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Introduction to the FRICoRe Trans-national Training Workshop on

THE JUDICIAL PROTECTION OF HEALTH AS A FUNDAMENTAL RIGHT

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“Fundamental Rights In Courts and Regulation” – FRICoRe

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Health and data protection: the intersections, between complementarities and conflicts

- **The intersections between health and data protection, between the individual and collective dimension:** the legal definition of health data and their regime under the GDPR
- **An example of complementarity in the light of the ECtHR case law:** the definition of subjects who can access health data
- **An example of possible conflict between health and data protection, in the light of art. 52 CFR and the general principles of EU law:** data processing in the context of COVID-19 crisis.
- **Intersections between data and health protection the role of technologies:** the application of the data minimisation principle

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The intersections between health and data protection, between the individual and collective dimension

The definition of health data

Art. 4 (15) Reg. EU 2016/679 defines ‘**data concerning health**’ as

“personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status”.

Health data may concern multiple individuals (Examples: Genetic data; Tumor rate of residents in an identified polluted area ; Risk to die of a specific population for COVID-19 related reasons, e.g. persons between 70 and 80 years)

The intersections between health and data protection, between the individual and collective dimension

Health data regime

Health data are qualified by art. 9 GDPR as a **special category of personal data**

Recital 51 Reg. UE 2016/679 “Personal data which are, by their nature, particularly sensitive in relation to **fundamental rights** and freedoms merit specific protection as the context of their processing could create **significant risks to the fundamental rights and freedoms**”.

According to **Art. 9 Reg. UE 2016/679**, the processing of **health data is prohibited, except** where the **conditions** provided for by the second paragraph of that article are met.

The intersections between health and data protection, between the individual and collective dimension

Health data regime

The following exceptions provided for by art. 9 GDPR are of particular interest:

- processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent (Art. 9(2)(c));
- **processing is necessary for the purposes of preventive or occupational medicine, (...), medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services (...)** and subject to conditions and safeguards (Art. 9(2)(h));
- **processing is necessary for reasons of public interest in the area of public health**, such as protecting against serious cross-border threats to health (...) on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy (Art. 9(2)(i));
- processing is necessary for archiving purposes in the **public interest, scientific (...) research purposes or statistical purposes** (...) which shall be **proportionate** to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject. (Art. 9(2)(j)).

An example of complementarity in the light of the ECtHR case law

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An example of complementarity in the light of the ECtHR case law

ECtHR case law defining the subjects who can lawfully access health data

In assessing the existence of an interference with art. 8 ECHR (right to respect to private and family life), the ECtHR stated that in case of lack of health data confidentiality, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community

Mockute v. Lithuania, app. no. 66490/09, of 27 February 2018; *Z. v. Finland*, App. No. 22009/93, of 25 February 1997; see also *I v. Finland*, app. no. 20511/03, of 17 July 2008; *M.S. v. Sweden*, app. No. 74/1996/693/885, of 27 August 1997; *Avilkina and Others v. Russia*, no. 1585/09, 6 June 2013.

An example of possible conflict, in the light of art. 52 CFR and the general principles of EU law

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An example of possible conflict between health and data protection

Personal data processing in the context of the COVID-19 crisis

EDPB- EDPS Joint Opinion 04/2021 on the Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery, 31 March 2021

In the light of art. 52 CFR, «**compliance with the principles of necessity and proportionality** by the measures introduced with the Proposal should carefully be analysed. In particular, the Proposal should achieve a fair balance between the objectives of general interest pursued by the Digital Green Certificate and the individual interest in self-determination, as well as the respect for her/his fundamental rights to privacy, data protection and non-discrimination, and other fundamental freedoms (...)».

An example of possible conflict between health and data protection

Personal data processing in the context of the COVID-19 crisis

EDPB, Guidelines 4/2020 on the on the use of location data and contact tracing tools in the context of the COVID-19 outbreak, 21 April 2020

«The general principles of effectiveness, necessity, and proportionality must guide any measure adopted by Member States or EU institutions that involve processing of personal data to fight COVID-19» (p. 3)

An example of possible conflict between health and data protection

Personal data processing in the context of the COVID-19 crisis

French Constitutional Council, decision 2020/800 of 21 May 2020

The Constitutional Council stated that when personal data of a medical nature are processed, particular vigilance must be observed in the conduct of processing operations and the determination of their terms.

In order to assess the adequacy and proportionality of the contested provisions with regard to the objective pursued, the Council considered, *inter alia*, that i) the collection, processing and sharing of health data could only be implemented to the extent strictly necessary for four specific purposes; ii) the scope of personal health data that may be collected, processed and shared was restricted by the legislator to data relating to the virological or serological status of individuals with regard to the covid-19 disease or to clinical diagnostic and medical imaging evidence specified by decree in the Council of State after consulting the High Council for Public Health.

Intersections between data and health protection the role of technologies

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Intersections between data and health protection the role of technologies

Data minimisation principle

Article 5 – Principles relating to processing of personal data

1. Personal data shall be:

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (**'data minimisation'**);

Intersections between data and health protection the role of technologies

EDPS, *Preliminary Opinion 8/2020 on the European Health Data Space*, 17 November 2020

«to implement **data minimisation**» it should be considered «the use in context of privacy enhancing technologies, including those enabling to perform operations on encrypted data without having access to the data in clear or performing calculations on distributed data without having access to all data sources or enabling reliable statistical calculations on data where noise has been injected».

Thank you for your kind attention

***Enjoy the FRICoRe Workshop on
Health as a Fundamental Right!***