Pharmaceutical Data Exclusivity in the Light of Access to Clinical Data: Is the EMA oversharing?

Emmanouela Roussakis

ABSTRACT

In the ever-evolving landscape of EU pharmaceutical regulation, this article unravels the complexities of regulatory data exclusivity and commercially confidential information (CCI). Examining EU legislation, CJEU jurisprudence, and EMA policies, it navigates the delicate balance between proprietary rights, transparency, and fundamental freedoms in the pharmaceutical industry. Central to the discussion is the conflict between safeguarding commercial interests and the public interest in clinical trials data disclosure. By offering nuanced perspectives, the article contributes to the ongoing dialogue, providing legal practitioners and pharmaceutical stakeholders with a concise understanding of the evolving regulatory landscape.

1. INTRODUCTION

In the ever-evolving landscape of pharmaceutical regulation within the European Union (EU), the intersection of proprietary rights, transparency imperatives, and fundamental freedoms has become a focal point of legal discourse. This article delves into the intricate web of regulatory data exclusivity for pharmaceutical products, unravelling its nuances and examining the definition of commercially confidential information (CCI) as illuminated by EU legislation and the jurisprudence of the Court of Justice of the European Union (CJEU), in reference to policies of the European Medicines Agency.

As the pharmaceutical industry remains at the forefront of innovation and research, the delicate balance between safeguarding commercial interests and promoting transparency has prompted a series of complex legal considerations. A cornerstone of this discussion revolves around fundamental rights enshrined in the Charter of Rights of the EU and the compelling public interest in the disclosure of clinical trial data. This discourse takes centre stage in conflict with the rights of pharmaceutical companies to conduct their business securely while pursuing economic incentives vital for sustained innovation.[1]

This exploration encompasses a presentation of pivotal EU legislation and European Medicines Agency policies and guidance, including the delineation of regulatory data exclusivity and the evolving definition of CCI. Drawing insights from case law, particularly decisions handed down by the CJEU, we navigate the legal intricacies that shape the boundaries of information deemed commercially confidential.

This article aims to contribute with nuanced perspectives to the ongoing dialogue surrounding the delicate equilibrium between the public's right to information and the imperative for pharmaceutical companies to protect their confidential data. By exploring the multifaceted dimensions of regulatory data exclusivity and CCI, the author seeks to provide legal practitioners and stakeholders within the pharmaceutical sector with a comprehensive understanding of the evolving regulatory landscape.

Regulatory Exclusivities

The idea of marketing government-authorized drugs in a competitive market without intellectual property (IP) protection is often considered as an insufficient motivator for drug development. This is due to the risk of competitors copying the innovator's product and selling it at a lower cost, having incurred fewer development expenses. The rationale behind data exclusivity is rooted in the significant investments required for producing clinical test data, such as conducting clinical trials. Protecting this test data from use by generic and biosimilar companies[2]

1 Daminova Nasiya 'The European Medicines Agency 'Transparency' Policies, the CJEU and COVID-19: Do the CFREU Provisions Retain Any Relevance?', MTA Law Working Papers 2021/1, ISSN 2064-4515.

2 Liddicoat Jonathan, Liddell Katherin, Aboy Mateo et al. 'Has the EU Incentive for Drug Repositioning Been Effective? An Empirical Analysis of the "+1"' Regulatory Exclusivity. IIC 52, 825–851 (2021) <https://doi.org/10.1007/s 40319-021-01088-0> accessed 17 November 2023.

is seen as a strategy for the promotion of medical research and development (R&D). The rationale behind data exclusivity aligns with the principles behind patents and other pharmaceutical market exclusivities, assuming that safeguarding the investments made in R&D by granting exclusive rights is necessary and effective in stimulating innovation.[3]

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) includes an obligation for WTO members to protect certain types of test data against unfair commercial use but does not mandate data exclusivity. TRIPS data protection is required only for data related to a new chemical entity, previously undisclosed, and requiring significant effort to generate. TRIPS does not specify a time period for this protection and allows the use of test data for regulatory approval of competing products.[4]

European governments utilize their regulatory frameworks for drug approval to offer non-patent-based incentives, aiming to encourage the discovery of new medicines and shield sponsors of new drugs from competitive pressures. The prevalent incentive takes the form of regulatory data protection for drugs with new active ingredients, often termed as new chemical entity (NCE) exclusivity for small molecule drugs. In this arrangement, regulatory authorities confer exclusive rights to the drug sponsor over the preclinical and clinical data utilized to secure regulatory approval, for specified periods. This type of regulatory exclusivity proves advantageous as it hinders generic competition. Generic companies, lacking access to these data, are unable to leverage the streamlined drug approval processes provided by regulatory agencies. The benefit stems from the fact that generic companies, without access to the initial clinical trial data, are unable to take advantage of the efficient drug approval procedures that depend on existing data. In the absence of access to this information, generic competitors must conduct their own clinical trials and submit separate data, resulting in a more time-consuming and expensive approval process. This regulatory challenge serves as a barrier to generic competition throughout the exclusivity period, giving the original pharmaceutical company an opportunity for market exclusivity to recoup expenses and create earnings. New chemical entity exclusivity is commonly implemented in significant drug markets, including the US, EU, Switzerland, Canada, Israel, Japan, South Korea, Singapore, and Taiwan, even if the sponsor's data are publicly accessible.[5]

Data exclusivity is granted automatically and controlled through a regulatory system. Holders of these rights, predominantly drug companies, are not required to apply or provide evidence of eligibility. Regulatory exclusivity offers commercial advantages, being costless to obtain, automatically enforced, and generally not subject to challenge.[6] These exclusivity periods commence upon marketing authorization, providing sponsors with certainty over the duration of market protection. The introduction of orphan drug exclusivity in the EU in 1999 led to increased development efforts and product registrations for rare diseases, showcasing how exclusivities incentivize the industry, extend research interest, and contribute to public health progress and improved living quality. The global importance of regulatory exclusivities is evident in the concerted efforts of industry and trade representatives in the US and EU to negotiate expanded pharmaceutical data protections worldwide.[7]

2. EMA'S INITIAL TRANSPARENCY POLICY

Before Regulation 726/2004 of the EU came into effect, the legal framework for the authorization, supervision, and pharmacovigilance of medicinal products for human use was primarily governed by Directive 2001/83/EC. This directive, adopted in 2001, established the regulatory framework for the licensing of medicinal products within the European Union. It outlined the requirements for obtaining marketing authorization, the obligations of pharmaceutical companies, and the procedures for monitoring and ensuring the safety of medicinal products on the market. Directive 2001/83/EC provided the basis for the harmonization of pharmaceutical regulations across EU member states, aiming to create a single market for medicinal products while ensuring a high level of public health protection. However, recognizing the need for further consolidation and centralization of regulatory procedures, Regulation 726/2004 was later introduced to enhance and streamline the authorization process, centralize certain aspects of supervision, and strengthen pharmacovigilance activities at the EU level.

Regulation 726/2004, which initiated the current legal framework, brought about several modifications. Initially, Article 14(11) substituted the 10-year data protection period with eight years of data exclusivity, running concurrently with 10 years of market exclusivity. Data exclusivity denotes a timeframe during which competitors are barred from seeking authorizations for generic versions. In contrast, market protection, often termed as market exclusivity, signifies a period when competitors can secure authorizations for generics, but these generics cannot be introduced to the market until the conclusion of the mar-

3 Beverley-Smith Hue, "Rights in Data and Information" in Rochelle Dreyfuss, Justine Pila (eds) The Oxford Handbook of Intellectual Property (first edition published 2018, Oxford University Publishing) 17.

4 Correa Carlos, Reto M Hilty 'Access to Medicines and Vaccines Implementing Flexibilities Under Intellectual Property Law' (published 2022, Springer Nature Switzerland AG) 1-6.

5 Morgan Robert Maxwell, Gwilym Roberts Owen, Edwards Aled Morgan 'Ideation and implementation of an open science drug discovery business model – M4K Pharma' [version 1; peer review: 2 approved, 1 approved with reservations]. Open Res 2018, 3:154 <https://doi.org/10.12688/wellcomeopenres.14947.1> accessed 17 November 2023.

6 ibid 4.

7 ibid 5; Armouti Wael, Nsour Mohammad 'Data Exclusivity for Pharmaceuticals in Free Trade Agreements: Models in Selected United States Free Trade Agreements.' Houst J Int Law. 2017; 40(1): 105–138.

ket protection period. Three options are also available for securing an additional year of exclusivity.[8] For example, an extra year of marketing exclusivity can be granted for new therapeutic indications demonstrating significant clinical benefits compared to existing therapies (Article 10(1), para. 4). Additionally, one year of data protection is available for new indications of well-established substances (Article 10(5)), and one year of protection is provided for data supporting a change in classification, such as from a prescription drug to an over-the-counter medication (Article 74a).[9] These supplementary exclusivity terms are not cumulative, ensuring that the overall protection does not surpass eleven years. Therefore, Europe presently employs an "automatic" protection approach under the 8+2+1 principle for both small molecule drugs and biologics like vaccines.[10]

The EMA holds the responsibility of approving safe and effective medicinal products through Market Authorizations and indirectly standardizing research procedures in the EU. This involves collecting clinical trials data (referred to as CTD) submitted as part of the Market Authorization application dossier. According to Article 8 of Directive 83/2001 on medicinal products for human use, an application must be made to the competent authority of the Member State for authorization to market a medicinal product. Furthermore, Article 8 elaborates on the documents that must accompany the application, specifying in subparagraph (i) that results of clinical trials must be submitted as well.[11]

Since its inception, the EMA has prioritized operational transparency, a principle reaffirmed in Article 73 of Regulation 726/2004. This regulation, which established the Agency, asserts the applicability of Regulation 1049/2001 regarding public access to EU documents. It grants public access to content related to the institution's responsibilities, with exceptions limited to circumstances involving public interest, privacy, individual integrity, protection of commercial interest, and the effectiveness of EU decision-making.[12] It is also noteworthy that, in the event of an exception claim that is based on commercial interest of the enterprise, an additional stage of proportionality assessment is added. The EMA is also mandated to develop a registry and a database on medicinal products to make documents accessible.

The Treaty of Lisbon further supported openness, transparency, and the right to access documents in EU Law. For instance, Art. 15 TFEU obliged the EU's legislature to act publicly and established that citizens shall have the right to access documents held by all Union institutions, bodies, and agencies. Moreover, the right of access to documents, and its nature as a fundamental right, is further emphasised by Art. 42 of the Charter of Fundamental Rights of the European Union (CFREU), which is now of 'the same legal value as the Treaties'. [13]

The EMA's approach to transparency in documents submitted by pharmaceutical enterprises has evolved, influenced notably by the European Ombudsman. In 2010, the Ombudsman criticized the EMA's limited public access to documents. In particular, she mentioned the limited access of the EU public to the Agency documents which did not seem to be consistent with the overriding interest in providing sufficient information to the healthcare professionals and patients, leading to the adoption of Policy 0043.[14]

This policy aimed to regulate retroactive access to information, allowing for the redaction of commercially confidential information without providing a precise definition of the term. This unwillingness to directly address the matter of confidential information is consistent with the EMA's previous actions. In 2007 the Agency published the 'Principles to be applied for the deletion of commercially confidential information for the disclosure of EMEA documents', and had carefully avoided a precise definition of this term, proclaiming that the 'commercially confidential information' shall be generally considered to fall broadly into two categories: (a) confidential intellectual property, 'know-how' and trade secrets (including e.g. formulas, programs, process or information contained or embodied in a product, unpublished aspects of trade marks, patents etc.) and (b) commercial confidences (e.g. structures and development plans of a company).[15]

Before December 1, 2010, the EMA treated documents submitted for Market Authorization as presumptively confidential. Policy 0043 introduced a detailed procedure for public access to clinical trial data, conditional upon a request that discloses the identity of the applicant permitting the redaction of personal data and commercially confidential information, though the latter term remained undefined.

8 ibid 5.

9 ibid 2.

10 Ballardini Rosa Maria, Mimler Marc, Minssen Timo, Salmi Mika 'Addressing Exclusivity Issues During the COVID-19 Pandemic and Beyond, 3D Printing, Intellectual Property Rights and Medical Emergencies: In Search of New Flexibilities' IIC – International Review of Intellectual Property and Competition Law, volume 53, issue 8 accessed 17 November 2023.

11 Directive (EC) 2001/83 Of The European Parliament And Of The Council [2001] on the Community code relating to medicinal products for human use.

12 Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145.

13 ibid 1.

14 Decision of the European Ombudsman closing his inquiry into complaint 2560/2007/BEH against the European Medicines Agency (The European Ombudsman Official Website, 2010). Available at <https://www.ombudsman.europa.eu/en/decision/en/5459> 10 June 2019 accessed 17 November 2023.

15 Principles To Be Applied For The Deletion Of Commercially Confidential Information For The Disclosure Of EMEA Documents, EMEA/45422/2006, 15 April 2007.

3. CHANGES IN THE SCENERY

Policy 0070

The Policy, effective from January 1, 2015, aimed to enhance transparency by making clinical data, crucial for regulatory decisions, available for public scrutiny and future research in the interest of public health. This was achieved through the EMA's proactive publication of clinical reports submitted for regulatory approval on its Clinical Data portal. In December 2018, the Policy was suspended due to the EMA's relocation from London to Amsterdam following the UK's departure from the EU. During the pandemic, the Policy was reinstated exclusively for COVID-19 treatments and vaccines. Most recently, in December 2022, the EMA Management Board agreed to gradually reinstate the Policy and held a Webinar in May 2023 to initiate the procedures and inform interested parties. The EMA advised applicants to prepare their Redaction Proposal Document Packages early, to make use of the pre-submission meetings offered by the EMA, and to contact the EMA proactively for any specific product issues. When redacting CCI, applicants should cite detailed and precise justification, explaining exactly how its publication would undermine its economic interests. Applicants should also ensure consistency of redactions of CCI across clinical data submitted to both CTIS and which is subject to publication under the Policy. As a first step, the Policy was relaunched in September 2023[16] for medicinal products with NAS status. In response to a letter of the European Ombudsman concerning "[t]he proactive transparency of clinical trial data", the EMA pointed out that the reinstation of the Policy only for certain medicinal products is in accordance with the public and stakeholders' interests. The gradual reinstation ensures that the Policy will be implemented properly and achieve optimal results while the Clinical Data Policy Service works on the improvement of the technical tools before moving to the next step, which is the expansion of the Policy beyond NAS-containing medicinal products.[17]

Whilst the substance of the Policy has not changed, certain procedural aspects have been amended. In the previous iteration of the Policy, the EMA was obliged to publish the redacted/anonymised clinical reports within 60 days of the issuance of the Commission Decision. Under the reinstated Policy, the EMA will be required to publish the redacted/anonymised clinical reports within 120 days of the adoption of the CHMP opinion. The aim of the policy is to cover the disclosure of clinical data, namely, clinical reports and, on a second level, Individual Personal Data (IPD), submitted under the centralised marketing authorisation procedure. This data is submitted as part of a Marketing Authorisation Application (MAA), a post-authorisation procedure for an existing centrally authorised medical product, procedure under Article 58 of Regulation 726/2004. The data may also be submitted by a third party in the context of a MAA or post-authorisation procedure or requested by the Agency as additional clinical data in the context of the scientific assessment process for the aforementioned situations. The types of data that are not covered by the Policy are also clarified in the text.

In order to enable public scrutiny and to encourage the application of new knowledge in future research the Terms of Use (ToU) for the access to clinical are set out in the document. General access to clinical reports is allowed for any registered user that has agreed to the terms, for general and non-commercial use but only in "view-on-screen" format. A slightly more demanding registration process is required in order to download, save and print the content, solely for academic and non-commercial research purposes, as the user must also disclose information concerning their identity (i.e. name, date of birth, passport or ID card number, expiry date of the document; for juridical persons, the affiliation and position within the organisation of the user should also be provided). Both sets of ToU have the following elements in common: a) No attempt shall be made to re-identify the trial subjects or other individuals from the information b) The clinical reports may not be used to support a MAA/ extensions or variations to a MA nor to make any unfair commercial use of the clinical reports c) A watermark is applied to the published information to emphasise the prohibition of its use for commercial purposes d) The Agency accepts no responsibility for the user's compliance with the ToU.[18]

A pressing matter that aims to be regulated in the Policy is the management of Confidential Commercial Information (CCI) in clinical reports. The method that has been pursued by the EMA is the redaction of said information upon justified proposal of the Market Authorisation Holder and after scrutiny by the EMA. An important contribution of the Policy is the establishment of redaction principles which should be followed by the applicants. Namely, information that is in the public domain or publicly available will not be redacted. Furthermore, justification may be founded on the deterioration of the applicant's position due to the nature of the concerned product or based on the competitive situation of the therapeutic market, or due to the approval status in another jurisdiction, the novelty of the clinical development or a new development by the same company. In short, for the information to be redacted as commercially confidential a detailed justification that illustrates how their disclosure would undermine the economic interest of the undertaking is necessary. [19]

16 Tsang Lincoln, Peterson Hannah 'Relaunch of the EMA's policy on the proactive publication of clinical data' <Relaunch of the EMA's policy on the proactive publication of clinical data – Lexology> accessed 17 November 2023.

17 Reply of the European Medicines Agency in response to the letter of the European Ombudsman concerning "[t]he proactive transparency of clinical trial data" (Case SI/3/2023/MIK) EMA/88457/2023 29 September 2023.

18 European Medicines Agency policy on publication of clinical data for medicinal products for human use EMA/144064/2019.

19 ibid 18.

Regulation 536/2014

Regulation 536/2014, also known as the EU Regulation on clinical trials, introduced a comprehensive framework for the approval and oversight of medicinal product trials within the EU. One of its prominent features is the establishment of a centralized procedure, streamlining the authorization process by enabling sponsors to submit a single application for approval across the entire EU. This not only reduces redundancy, but also expedites the approval timeline. Although the Regulation entered into force on 16 June 2014 the timing of its application depended on the development of a fully functional EU clinical trials portal and database.[20] In terms of transparency, the regulation mandates the disclosure of crucial trial information, ensuring accessibility to details regarding authorization, conduct, and outcomes. In other words, the Regulation places a significant emphasis on transparency and information sharing in the context of clinical trials, marking a departure from the previous EU framework. The establishment of a centralized EU portal and database, providing a single-entry point for the submission and assessment of clinical trial data streamlines the process, enhances accessibility, and ensures consistent information sharing across all member states. Sponsors are required to provide detailed summaries of their clinical trial protocols, results, and layperson summaries, which will be made publicly available, fostering transparency. As a result, the transition to electronic submission via the EU portal enhances efficiency in document handling. Moreover, the regulation incorporates robust pharmacovigilance requirements, guaranteeing continual safety monitoring and prompt reporting of any adverse events.

In comparison to the previous Clinical Trials Directive 2001/20/EC, the new regulation introduces more rigorous transparency measures. The EU portal and database enable the public, including patients, researchers, and healthcare professionals, to access comprehensive information about ongoing and completed clinical trials. This move toward greater transparency aligns with broader trends in healthcare and medical research, emphasizing the importance of open access to information. By facilitating the sharing of trial data, Regulation 536/2014 aims to encourage collaboration, prevent duplication of efforts, and contribute to the overall advancement of medical knowledge. It is worth noting that, the EMA's publication policy and the EU database initiative are distinct measures. While the former provides for the publication of data submitted to the EMA for marketing authorisation through the centralised procedure after 1 January 2015, the latter applies to clinical trials data which are a result of trials approved under the new regulation.[21] EMA Management Board confirmed to the European Commission on 21 April 2021 that the EU Portal and Database were fully functional. The publication of the subsequent Commission notice on 31 July 2021 fixed the date of applicability of the Clinical Trials Regulation on 31 January 2022.[22] On 31 January 2023, the CTIS became the sole repository for submission of data and information relating to clinical trials as per regulatory requirements.

4. COMMERCIALLY CONFIDENTIAL INFORMATION

The concept of CCI must be understood in the context of Article 15(3) TFEU, extending public access rights to documents of all EU institutions, bodies, offices, and agencies.[23] While this provision enhances democratic legitimacy, its application is inherently challenging. The EMA must balance factors like the public's need for information, effective public health protection, and fostering innovation in European medical research, against the business interests of pharmaceutical enterprises. This challenge arises due to the absence of general regulation, the classification of 'sensitive' documents in the EU, and the lack of a comprehensive transparency mechanism in this domain.

As previously mentioned, the fundamental Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, is applicable for the Agency's activities. In the same manner, limitations to access are also applicable, allowing refusal of access in the event that the information pertains to: public interest (Art. 4(1)a), privacy and the integrity of the individual (4(1)b), protection of commercial interests of the individuals and/or the enterprises (Art. 4(2)), or/and the effectiveness of the EU institution's decision-making process (Art. 4(3)). Institution-specific rules for public access procedures and detailed exceptions to exclude information from access are required, especially considering the Art. 4(2) clause of Regulation No. 1049/2001 concerning "commercial interests of a natural or legal person, including intellectual property rights".

Subsequently, Policy 0070 and Regulation 536/2014 were introduced, allowing proactive publication of clinical trials data. Notably, as previously mentioned, the Policy introduced a publication process on the EMA website, providing on-screen access for general users and downloadable access for registered identified users, primarily for academic and non-commercial research. The Policy defined 'commercially confidential information' as any

20 Clinical trials – Regulation EU No 536/2014 <https://health.ec.europa.eu/medicinal-products/clinical-trials/clinical-trials-regulation-eu-no-5362014_en> accessed 6 December 2023.

21 European Commission, 'Impact Assessment Report on the Revision of the "Clinical Trials Directive" 2001/20/EC Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Clinical Trials on Medicinal Products for Human Use, and Repealing Directive 2001/20/ EC' SWD (2012) 200 final accessed 3 December 2023.

22 Commission Decision (EU) 2021/1240 of 13 July 2021 on the compliance of the EU portal and the EU database for clinical trials of medicinal products for human use with the requirements referred to in Article 82(2) of Regulation (EU) No 536/2014 of the European Parliament and of the Council < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2021:275:TOC> accessed 3 December 2023.

23 ibid 1.

non-public information in clinical reports submitted to the Agency, where disclosure may undermine the legitimate economic interest of the applicant or authorisation holder.

Both Regulation (EC) 726/2004 and Regulation (EU) 536/2014 include an exception from disclosure for commercially confidential information. However, the lack of a legal definition led the EMA to consider CCI as any non-public information where disclosure could undermine economic interests or competitive positions. The policy clarified that clinical data, including clinical reports and IPD, are generally not considered CCI except in limited circumstances. The policy annex outlined elements of clinical reports potentially considered as CCI, such as product development rationale, biopharmaceutics, clinical pharmacology, benefits and risks, conclusions, and summaries of studies. These sections could be redacted upon the EMA's review of the submitted justification.

The Clinical Trials Regulation modernized rules on public access to clinical trials data, mandating the submission of clinical study reports within specific timelines. The EU Clinical Trial Portal and Database further facilitated public access to clinical trial information. Article 81(4) of the Clinical Trials Regulation indirectly addressed commercially confidential information, allowing exclusion from public access based on justified confidentiality, considering the marketing authorization status and an overriding public interest.

Facing resistance from the pharmaceutical industry, the EMA released external guidance on implementing Policy 0070, providing specific guidelines for redaction and data anonymization. The 2016 guidance outlined categories of information not considered CCI, namely, information that is already in the public domain, information that does not bear any innovative features (common knowledge), additional information the disclosure of which would be in the public interest, and information lacking sufficient or relevant justification. The guidance, also, requires detailed specifications from applicants on how disclosure would affect their commercial interests, with the final decision resting with the EMA. The guidance established a high threshold for disclosure due to broad interpretations allowed by vague definitions.[24]

Despite stringent policies, Art. 4(2) of Regulation No 1049/2001 poses an additional challenge to pharmaceutical companies. Even if an applicant satisfies all requirements, CCI could still be disclosed in the event of an 'overriding public interest,' such as access to EMA documents and protection of public health in the EU.

5. INTERPRETATION OF THE DEFINITION IN CJEU CASE LAW

In recent years, a dynamic interaction has evolved between the CJEU and the EMA data disclosure policies, highlighting a delicate balance between the imperative for complete clinical study report disclosure and the pharmaceutical companies' assertions regarding the safeguarding of their commercial interests and innovation incentives through data confidentiality. CJEU reviews EMA decisions under Article 263(1) of the TFEU and any arbitration clause in the Agency's contracts, showcasing the complex landscape in which EMA operates.[25] This legal precedent illustrates the dilemma faced by the EMA, caught between the pressure for complete disclosure of clinical study reports and the demands of research-oriented pharmaceutical companies seeking to safeguard their commercial interests on the one hand, and innovation incentives through data confidentiality on the other.

The genesis of this interplay can be traced back to the AbbVie case in 2013, where a university science student sought access to clinical study reports from AbbVie for academic purposes. Despite AbbVie's claim that these reports fell under the exception of CCI as per Article 4(2) of Regulation No 1049/2001, the EMA, relying on Policy 0043, decided to grant access. AbbVie, contesting this decision, raised concerns about the potential violation of its rights, including the right to an effective remedy under Article 47 of the EU Charter. The General Court acknowledged the urgency of AbbVie's request, emphasizing the risk of irreparable harm to its business secrets and right to a private life under Articles 7 and 47 of the Charter. However, the case was settled out of court with AbbVie and the EMA reaching an agreement on the redacted versions of clinical reports, leaving issues concerning the scope of CCI protection under Policy 0043 and CFREU provisions unresolved.[26]

Following this decision, a similar case was brought to the attention of the Court. EMA v. InterMune UK and Others was slightly different as in this case, a "rival" pharmaceutical company demanded access to clinical reports.

24 External Guidance On The Implementation Of The European Medicines Agency Policy On The Publication Of Clinical Data For Medicinal Products For Human Use, EMA/90915/20167.

25 ibid 1.

26 Case T-44/13 R, AbbVie, Inc. and AbbVie Ltd v. European Medicines Agency (EMA) [2013] Order of the President of the General Court, 25 April 2013, ECLI:EU:T:2013:221 43.

Once again, interim measures were granted, based on a similar reasoning on the foundation of Articles 7 and 47 of the Charter, until a final decision on the appeal was made and the case was referred back to the General Court to assess the possibility of partial disclosure of information. Nevertheless, the Court, adopting a more proactive stance, emphasized that mere claims of fundamental rights violation were insufficient, insisting on considering the commercial value of the information. This led to a clearer definition of CCI, emphasizing the professional and commercial importance evaluated by the undertaking. The case was again settled out of court through an agreement.[27]

Several subsequent cases, such as PariPharma v. EMA, PTC Therapeutics International Ltd v. EMA, and MSD Animal Health Innovation GmbH and Intervet international BV v. EMA, show pharmaceutical companies striving to protect their data from EMA's transparency policy. The claimants argued that clinical and non-clinical study reports should be regarded as trade secrets, emphasizing the commercial importance of the information. In order to support the argument, the claimants used both the Charter, namely Articles 7 and 42 (access to EU documents), and Art. 4(2)a of Regulation No 1049/2001 and Art. 339 TFEU to demonstrate the absence of an emerging "overriding public interest" that would justify the disclosure. A part of their argumentation that can be considered crucial for the subsequent decisions, is that the claimants asserted not only that the especially sensitive parts of the reports should be covered by confidentiality protection, but rather, that this protection must extend to the reports as such, because the sensitive parts are embedded in a series of arguments.[28]

In the process of examining these requests, the intervener on the PariPharma case attempted to demonstrate that Article 47 of the Charter must be interpreted as supportive to the access as a tool for competing business interest. However, the General Court dismissed a general presumption of confidentiality, asserting that a significant part of the information in these reports is public domain and cannot be considered within the scope of commercial interest under Article 4(2) of Regulation No 1049/2001.[29] The Court clarified that the economic value of the dossier is a factor but not sufficient to classify information as commercially confidential alone. It emphasized that EMA should individually examine each document to determine whether the data falls under the exception for trade secrets outlined in Article 2(4)(a) of Regulation 1049/2001. In contrast, the EMA's 2016 Guidance suggested that the resources invested in clinical trials are irrelevant to justifying redaction, and applicants must demonstrate specifically how the release would undermine commercial interests.[30]

The provisions of Article 39(2) and (3) of the Agreement on TRIPS do not create a general presumption of confidentiality for information contained in a market authorisation application, as they do not give absolute precedence to the protection of intellectual property rights over the principle of transparency. There is no general presumption of confidentiality protecting sensitive clinical and non-clinical documents.[31] As a consequence, the fundamental rights that were mentioned are not relevant ground for the refusal of disclosure of data.

6. A DELICATE BALANCE

In 2019, following appeals by PTC Therapeutics and Intervet regarding CJEU decisions, the Advocate General expressed an opinion favouring a general presumption of confidentiality due to perceived deficiencies in EU legislation safeguards. These appeals marked the first instance of EU's document access regime issues within the pharmaceutical and veterinary sectors being brought before the Court.

AG Hogan contended that the General Court had incorrectly applied the test for recognizing a general presumption of confidentiality.[32] In fact, between the General Court decisions and the appeal, the CJEU delivered a judgment in ClientEarth v. Commission (Case C-57/16 P), setting the test for the recognition of a general presumption in respect of a new category of documents. According to this decision, showing that "it is reasonably foreseeable that disclosure of the type of document falling within that category would be liable actually to undermine the interest protected by the exception in question", is sufficient to secure protection, regardless of whether the information is new.[33] AG Hogan argued that these specific documents met this test, given the expensive and time-consuming nature of the information and the high-level summary available publicly. The potential for a competitor to gain key know-how without significant investment justified recognizing a general presumption of confidentiality for these documents.

Moreover, the AG disagreed with the General Court, asserting that TRIPS provisions meant the CCI exception should align with safeguarding data against unfair com-

27 Case C-390/13 P(R), European Medicines Agency (EMA) v. InterMune UK Ltd and Others[2013] Order of the Vice-president of the General Court from 28 November 2013, ECLI:EU:C:2013:795. 55.

28 Case T-235/15, Pari Pharma GmbH v. European Medicines Agency (EMA) [2018] ECLI:EU:T:2018:65. 65 and Case T-718/15, PTC Therapeutics International Ltd v. European Medicines Agency (EMA) [2018] ECLI:EU:T:2018:66. 66 and Case T-729/15, MSD Animal Health Innovation GmbH and Intervet international BV v. European Medicines Agency (EMA) [2018] ECLI:EU:T:2018:67.

29 Case T-235/15, Pari Pharma GmbH v. European Medicines Agency (EMA) [2018] ECLI:EU:T:2018:65. 65 49.

30 External guidance on the implementation of the European Medicines Agency policy on the publication of clinical data for medicinal products for human use, EMA/90915/2016.

31 Case C-175/18 P PTC Therapeutics International Ltd v. European Medicines Agency (EMA) and European Confederation of Pharmaceutical Entrepreneurs (Eucope) [2018] ECLI:EU:C:2020:23 112.

32 Case C-175/18 P PTC Therapeutics International Ltd v European Medicines Agency (EMA) Opinion of the Advocate General Hogan delivered on 11 September 2019 ECLI:EU:C:2019:709 98, 166.

33 Case C-57/16 ClientEarth v. European Commission [2018] ECLI:EU:C:2018:660.

mercial use. If effective steps were not taken to ensure such protection, disclosure could compromise the applicant company's data protection, especially when global protection is unattainable outside the EEA. Despite this argument, the CJEU did not adopt AG Hogan's suggestion, stating insufficient evidence from claimants regarding the potential harm to their business interests. The CJEU emphasized that a mere "risk" of a competitor using data for economic purposes was not adequate grounds for a general presumption of confidentiality. However, the Court contributed methodologically, emphasizing that pharmaceutical companies seeking to prevent third-party access must explicitly demonstrate how information disclosure would foreseeably undermine a protected interest.[34]

In reference to the fundamental rights of the Charter as a tool against the disclosure of CCI, the CJEU had already "closed this door" in Amicus Therapeutics UK and Amicus Therapeutics v. EMA, when the Court prominently disregarded the notion that Articles 7 and 17 of the Charter constituted an automatic exception to the principle of disclosure for documents related to private entities' commercial activity referring to the Deza v. ECHA case outcome. Despite the inapplicability of Regulation 536/2014 to the case, the Court interpreted its provisions as reinforcing the EU legislature's emphasis on maximum transparency of EMA documents.[35]

Cases after the 2019 AG opinion indicate the Court's continued reluctance to grant data the status of CCI, particularly based on alleged fundamental rights infringement. Regulation 536/2014 and new Policy 0070 may further strengthen this stance. This raises concerns about potential rights violations for pharmaceutical companies (for instance, Arts. 16, 17 and 47 CFREU), emphasizing the need for intensified dialogue with the EMA during the redaction process.[36]An illustrative example of absence of fundamental rights in the dialogue with pharmaceutical companies has been the Covid-19 emergency which led to several conditional licenses from the EMA. None of the companies attempted to invoke the Charter provisions (Arts. 7, 16, 17, 47 and 42 for instance) as a ground to block access of the third persons to the application kit submitted to the EMA while submitting the application kits for the COVID-19 medicines and vaccines.[37] This could suggest a potential reluctance of companies to utilize the Charter as an effective tool to protect their commercial interests, given the evolving body of the CJEU's case law that evidently reflects a decline in the relevance of CFREU guarantees in the Court's rationale.

The balance between commercial interests of pharmaceutical companies and general public's right to access EU documents is a key consideration. For the exception to apply, the risk of hindering commercial interests must be reasonably foreseeable, not purely hypothetical. However, when clinical data is requested, evaluating the prospective effects of disclosure may be challenging, as at the point when access to clinical data is petitioned for, the prospective effects of disclosure may not be adequately foreseeable. The impact on the commercial interests of original drug sponsors, particularly in terms of facilitating the entry of a competing drug, must be considered. The EMA's goal of establishing a level playing field through disclosure seems contradictory, potentially accelerating the development of competing drugs and undermining the economic interests of information owners.

While the EMA's objectives of fostering innovation and transparency are commendable, their relevance to the public interest assessment under Article 4(2) of Regulation (EC) 1049/2001 is questioned. Economic efficiency-oriented policy goals may require a more in-depth economic analysis and specialized regulatory treatment. The right of access to documents might be too narrow to fully support economically oriented objectives. In the pharmaceutical industry, the reservation for "non-commercial research" purposes may not adequately protect the commercial interests of trial sponsors, as any information from marketing authorization dossiers reused by other developers could facilitate the launch of a new, potentially competitive drug.[38]

7. IS EUROPE OUT OF THE RACE?

Sharing clinical trial data is crucial for enhancing transparency, ensuring scientific progress, minimizing research inefficiency, and maintaining trust in the pharmaceutical industry.[39] In 2013, a significant portion of the industry, represented by the Pharmaceutical Research and Manufacturers of America (PhRMA) and the European Federation of Pharmaceutical Industries and Associations (EFPIA), committed to various initiatives, including sharing participant-level data, study-level data, and protocols from clinical trials of US and EU registered medicines with qualified researchers. They also pledged to provide public access to clinical study reports, share summary result reports with trial participants, establish public web pages displaying data sharing policies, and publish results from trials with medical importance.[40]

34 Manley Maria Isabel, Chatzidimitriadou Zina 'Crucial Development on the Presumption of Confidentiality in the Access to Document Saga (PTC Therapeutics v EMA and MSD Animal Health Innovation, Intervet v EMA),' <Crucial Development on the Presumption of Confidentiality in the Access to Document Saga (PTC Therapeutics v EMA and MSD Animal Health Innovation, Intervet v EMA) – Lexology> accessed November 17 2023.

35 ibid 5.

36 Daria Kim 'Transparency Policies of the European Medicines Agency: Has the Paradigm Shifted?' [2017] 25(3) Oxford Medical Law Review 456.

37 ibid 23.

38 ibid 34.

39 ibid 33.

40 The FDA defines Commercially Confidential Information (CCI) as valuable data or information held in strict confidence within one's business, but the FDA may use discretion to release it if there is a compelling public interest; Modi Natansh, Kichenadasse Ganessan, Hofmann Tammy, Hasel Mark, Logan Jessica, Veroniki Areti, Venchia-

Despite these commitments, the pharmaceutical industry operates in a highly competitive environment. In Europe, the pharmaceutical sector is a key contributor to the economy, generating over €200 billion in Gross Value Added (GVA), providing 2.5 million jobs, and leading in R&D intensity. Over the years, however, Europe's share in global pharmaceutical innovation has declined, with the United States outpacing it. The region's policies have often prioritized affordable medicines over industrial competitiveness, contributing to its diminishing influence in global pharmaceutical innovation. It is noteworthy to highlight that in 1960, Europe was the source of nearly two-thirds of all new medicines. By 1990, pharmaceutical companies in Europe accounted for over half of the worldwide R&D spending, but this percentage has consistently decreased over the years, reaching 35 percent in 2020.[41]

In the past years, most policies and strategies in the pharmaceutical space have put affordable medicines front and centre and left goals such as strengthening the EU's placement in the pharmaceutical market as a complimentary purpose. Securing affordable medicines is a perfectly legitimate policy goal, but it is not industrial policy and does not per se complement the competitiveness of the European pharmaceutical sector. An example of Europe's decline is evident in the development of Advanced Therapy Medicinal Products (ATMP), where the Asia-Pacific region has been more competitive in attracting clinical trials. Despite European institutions being prominent in academic research, R&D investments tend to go elsewhere. While Europe may not adopt the pricing freedom of the United States, it is crucial for policymakers to explore alternative strategies to compensate for disadvantages such as persistent cost-containment policies and market fragmentation within the EU.[42]

8. CONCLUSION

Intellectual Property Rights could be the cornerstone of making Europe an increasingly attractive market for pharmaceuticals. Regulations as the GDPR and Regulatory Exclusivities that are more generous than in any other competing market could serve as an assurance for the undertakings' data safety. However, a strict transparency policy negates this increased level of protection. The 2019 AG opinion offers a legal depiction of this issue, illustrating that the balancing that has been conducted in past cases does not consider the importance of knowledge valorisation, and the fact that a company's data is a fundamental factor to its freedom to conduct business and to maintaining competitiveness in the market. The most important aspect of this issue is the globalization of the market and international competition, meaning that if Europe upholds a strict policy in reference to CCI it will possibly become uncompetitive as a result.

With the implementation of the Lisbon Treaty, the EUCFR has officially transformed into a legally binding instrument of primary law. It stands at the heart of the Union's legal structure, serving as a key reference for CJEU judges as they evaluate the alignment of measures taken by the EU or its Member States with fundamental rights. Thus, Article 16, which expressly addresses the freedom to conduct business has gained a primary law status as well. A pivotal ruling shedding light on the extent of this essential right is the Sky Österreich case. Here, AG Bot applied Article 16 of the Charter on his own initiative, and the CJEU, once more, harkened back to its precedents emphasizing the non-absolute nature of the freedom to conduct business.[43] As was mentioned in paragraph 47 that: "[o]n the basis of that case-law and in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest."[44] It seems that the CJEU has interpreted the phrase "in accordance with Union law and national laws and practices" to reflect a broader limitation to curtail the freedom to engage in

rutti Rebecca, Smit1 Amelia, Tufaha Haitham, Jayasekara Harindra, Manning-Bennet Arkad, Morton Erin, McKinnon Ross, Rowland Andrew, Sorich Michael and Hopkins Ashley 'A 10-year update to the principles for clinical trial data sharing by pharmaceutical companies: perspectives based on a decade of literature and policies.' BMC Med. 2023 Oct 23;21(1):400. doi: 10.1186/s 12916-023-03113-0. PMID: 37872545; PMCID: PMC10594907.

41 Erixon Fredrik, Guinea Oscar 'Strategic Autonomy and the Competitiveness of Europe's Innovative Pharmaceutical Sector: A Wake-up Call' <https://ecipe.org/publications/strategic-autonomy-competitiveness-europes-innovative-pharmaceutical-sector/> accessed 17 November 2023.

42 ibid 39.

43 Groussot Xavier, Petursson Gunnar Thor, Pierce Justin 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' (April 23, 2014). Lund University Legal Research Paper Series No 01/2014, Available at SSRN: https://ssrn.com/abstract=2428181 or <http://dx.doi.org/10.2139/ssrn.2428181> accessed 6 December 2023.

44 Case C-283/11 Sky Österreich GmbH v. Österreichischer Rundfunk [2013].

business for the greater public good than what would be applicable otherwise. It could as well be argued that the CJEU views the inclusion of this language in Article 16 as a reflection of its own case law, which has consistently shown a degree of ambiguity regarding the freedom to conduct business.[45]

It could be argued that, so far, the CJEU maintains a "weaker" right status for the freedom to conduct business. Based on European legal tradition, this is a sensible more human-centred practice that aligns with the latest policies of the EU.[46] However, it is worth considering that Europe is part of an international market that runs on competitive terms. Undoubtedly, the importance of open science and access to knowledge should not be diminished. Nevertheless, it must be acknowledged that a legal order which does not protect data which is the product of tremendous investments, will not offer an appropriate incentive for R&D. The pandemic has proven that in extreme situations, sharing of research data can be safeguarded based on urgency and threat to public health as was, indeed, the case even though Transparency Policy 0070 was at halt. Moving from a general presumption of confidentiality to a general presumption of openness and demanding pharmaceutical companies to prove an existing harm can arguably be an imbalanced practice. Notably, because the "harm" will only be apparent after the publication of data and at that point the harm to the undertaking will be irreparable and especially considering that CCI is a notion that has been greatly shaped by case law instead of being clearly defined in legislative texts creating legal uncertainty.

Emmanouela Roussakis

Emmanouela Roussakis completed her undergraduate studies in law at the National and Kapodistrian University of Athens. She conducted her traineeship at the Hellenic Court of Audits and moved on to work for privet practices. She holds an LLM in International and European Legal Studies with a specialization in European Private Law. During the program she focused on Intellectual Property Rights and Technology Law and wrote her thesis on Intellectual Property Rights in the Context of Blockchain. She has been employed by the Stockholm University Faculty of Law as a trainee for the Intellectual Property Law team, where she worked as a Legal Researcher and Editor and is currently doing freelance research on Text and Data Mining and Intellectual Property implications of research in the European Union.

45 Oliver Peter 'What Purpose Does Article 16 of the Charter Serve?' in U. Bernitz et al. (eds.), General Principles of EU La and European Private Law (Kluwer, 2013), 293.

46 Picod Fabrice 'Charte des Droits Fondamentaux de l'Union Européenne. Commentaire Article par Article, Bruylant, 2017.; Plasseraud, Lucie, 'The Relationship Between the Internal Market and Fundamental Rights: Strengthening; Freedom to Conduct a Business in the Service of the European Union Economic Integration' (July 24, 2019). Available at SSRN: https://ssrn.com/abstract=3491655 or <http://dx.doi.org/10.2139/ssrn.3491655> accessed 6 December 2023.