

Explanatory Report¹

Date: 31 August 2020
To: The Swiss Federal Institute of Intellectual Property (**IPI**) – Anaïc Cordoba
From: Michel Jaccard | Juliette Ancelle
Re: **Model agreements for sharing technical data**

I. INTRODUCTION

- 1 The IPI has entrusted the law firm id est avocats Sàrl (**id est**, hereinafter “**we**”) with the drafting of model agreements for the transfer and exchange of technical data between private actors (hereinafter “**model agreements**”). This mandate falls within the scope of the more general task given to the IPI by the Federal Council to analyse the problems concerning access to technical data in Switzerland and abroad, and to formulate proposals and solutions to promote the exchange of such data². The IPI was therefore asked to examine the feasibility of a potential compulsory licensing system and also to look for other solutions for access to non-personal data³.
- 2 In general, the term ‘technical data’ is defined by referring to ‘personal data’ in the negative within the meaning of applicable legislation (i.e. as ‘non-personal data’)⁴. This term therefore jointly covers non-personal data, i.e. data that does not concern an identified or identifiable natural person, as well as anonymised personal data. This could include meteorological, environmental data or statistical data, data generated automatically by machines such as sensors or probes, or data generated by natural persons such as data on the frequency or intensity of the use of a product⁵. When accessible, it has the capacity to contribute to technological innovation and is of major economic interest. Nevertheless, this data – whose circulation and use is essential to the development of a data economy – is often held by private entities that restrict access either voluntarily or due to a lack of sharing solutions. The objective of our intervention is to propose standardised contractual documentation in order to facilitate the sharing of this technical data by making such data held by private sector actors available to other organisations or private entities for their own use.
- 3 Initially, the methodology applied in this intervention led to identifying the needs to be fulfilled based on the recurrent problems raised by existing literature and, in particular, the European work carried out in the field of data sharing. Once these needs had been identified, we then sought to

¹ Freely translated from the french text.

² *Report of the expert group on data processing and data security*, Recommendation No. 20, 17 August 2018; *Report on the recommendations of the expert group on the future of data processing and data security, acknowledgement and further procedure*, DETEC, 15 October 2019.

³ *Report on the recommendations of the expert group*, DETEC, 15 October 2019, p. 9.

⁴ Art. 1 and 3 para. 1 of the EU Regulation on the free flow of non-personal data; *Communication from the Commission, Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union* of 29 May 2019, p. 5.

⁵ *Communication from the Commission* of 29 May 2019, p. 6 et seq.; see also Gefion Thuermer, Johanna Walker, Elena Simperl, *Data Sharing Toolkit*, p. 16; and the practice examples available at <<https://eudatasharing.eu/data-sharing-practice-examples>> (last accessed 20 May 2020).

address them through an appropriate contractual framework. Our analysis was carried out independently of any questions of qualification or legal ownership of the data concerned and the possible technological modalities of sharing, which are beyond the scope of the present intervention.

- 4 This report presents the recurrent themes and needs identified within the context of data sharing between private sector actors (*see section II. below*), followed by the contractual framework drafted on this basis in the form of a user guide (*see section III. below*).

It accompanies the contractual documentation prepared in carrying out our mandate, i.e. the various model agreements drawn up in the form of a neutral version and a commented version to facilitate their use.

II. NEEDS ASSESSMENT

- 5 The model agreements aim to address the main issues raised by sharing technical data from a legal and practical perspective, irrespective of the technological aspects of such data sharing and questions of legal ownership.

- 6 In this respect, the themes and needs to be addressed were determined on the basis of existing literature, including the various work on data sharing and portability carried out by the European Union⁶. This work highlights the emergence of a data economy, the value of data as an asset, and the fundamental importance of data accessibility⁷. Data sharing is therefore defined as permitting specifically authorised access to datasets by third parties in order to generate value⁸ with a view to promoting data-driven innovation⁹. At the Swiss level, the report of the expert group of 17 August 2018 shares this vision stating that the issue of data access and ownership represents “*major challenges for the B2B domain*”¹⁰.

- 7 The following issues with regard to data sharing between private actors are repeatedly discussed in the various studies considered:

- The contractual relationship model
- The type of data shared
- The quality of data shared
- The use made of the data shared by the recipient

- 8 In addition to these elements, the following concerns are most often cited as being a hindrance to data sharing by private actors:

- The loss of control over shared data

⁶ See the work of the Support Centre for Data Sharing (SCDS) created by the European Commission, as well as, in particular: *Commission Staff Working Document, Guidance on sharing private sector data in the European data economy* of 25 April 2018; *Communication from the Commission “Towards a common European data space”* of 25 April 2018; *Communication from the Commission* of 29 May 2019; SCDS, *Report on collected model contract terms* of 26 July 2019; SCDS, *Analytical report on EU law applicable to sharing of non-personal data*, 24 January 2020.

⁷ See the toolkit developed by the EU Horizon 2020 Data Pitch programme: Thuermer, Walker, Simperl, *Data Sharing Toolkit*, available at <<https://datapitch.eu/datasharingtoolkit/>> (last accessed on 14 May 2020).

⁸Gefion Thuermer, Johanna Walker, Elena Simperl, *Data Sharing Toolkit*, p. 4.

⁹ Thuermer, Walker, Simperl, *Data Sharing Toolkit*, p. 5.

¹⁰*Report*, p. 4 et seq.

- The protection of data or interests when sharing (e.g. competitiveness, business secrets, etc.)
 - The complexity of the applicable legal and regulatory framework and its compliance by the data provider and the recipient
 - The absence of good practices
 - The cost of preparing data for sharing
- 9 Our analysis also identified a number of potential business models related to data sharing, influenced by the type of data provided and the interests of the parties involved. For example, sharing can take place via online sales spaces or exchange platforms acting as intermediaries¹¹ on the basis of bilateral contracts or even on the basis of models similar to open data, bearing in mind that the studies carried out at European level have found that exchanges between private entities are primarily based on bilateral or multiparty contracts¹². From a technical point-of-view, data is most often shared through application programming interfaces (**API**), as well as through platforms that host data¹³.
- 10 While issues of a technical nature are likely to require technical standards, issues related to the regulatory and contractual framework can be addressed through standardised model agreements.
- 11 In the context of drafting such models, the first question is the relationship between the parties involved in the exchange. This may or may not be of a long-term nature, and may provide for monetary compensation in return for sharing the data, or a mutual exchange, or even be free of charge. Secondly, the data to be shared may only be technical data to the exclusion of all other personal data within the meaning of the applicable regulations. This last point raises not only the question of possible data quality requirements, but also the question of possible contractual guarantees that may be provided by either party, as well as their enforceability. With regard to potential restrictions on the use of data, this topic also includes possible restrictions on the scope of use of the data, but above all, prohibitions to protect trade secrets and other confidential information of the data provider. Again, the question arises as to how the parties will be able to enforce such clauses and assert their rights arising from them, since any contractual penalties would appear from the outset to be unsuited to the goal of standardisation pursued by the models.
- 12 Indeed, the contractual instrument must apply to exchanges between private actors who currently do not have access to technical data. It is therefore primarily aimed at SMEs and other private legal entities of similar size. This is because the literature observes that large economic actors have the means to exploit and benefit from their data. The documentation must therefore meet the needs of the target users and allow for easy and widespread use. On one hand, this documentation must meet the requirements of standardisation and pragmatism, which leave little scope for the creativity of its users. On the other, it must have a sufficient degree of granularity to adequately cover the needs and concerns of these stakeholders.
- 13 Finally, use of the documentation proposed presupposes that the actors involved have successfully implemented organisational learning among themselves and thus have the structural means to allow the data to be prepared for sharing and used for its intended purpose.

¹¹ For example, see the Hazy platforms <www.hazy.com> or Truata <www.truata.com> (last accessed 20 May 2020).

¹² Cf. in particular the *Commission Staff Working Document* of 25 April 2018, p. 6.

¹³ Regarding the technical aspects of data sharing in general, see Wout Hofman, Madam Rajagopal, *A Technical Framework for Data Sharing*, *Journal of Theoretical and Applied Electronic Commerce Research*, vol. 9, issue 3, 2014, 45-58.

III. THE MODEL AGREEMENTS – USER GUIDE

A. Introduction to the individual agreement categories

- 14 The contractual documentation was drawn up based on the needs and concerns identified in our analysis (see section II. above), which made it possible to individualise the most common types of use. More specifically, the documents must cover the following cases:
- The one-time provision of data
 - Access to a data feed or the regular provision of long-term data
 - The exchange of data between parties
- 15 The agreements are therefore divided into three different models on the basis of a common structure, which are intended to be accessible both in terms of their content and format.
- 16 The proposed agreements are bilateral and include agreements of a long-term and of a one-off nature. Data sharing can take place unilaterally or bilaterally through an exchange of data.

- 17 The model agreements proposed are as follows:
- An **Agreement for the Transfer of Technical Data**
 - A **Subscription Agreement for Access to Technical Data**
 - An **Agreement for the Exchange of Technical Data**

- 18 To make it easier for the user to select the appropriate model agreement, we have summarised the situations covered by each model agreement below:
- a) **Agreement for the Transfer of Technical Data (unilateral).** This model is aimed at less common cases where data is provided once only or where the parties wish to test a sample of data with a view to subsequently concluding one of the two other agreements. This exchange of data can be free of charge or subject to payment.
 - b) **Subscription Agreement for Access to Technical Data (unilateral).** This agreement is intended for the regular and unilateral provision of data by a data provider over a certain period of time, without the data provider having any interest in the results of the processing or further use of the data provided. This access can be provided free of charge or, if the data provider wishes to monetise its service, in the form of a fee-based subscription. This model gives the provider the possibility of reserving the right to audit in order to ensure compliance with the agreement. This applies primarily to cases where the data provider does not aim to exploit itself the data collected, but can identify an economic interest in making this data available to third parties in return for remuneration, either for research purposes or for commercial exploitation.
 - c) **The Data Transfer Agreement for Technical Data (mutual).** This agreement is the most extensive data sharing model and is recommended for situations where a synergy is possible between parties that have a mutual interest in pooling their respective technical data. In such situations, access is in principle free of charge and covers all updates, as well as new data collected by either party. The parties can also grant mutual access to the results based on the data obtained in this way, as well as a mutual right to audit.

B. Formal elements

- 19 The models are bilateral agreements between a data provider and a recipient, i.e. the data user, to the exclusion of third-party intermediaries.
- 20 In order to ensure that they are simple to use and suitable for a wide range of situations, the model agreements have a standardised format and the same following structure:
- A cover sheet to be filled in by the parties where they indicate or choose:
 - the date, their names and contact details
 - the type of data concerned
 - the data format
 - the technical modalities for providing the data
 - the financial aspects
 - any restrictions on use
 - the duration and termination of the agreement
 - a list of definitions
 - a set of contractual clauses
 - the signatures of the parties
- 21 This reduces the involvement of the parties. They only need to fill in the cover sheet, which they can complete with either factual data (identity, address, technical modalities, fee, etc.) or by choosing from the tick-box options offered. In the body of the contract itself, the parties only have to choose from alternatives that allow them to adapt the agreement to their specific needs. Notes have been included in the commented versions to help the parties choose the appropriate option.
- 22 The design of the agreements reflects the desire to use a common format that facilitates implementation and automation by the parties with fields to be filled in on the cover sheet and pre-defined choices within the contractual clauses. In practice, this allows the model agreements to be made available to users online in a format that allows for modifications and signatures to be executed electronically¹⁴.

C. Content of the model agreements

- 23 As a preliminary remark, we would like to point out that these model agreements do not address the legal issues related to the ownership of the technical data, the aim being simply to facilitate dissemination of the data rather than setting the existence or non-existence of a possible property right. Nevertheless, the legal and regulatory context cannot be entirely ignored. Certain clauses have been inserted to acknowledge the possible existence of intellectual property rights that may affect (even partially) the use of the data made available (*see point 31 below*), as well as to anticipate possible issues related to the regulations applicable to the protection of personal data (*see points 26 and 36 below*).
- 24 In addition to the cover sheet, the three model agreements have a common structure that is divided into six parts:

¹⁴ See Section 7.2 of the model agreements. Although an electronic signature via the DocuSign or PDF programs does not meet the requirements of the Federal Act on Electronic Signatures (ESigA), the principle of freedom of form applies to model agreements in their current content, which are not subject to written form by law. The parties are therefore free to choose the form, but it is advisable to opt for a mode of conclusion that sufficiently demonstrates their intention to bind themselves contractually. Electronically signing the model agreements enables these necessary evidentiary functions to be fulfilled.

- General provisions: this section aims to cover the general framework relating to the provision and use of the data covered by the agreement, including the modalities of data provision, financial compensation, applicable restrictions and other conditions related to the sharing of the data. The content differs from agreement to agreement.
 - Additional services: this section deals with possible additional services provided by the parties and provides for the conclusion of separate agreements where appropriate.
 - Attribution: this clause concerns the origin of the data and whether or not the identity of the provider should be disclosed in the event of subsequent distribution by the recipient.
 - Representations and warranties: this section includes the disclaimers of the parties with respect to the content of the data, its quality, etc. as well as the obligations of the parties with respect to compliance with the law and confidentiality.
 - Duration and termination: the model agreements provide for terms of duration and voluntary or automatic termination of the agreement in the event of a breach of contract, as well as the consequences of termination.
 - Miscellaneous: this section includes the usual final clauses regarding form, amendment, interpretation, governing law and jurisdiction. As regards form, the parties may use electronic signatures.
- 25 Based on this common structure, the three agreements differ according to their field of application. Certain decisions have been made regarding the actual content of these model agreements, which are summarised below.
- 26 **The type of data shared.** The agreements exclusively relate to technical data to the exclusion of any personal data within the meaning of Art. 3 let. a FADP. Technical data is therefore data that does not relate to an identified or identifiable person (e.g. meteorological data), or personal data that has been anonymised and which can no longer be attributed to a specific person. The model agreements also do not cover the transfer of mixed data, i.e. batches of technical data that also includes personal data and which are also subject to data protection rules. In practice, it should not be possible to establish a link between data and a specific individual regardless of advances in technology and data analysis. The provider must therefore have the technology that enables it to sort its data, separate it if necessary, and correctly anonymise it before any transfer takes place. To mitigate this data protection risk, the agreements provide for a mutual obligation of the parties to comply with legal obligations on this subject through contractual guarantees (*see point 36 below*).
- 27 **The technical modalities of sharing.** The format of the data (sample data, synthetic data, etc.), as well as the technical modalities of sharing are specified by the parties in the cover sheet. In practice, it is likely that the data will be made available by means of an API or a platform, the use of which is, in principle, subject to a separate contractual framework in the form of conditions of use, which will also have to be accepted by the data recipient.
- 28 **Compensation.** The parties can choose between sharing data for free or in return for payment. If the data is provided in return for payment, it will be up to the parties to fix a fee and, in the event of regular payments, the payment frequency within the framework of a subscription agreement. By default, we have provided for payment in advance, which permits the data provider to withhold the data until payment has been made or to simply interrupt access in the event of non-payment of a monthly or annual instalment.
- 29 **No exclusivity.** As the aim of these model agreements is to facilitate the dissemination of technical data, the agreement provides for the provision, by default, that data is made on a non-exclusive basis, which means that the data provider may continue to use the data itself and make it available to third parties if it so wishes.

- 30 **Restrictions on data use.** To address concerns related to the loss of control of shared data with regard to its use by the recipient, the cover sheet allows the data provider to prohibit commercial use, as well as distribution of the data or the result of its processing to third parties. The terms ‘commercial use’ and ‘distribution’ are uniformly defined in all three model agreements in order to ensure a standardised framework. To this end, we have aligned the term ‘commercial use’ with its definition in the Creative Commons licences, which is widely recognised in the public domain¹⁵. The term ‘distribution’ refers to cases where data is made available to third parties both in its original format and in a modified format, provided that the original data can be reconstructed from it. In fact, the objective is to avoid the data user slightly modifying the format of the data then redistributing it to third parties if the data provider wishes to retain control over the data recipients. It should also be noted that distribution can also take place without a commercial purpose, which is why this term is treated separately from that of commercial use. Furthermore, restrictions on use may relate to the data transmitted, but also to the results obtained by the user on the basis of this data. In fact, in certain contexts, it is possible that a provider may be willing to grant access to some of its technical data in order to promote research, but at the same time does not want the data transmitted and the results obtained from it to be commercially exploited, i.e. only internal use of the data concerned is permitted.
- 31 **Dealing with intellectual property rights.** The model agreements define the term ‘intellectual property rights’ and stipulate that none of these rights belonging to a party are transferred in any way to the other party. Without commenting on the existence or non-existence of intellectual property rights relating to the data concerned, the model agreements take into account that some of these rights may be relevant, in particular copyright or even a *sui generis* right to databases (see point 23 above). To prevent such rights hindering the implementation of the agreement, the data provider grants the recipient a user licence for the purpose of enabling use covered by the agreement.
- 32 **Confidentiality.** One of the recurring themes concerning data sharing is the concern about possible interests or information to be protected when exchanging data. This issue is covered by a confidentiality clause that prohibits the data recipient from obtaining confidential information of the data provider, whether through the provision of technical data or through methods of reverse engineering, and from passing on any confidential information transmitted to third parties. Nevertheless, it is first and foremost the responsibility of the data provider to ensure that the data transferred does not contain any sensitive information concerning its business (or personal data).
- 33 **The right to audit.** The model agreements allow the parties to select strict restrictions of use, which raises the question as to whether these restrictions are respected or monitored. In a business context, contractual penalties are often used, which require the party that breaches its obligations to pay an amount defined in advanced by the parties. However, such an instrument did not seem appropriate in a model agreement as the conditions of such penalties can vary greatly from case to case. Instead, the model agreements provide for an automatic termination of the agreement in the event of a breach (see point 37 below). To implement such a termination, the data provider must be able to establish that a breach has occurred, which is why an optional audit clause has been inserted. However, it should be noted that such a clause would only be justified in cases where the parties have actually agreed on restrictions of use, in which case the provider would have an interest in ensuring that they are complied with.
- 34 **Additional services.** The model agreements are only intended to cover the provision of technical data. Nevertheless, it is not excluded that the data provider, in addition to providing access to the data, particularly via a platform, may also offer additional services such as support, maintenance or hosting services, etc. Due to the variety of services possible and the conditions for their provision, the model agreements cannot cover them all. However, if such services exist, it seemed

¹⁵ Licences available at <<https://creativecommons.org/>> (last accessed 28 May 2020).

appropriate to be able to make reference to them by specifying that they are the subject of separate contractual conditions.

- 35 **Attribution.** Depending on the situation, the data provider may have an interest in seeing its name and the origin of the data supplied mentioned if there is any authorised distribution of the data. On the other hand, the data provider may be reluctant to be associated with certain distributions, or at least wish to be consulted before being mentioned as the provider of the data in question. This issue needs to be clarified between the parties, who can choose between the two options provided for in the model agreements.
- 36 **Contractual guarantees.** To address concerns related to the quality of the data provided, its use by the recipient, or compliance with applicable law, for example, those involved in the sharing of data are often encouraged to establish various contractual guarantees. Nevertheless, such provisions, although common in traditional contracts, almost always lead to a contractual complexity that does not fit the purpose pursued here. To ensure their effectiveness, they often have penalty clauses and rights to compensation as a corollary. This is difficult to reconcile with standardised agreements for simple and sometimes one-off transactions, where little or nothing can be negotiated. For these reasons, model agreements are intended to be the only link and vehicle of trust between the parties, who should not have any further relationship within this framework beyond the sharing of data. The only contractual guarantees provided for by the model agreements are limited to compliance with applicable law, the model agreement concerned and confidentiality. In doing so, the attention of the data recipient is drawn to the fact that, although the data provided is defined as not including personal data, the provider cannot rule out the possibility that the recipient may nevertheless be able to obtain personal data by accessing the technical data, for example by combining it with other data. In such a case, the user undertakes to comply with any possible data protection obligations. In addition, the data provider does not offer any guarantee with regard to quality and does not accept any liability.
- 37 **Duration and termination.** Although the purpose of the Agreement for the Transfer of Technical Data is only to provide data on a one-off basis, all three model agreements are of a long-term nature as the use of the data made available extends beyond the mere provision in terms of time. The parties can therefore define the duration of their contractual relationship and any notice periods themselves. A mechanism of automatic termination is provided for in the event of a breach of the terms of the agreement. The consequences of the termination include the termination of the use of the data provided. In this respect, it is recommended that the contractual mechanism be supplemented by technical means that allow, in particular, the interruption of access to the data, provided that this is possible according to the modalities of transfer chosen by the parties.
- 38 **Jurisdiction and governing law.** While drafting the agreements, the question was raised as to whether an alternative dispute resolution procedure should be set up, such as prior mediation or the inclusion of an arbitration clause. As there is currently no specialised body in Switzerland that could deal with such disputes, this route has not been followed. The competent authorities are therefore the one to which the parties have chosen to refer to in the event of a dispute. Finally, in view of the context of our mandate, the model agreements are governed exclusively by Swiss law. This choice allows the parties to rely on the general mechanism of Articles 97 et seq. of the Swiss Code of Obligations to obtain compensation in the event of a contractual breach, based on the presumption of fault and on the concept of damage as defined in doctrine and case law in relation to these legal provisions, which also includes loss of profit and direct loss.

IV. CONCLUSION

- 39 The model agreements are not intended to engage in a legal debate surrounding the issues of data ownership. They are meant as independent instruments that can be legally applied regardless of any solutions to these problems. The purpose of these agreements is to provide

private actors without the means of developing a genuine strategy for sharing technical data with simple legal instruments so that they can make the most of these assets. Nevertheless, the use of these tools requires awareness-raising and organisational learning on the part of the entities concerned. In fact, it will be up to them, on the one hand, to prepare the data to be supplied in such a way that both their business secrets are protected and the applicable law is respected; and on the other hand, to process the data received in such a way that benefits are derived from it. Finally, it is also the parties who must choose the appropriate technologies for data sharing.