Summary: Implementation of the provisions of Article 34 HRA by researchers and ethics committees

For some years now, research projects involving the further use of existing health-related data or biological material have accounted for a growing proportion of all research projects in Switzerland – 43% in this analysis. This further use is regulated in detail in the Human Research Act (HRA). Before existing data and samples can be used, the person concerned (i.e. the persons from who the data and samples originate) must have given their free and informed consent. In exceptional situations, the further use of health-related datasets and samples is permissible without the consent of the participants. To this end, three requirements stated in Article 34 HRA a-c must all be met:

- first, the applicant must explain why it would be impossible or disproportionately difficult to obtain consent,
- second, the applicant must show that no documented refusal has been issued by the person concerned,
- and third, the applicant must have reviewed the interests and demonstrate that the interests of the research outweigh the interests of the person concerned.

If all these requirements are met, the ethics committee can then review the situation and issue its approval for the respective research project.

This study addresses the implementation of the provisions of Article 34 HRA by the researchers and the executive authorities. On behalf of the FOPH, swissethics has carried out a structured analysis of applications for further use according to Article 34 HRA and compared these with applications for research projects for further use with consent. The aim was to obtain an overview of the type of applications and discover how the ethics committees deal with these applications in practice. 60 applications for further use according to Article 34 HRA and 60 applications for projects with consent were analysed in respect of numerous parameters. In both cases, they were the first 60 applications submitted in 2019 and assessed by the ethics committees. Interpretations and evaluations reflect the opinions of the authors alone.

Generally speaking, further-use projects are predominantly initiated by the researchers themselves, and the industry is clearly under-represented as the initiator. Relative to the number of submitted applications, the exemption allowing further use without consent according to Article 34 HRA is the rule rather than the exception: 59% of all submitted applications for further use request the application of Article 34 HRA. It should be noted that this proportion includes "mixed" applications, where consent is lacking only for part of the datasets or samples. Some of the projects according to Article 34 HRA involve very specific scientific investigations, and there is a trend towards acute illnesses. Applications for further use according to Article 34 HRA are slightly more likely to involve older data and larger datasets. Only in rare cases are Article 34 projects funded externally, and in most such cases they are funded by the Swiss National Science Foundation. This external funding is very substantial, amounting to approx. CHF 5 million in the analysed sample. 52% of the projects according to Article 34 HRA also pursue an educational objective, whereas this is the case for only 38% of the projects with consent. Projects for further use are predominantly conducted at national level. Most of the datasets and samples are initially in unencrypted form and then encrypted for analysis at a later date. Projects according to Article 34 HRA predominantly involve the analysis of non-genetic datasets, while genetic data and/or samples are involved in only 18% of cases. For projects with consent, the proportion of genetic data/samples is 30%.

Only in two-thirds of cases are all the requirements specified in Article 34 HRA met at first submission to the ethics committee. Since the ethics committees frequently ask for numerous rectifications, only 22% of the projects according to Article 34 HRA are approved initially, compared to 43% of the projects with consent. In 7% of applications, the ethics committees require consent to be obtained for all datasets/samples, which de facto amounts to a rejection of the application. The corrections to the protocol or the obtaining of consent required by the ethics

committee are formulated as restrictions or conditions. Two applications were withdrawn. Most of the applications according to Article 34 HRA are processed according to the simplified procedure, while the procedure involving a decision taken by the chairperson is selected for most of the applications with consent. Ultimately, all the submitted projects in the analysed sample were approved, in some cases after extensive revision.

When considering these results, it should be borne in mind that it is not the number of applications without consent according to Article 34 HRA or the number of applications with consent that is decisive in assessing the extent of further use research with and without consent, but rather the number of datasets or samples for which consent has been given or not. However, this study cannot draw any robust conclusions from these figures. Nor is it possible, based on these results, to propose any comprehensive, clear, or even new, criteria for the application of Article 34 HRA, given the considerable complexity of the individual research projects on the one hand and the individual decisions taken by the ethics committees on the other.

The question arises as to how this exemption might be handled in future. Consent should, and indeed must, be obtained wherever possible. This is also in line with the current practice of ethics committees in this dynamic process. At the same time, relevant research should not be prevented, and exceptional approval for retrospective research will also continue to be needed. Nevertheless, the proportion of cohorts without consent should become increasingly smaller; the more comprehensive introduction of general consent and implementation of the law by the ethics committees should facilitate this. The balancing act of promoting research while protecting participants is both challenging and complex, calling for sound solutions based on ethically acceptable principles.