text

Line number(s) *(e.g. 20-23)*	Comment	Proposed changes, if any *(If changes to the wording are suggested, they should be highlighted using 'track changes')*
15-17	Assessors of the CTD should be aware of their responsibility towards the community and also should be confident in the decisions/recommendations they make. Therefore, no further disclosures apart from those already provided in the EPAR are necessary	
27-31	Retrospective analyses of already collected data can never be of the same quality as prospective data analysis, where all endpoints are defined prior to data collection	
34-35	This statement appears to suggest that re-analysis of data submitted to a regulatory authority and on which a regulatory decision has been made can be challenged by a third party analysis. This could lead to concern amongst EU citizens regarding the competence of the regulatory authorities and could lead to uncertainty for patients, physicians and MA holders that an MA granted might be revoked or “second guessed” by multiple re-analyses of data.	
41-43	This should be permitted. According to the current recommendations on the content of the informed consent form in Germany, patients only consent that the authorities have the right to view the data. Patients do not allow the authorities to make their data publically accessible. The informed consent shall protect patients in clinical trials. Every possible use of the data gained in the trial need to be explained to and enabled by the patient. If the Agency plans to implement a guarded approach to share patient-level data the needed information for a informed consent will grow rapidly and hamper future clinical trials.	~~The Agency therefore takes a guarded approach to the sharing of patient-level data. This is done to enable the legitimate learnings from the sharing of patient-level data while preventing rare but potentially damaging instances of patient identification.~~ Therefore patient-level data will not be disclosed.
44	The Agency underlines the “respect for the boundaries of patients’ informed	

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	consent". However, it remains unclear how the Agency will address the question of the scope of an informed consent given by the patients participating with regard to the subsequent use of their data. A general view that the informed consent also encompasses the publication of the data derived from the clinical trial in question is not acceptable. Therefore we strongly encourage the Agency not to disclose any patient-level data at all.	
49-51	In stating "in general" the Agency clearly envisages that there will be exemptions from this rule. The view that CT data cannot be considered CCI and that the interests of public health outweigh considerations of CCI is not adequate and conflates the question of whether the data are confidential and the disclosure of them could damage the legitimate interests of the data owner and the question of the public interest in overriding any such confidentiality. Furthermore, the general assumption that the interests of public health outweigh considerations of CCI does not sufficiently take the recent findings of the Study on Trade Secrets and Confidential Business Information in the Internal Market of the Commission's DG Internal Market and Services (MARKT/2011/128/D) into consideration. According to the definition of CCI as provided for in the Agency's draft Policy paper: "CCI shall mean any information that is not in the public domain or publicly available and where disclosure may undermine the legitimate economic interest of the owner of the information. CCI falls broadly into two categories: trade secrets [...] and commercial confidences." The above mentioned study confirmed "that the relevance of trade secrets in the new global economy is steadily growing: they are pervasive key factors for maintaining competitive advantage in all business sectors, for both innovative	

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	and non-innovative firms, regardless of their size. In this context, trade secrets protection effectively fills the gap between copyright and patent protection, the two traditional pillars of intellectual property, for purposes of appropriating the results of investments in innovation. There are straightforward economic justifications for creating a sound legal environment to protect trade secrets: empirical evidence and stakeholders' opinions converge on the conclusion that an initiative of the EU Commission in that direction would contribute to fostering economic growth, competitiveness and innovation in the Single Market" (page 151; emphases added). The study further clarifies that "economists have observed that trade secrets appear of specific importance to SMEs because innovations by SMEs tend to be more incremental in nature and of core significance to firm value and performance. The perceived higher cost of patent ownership and the material impact that disclosure may have on SME firm's value and performance encourage the use of secrecy as a protection" (page 149). Additionally, the European Court of Justice has stated in Case C 453/03 (ABNA) that the publication of detailed product data is against the principle of proportionality as far as the authorities dispose of such data. Without any protection of this value innovation might be impeded significantly. In summary it must be noted that the protection of trade secrets could not be overruled by the public's interest in information about CT. Every request or disclosure has to be assessed on a case by case basis. An undifferentiated approach would contradict any Commission's attempt to effectively protect trade secrets.	
52	It is difficult to see how the Agency can say that the Draft Policy protects	

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	intellectual property rights and investment by industry when it does not protect valuable know-how of companies. Medicinal products are not necessarily protected by a compound patent; instead, many companies in the same position, rely more heavily on confidential information and know-how. Furthermore, patent protection may be difficult to achieve where a new therapeutic indication for a well-known substance is subject of the marketing authorisation. In these circumstances, the Draft Policy, if adopted in its current form, could de-incentivise companies, from filing applications for marketing authorisations or variations in the EU.	
57-59	The explicit goal of this policy should be to give scientific requesters an opportunity to conduct research with the obtained data. In addition, the patients and the public need the opportunity to get access to the results of CT. This could be arranged by a tiered access to the CT-data. Under no circumstances this policy may lead to distortions of competition between competitors offering the possibility to request commercial confidential data of constants.	
60-61	Associated with the comment on 34-35, this seems to be of critical importance in advance of finalisation of this Policy in order to protect the reputation of the regulatory authorities and avoid bringing the regulatory process into disrepute	Measures to protect public health and regulatory decisions should be put in place prior to the finalisation of this Policy.
62-66	Decision making by the regulatory bodies rely on a clear mandate from the EU to ensure secure processes of market authorisation for new products within the European market. Every attempt to query regulatory bodies' decision or to abet other findings would weaken the position of the legally mandated regulatory bodies. Related to the comments above, these sentences appear to be contradictory. It	Further clarification is required as to how regulatory decision making can be protected.

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	is unclear why protection of regulatory decision making no longer applies after a regulatory decision has been made. BIO Deutschland is concerned that competing pharmaceutical companies could engage in re-analyses of each other's' data leading to vexatious challenges to the regulatory process.	
67-72	It is interesting that the Agency takes the view that third parties who make secondary use of the CT data shall also disclose their findings. But there are no legal or other obligations to secure that third parties will do so, especially if the generate the secondary analyses outside the EU.	
132	It implies that only a small number of CT data sets would contain CCI. But every request or disclosure has to be assessed on a case by case basis. An undifferentiated approach would contradict the aim of this policy and infringe the legal EU framework. In addition, it appears that the Agency has already identified the categories of data that may contain CCI, and there is no opportunity in practice for a company to argue that other data contain CCI and should not be disclosed.	
133-136	In line 176 subseq. the Draft Policy identifies three categories of data. In particular, there is a controlled access category for data that contain personal data. The question arises of why this, or a similar procedure, cannot be applied to CCI. BIO Deutschland strongly believes it would be possible to enter into data sharing agreements in order to protect against unjustified access to data by competitors, while allowing research organisations to access the data, in the framework of a self-governing scheme set up by the pharmaceutical industry. Such a scheme offers a proportionate alternative to wholesale public access without any safeguards against unfair competitive use of data. As the Draft Policy already envisages such a procedure for raw data containing personal data, it would be straightforward for the Policy to apply the same procedure to data containing CCI.	

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150-154	In case of withdrawals there are to reasons possible: it might be a strategic reasons and the company plans to re-submit it in a later stage with enhanced clinical (or other) data. Under these circumstances, publication of already submitted clinical data would provide competitors with valuable commercial information that could give them unfair advantage. Publication needs to be prevented in order not to generate any distortion of competition. On the other hand it might be withdrawn by other reasons. In this case a publication is considerable.	Proactive publication of data should not apply to withdrawn applications.
155 subseq.	The Agency states that "protection of privacy is a paramount concern when sharing raw CT data". However, there remain concerns whether the Draft Policy will provide a sufficient level of protection. In particular where rare diseases are concerned the risk of re-identification is particularly high since only few individuals may have been subject to the trials in question. In this regard, the Agency has to consider all publicly available data, including social media data, when assessing the risk of re-identification. Stating in the introduction that "any use of the patient data oversteps the boundaries of patients' informed consent, and shall not be enabled by the policy" (lines 47-48) in conjunction with the correct analysis that "the Agency is concerned that emerging technologies for data mining and databank linkage will increase the potential of unlawful retroactive patient identification" (lines 40-41) leads to the clear conclusion that under no circumstances access should be granted to any personal data. This is the only way to avoid unlawful use of any personal data from clinical trials and prevent patients and companies for criminal use of the disclosed data.	CT data/documents with PPD concerns will **not** be disclosed or made public in any way. (Parts of the CT, e.g. CTD Modules 2.5 and 2.7 might be disclosed if there are no PPD in it.)
219-221	Same comment as lines 153-154 re circumstance behind withdrawal.	

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222 subseq.	It is unclear why the Agency does not handle the transparency of the requester like the envisaged transparency of the CT. Keeping the request "secret" up to one year is not necessary from BIO Deutschlands perspective. If needed the quantity of request-information given to the public could be reconsidered. However, it is essential that the affected sponsor of the requested data will be notified immediately.	
227	How will EMA know when analyses have been published? Will applicants be obliged to inform? Will editorial policies in journals be amended to establish publication guidelines for re-analyses of downloaded data that safeguard against inappropriate data mining, improper analytical methodology and repetitive publication of the same data without this being evident to readers?	Further clarification regarding publishing safeguards would be welcomed to protect against multiple publications of the same data sets i.e. to ensure it is clear to readers that the data are the same, just the analysis is different.
285 subseq.	The Draft Policy states that personal data from personnel involved in clinical trials are considered exempt from PPD considerations. This statement clearly contradicts the protection of individuals with regard to the processing of personal data according to Directive 95/46/EC. It is self-evident that the Agency is bound by the relevant legislation. Again, in particular where rare diseases are concerned, there might be only a few or even only one medicinal specialist in the respective field in one Member State.	
Annex I 2.5.2	Even the overview of biopharmaceutics could contain CCI especially when dealing with novel formulations.	No general assumption that this data is not confidential. Re-classifying 2.5.2 as C
Annex II 16.1.4	Certain elements of this section are confidential (namely CVs).	No general assumption that this data is not confidential. Re-classifying 16.1.4 as C
Annex II 16.1.6 and 16.1.7	Listings of patients and patient identification and randomisation schemes should be confidential	No general assumption that this data is not confidential. Re-classifying 16.1.6 and 16.1.7 as C

Please add more rows if needed.