SWISS FEDERAL INSTITUTE OF INTELLECTUAL PROPERTY – IPI

PRACTICAL GUIDE
MODEL AGREEMENTS ON THE SHARING OF TECHNICAL DATA

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PRACTICAL GUIDE

1   This guide provides practical information to people who wish to use model agreements on the sharing of technical data. It aims to help the reader determine if data sharing could be beneficial and how to share data efficiently, as well as to support them in choosing the sharing terms and the model agreement.

Why use a model agreement on the sharing of technical data?

2   Technical data is an essential resource in the digital economy as it is a source of information and knowledge. Even though the volume of technical data is constantly increasing, particularly due to the rapid rise of connected products, few small and medium-sized enterprises (SMEs) are taking advantage of its uses and value.

3   It is important to allow more SMEs to access this resource and to participate in the digital economy. There are currently no specific regulations regarding the sharing of technical data in Switzerland. Only a handful of legal provisions could apply, such as the rules that protect trade secrets and the law on unfair competition.[1]

4   Data sharing is therefore mainly regulated by agreements. This gives the parties a great deal of freedom, which can make it difficult to draw up an agreement. Model agreements offer the parties a standardised contractual framework that is designed to be easy to use. They are standardised tools that can be customised to a certain extent and within the limits of the applicable law (see No 54 below).

Who are the model agreements aimed at?

5   The model agreements are designed to encourage SMEs and players in the private sector of a similar size to participate in the data economy.

6   The aim is to facilitate the sharing and use of data between private-sector entities that are not necessarily in a position to leverage the data on their own due to a lack of tools or resources (e.g. legal staff).

What is *technical data*?

7   There is no legal definition for technical data in Switzerland. The term ***data*** itself can have multiple meanings. In this guide, the term is understood to have the meaning it has in the European Union (EU) legislation, namely "*any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording.*"[2]

8   Furthermore, when the guide refers to ***technical data***, it is to be understood as any data that is not personal data, either because it has never contained elements

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[1] IPI, Access to non-personal data in the private sector, Bern, 2021, IPI > Intellectual property > IP and society > Access to non-personal data in the private sector, https://www.ige.ch/en/intellectual-property/ip-and-society/access-to-non-personal-data-in-the-private-sector, accessed 15.02.2024.
[2] See Article 2 of the Regulation (EU) on harmonised rules on fair access and use of data (Data Act).

relating to an identified or identifiable person or because these elements have been removed following an anonymisation process (see No 21 et seq. below).

9   This understanding of technical data covers a wide range of data categories, which are known by various names. It can include (i) master data, (ii) metadata, (iii) control data, (iv) transactional data, etc., and group together data from different sources (data generated by tools, data resulting from a compilation of other data, etc.).

> **Example:**
>
> A production line operator could collect data relating to the frequency of incidents on the line, the efficiency of the different production points, possible overloading and the energy consumption of each production line and produce statistics on efficiency by compiling the relevant data.

How can technical data benefit SMEs?

10   Sharing technical data between SMEs can foster innovation, increase their competitiveness in the market and lead to cost savings and improvements in research and development or productivity.

11   Analysing technical data can, for example, enable SMEs to identify new sales or marketing opportunities, reduce manufacturing costs or assist them with decision-making.

> **Example:**
>
> The operator of an automatic irrigation system accesses data collected by a connected weather station to improve the irrigation cycles and develop its offering in regard to quality and maintenance.

12   The model agreements make it easier for players in the private sector to make data available to each other. The aim of the agreements is to enable SMEs to leverage the data generated by their activities by making it available to other companies or to allow them to access third parties' data more easily.

> **Example:**
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> A number of architectural firms decide to share information relating to how long it takes to obtain planning permission by municipality, size of project and time of year.

What can companies do with technical data and how can it be used?

13   Technical data is interesting because it can be analysed and interpreted to extract information. To this end, data must be collected, stored and processed beforehand. There are two main approaches to this[3]:

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[3] For more information on this subject, see *Data Science für KMU leicht gemacht, Bericht, abgeschlossenes FuE-Projekt, Zielgruppe Praktiker*, 20 August 2020, p. 26 et seq. and 33.

- **The inductive method**: involves collecting a very large set of raw data without filtering it, so that users can explore it to identify trends and correlations. This approach makes it possible to analyse the data at a later stage, as needs change. However, it does involve storage costs, which can be substantial.

  This method consists of the following steps:
  - Collecting data
  - Analysing the data
  - Identifying topics, trends and correlations
  - Developing hypotheses to explain the trends identified

- **The deductive method**: starts with establishing theories, which are then evaluated using data collected for this specific purpose. This approach makes it possible to reduce the quantity of data to be stored but it involves identifying the situation to be examined in advance and defining a viable working hypothesis on that basis. It is attractive to SMEs because it is generally less costly than the inductive method.

  This method usually consists of the following steps:
  - Identifying a question to answer or a hypothesis to verify
  - Collecting specific data
  - Analysing the data to test the hypothesis or question identified

Before analysing the data, it is recommended to determine:

  - **The scope**: the information already collected or to be collected.

  - **The source**: the origin of the data and the sources from which it will be collected.

  - **The methodology**: how the data is collected.

  - **The format**: how the data will be presented to ensure it can be read and used.

14   These points are also worth considering if a company wants to make data available to third parties without necessarily analysing the data itself in order to better promote and leverage the data in question.

How do I know if my company can leverage technical data?

15   Every company produces data in its operations. This data is usually information relating to the business's activities, grouped together in different types of files and formats. For a company to leverage this data itself or to share it with third parties, it needs to determine the extent to which the available data is usable and likely to be of value (see No 23 et seq. below).

16   The company will therefore also need to determine the basis and terms on which the use may take place. This depends, in particular, on whether the available data is recurrent or not, and on its accessibility and quality. These factors may influence the financial arrangements for making the data available (see No 37 et seq. below).

17   To sum up, to determine whether the data can be leveraged, the following questions must be asked:

> - Can the contents of the data be identified?
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> - Can the source of the data be identified?
>
> - Can the process and method of collection be explained?
>
> - Can the quality of the data be controlled, including by third parties interested in accessing it?

What is the difference between technical data and personal data?

18   The model agreements concern technical data and exclude all personal data. Personal data is any information relating to a natural person that allows that person to be identified directly or indirectly. It does not matter whether this information is public or confidential.

19   The agreements do not cover using or making personal data available. If the data to be made available contains personal data, legal restrictions apply. These should be analysed separately.

> **Example:**
>
> A last name, first name, address, photo, voice recording, old-age and survivors' insurance number, email address, IP address, login credentials.

20   For data to no longer be considered personal, it must be anonymised, i.e. it must be made impossible to identify the person in question, including by combining several pieces of information.

How can personal data be anonymised?

21   The aim of anonymisation is to make it impossible to identify the person to whom the data refers by any means whatsoever and in an irreversible manner. Anonymisation can be carried out according to different techniques and using a range of dedicated tools.[4]

22   As a general rule, anonymisation is effective if (1) it is impossible to identify an individual in a data set, (2) it is impossible to link separate data sets relating to the same person, and (3) it is impossible to derive new information about an individual.

How can technical data be prepared for use or sharing?

23   The process for using technical data involves several steps, which are briefly outlined below. These steps are not obligatory but they do make it possible to optimise data use in terms of costs.

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[4] For more information, see the proposals of the ResearchData team of the University of Geneva, accessible at https://www.unige.ch/researchdata/en/share/anonymisation/ (accessed on 6 October 2023).

24   This guide is not intended to suggest or promote specific tools. It is up to the parties to choose their own methods, tools and providers.

Step one: collect the data

25   Data can be collected from a variety of sources, including manual input, copies of data made by exporting sources, data extracted from online solutions (e.g. SaaS platforms), automatic retrieval tools, and the use of connected devices or dedicated digital solutions. It is recommended to clearly establish the data collection process, the tools and the methodology to be applied.

Step two: store the data

26   Once collected, the data needs to be stored using a suitable tool. The purpose is to maintain and safeguard the data collected. There are different ways to store data (in storage software, live, in the cloud, on a network, etc.). As a general rule, the choice of tool depends on its reliability, the degree of security it offers and the cost of implementation and maintenance.

27   When making the choice, it is also necessary to consider the objective of the storage, in particular whether the data is to be used in-house or made available to third parties. Depending on the circumstances and, in particular, if the data is to be shared for a fee, the third party concerned may be interested in obtaining warranties with respect to the storage.

Step three: structure the data

28   It is recommended to structure the data obtained in a format that is compatible with the intended analyses and/or the purpose for which it is to be made available.

29   The data can be organised in the form of standard tables (lists of rows and columns), which makes it easy to use and analyse. Specific relational database software and other database engines can also be used.

Step four: transform the data

30   It is generally better to transform the data after it has been structured. The data can then be cleaned up in order to eliminate errors, duplicates and other missing information. Duplicates (or redundant data) are particularly problematic because they take up space in the database and increase the probability of errors and discrepancies.

31   After the cleanup, the data is standardised and harmonised. It is then formatted according to the requirements and proposed processing. This step can be carried out using a range of tools.

Step five: validate the data

32   Once the data has been structured and transformed, it is recommended to verify its quality and accuracy. Analysing inaccurate data will lead to a false result, which could affect any decisions made on this basis.

33   Finally, a structured, transformed and validated database is more appealing to potential users, which will help to maximise data leverage (see No 37 below).

Do technical standards apply and what are they?

34   Under Swiss law, there are currently no specific regulations applicable to the sharing of technical data. We can therefore find inspiration in EU law, in particular the **Data Act**, a regulation which establishes the right to access data.

35   The Data Act sets out essential requirements regarding interoperability in data sharing. The aim is to develop the technical capability to combine data from different sources within and across sectors of activity.[5] The Data Act defines this capability as a necessary condition for sharing.

36   With regard to technical standards, the model agreements therefore draw inspiration from EU law and are based on a consensus in which each party commits to use its best efforts. The parties are free to define the technical terms of the data sharing but endeavour to do so in a complete, structured, commonly used and machine-readable format.

Can companies be remunerated for making data available?

37   In principle, the model agreements leave it up to the parties to decide if the making available of data is to be free of charge or subject to a fee, and how much the fee will be.

38   The model data exchange agreement is an exception to this as it is generally free of charge. In this case, it is understood that the parties benefit equally from the data sharing. However, it is possible to deviate from this approach and opt to set a fee in addition to the exchange of the data.

How can companies set remuneration for making data available?

39   At present, there are no standard fees for making technical data available. Generally speaking, remuneration for sharing technical data can be based on two elements: the costs associated with making the data available and any profit margin.[6] As with any company asset, however, the usual valuation methods can be applied to the data concerned to set remuneration for making it available.

40   The most common asset valuation methods are as follows: (i) the cost approach (what costs are incurred by making the data available and what would be the cost for a third party to reproduce the data), (ii) the market value approach (what are the market prices for similar data) and (iii) the potential income approach (what income

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[5] Art. 2 of the Data Act defines the concept of interoperability as "*the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data in order to perform their functions.*"

[6] For more information on criteria which are likely to apply to access to technical data, see MONTI TOMBAL/GREAF *Study for developing criteria for assessing 'reasonable compensation' in the case of statutory data access right: Study for the European Commission Directorate-General Justice and Consumers: final report* (UST/2021/PR/SCON/CIVI/0122).

could be generated by the use of data either in the form of a new income source or a reduction in costs).[7]

41   In the case of SMEs, it is rare that a market already exists for the data that they want to make available so the most frequently used methods to establish a value for their data and remuneration would be the cost and potential income approaches.

42   To set compensation for the cost of making the data available or the cost of reproduction, the data holder must first and foremost correctly identify the costs associated with the data sharing. This could be fees for storing, formatting or transforming the data, for example.

43   These fees and their scope depend, in particular, on the specific technical needs of the recipient of the data and the intended purpose of the sharing. The more complex the sharing and hosting, the more necessary it will be for the data holder to put specific technical measures in place. For example, access to data in the form of a subscription requires the use of a tool which allows for the regular porting of the data, such as an API, which probably would not be needed if it was just a one-time transfer.

44   When calculating a possible price, the profit margin could be added to the compensation of the costs incurred by the data holder, depending on the circumstances. The purpose of the remuneration should be to encourage and reward the data holder for making the data available so that it will continue to do so. Ideally, it should also reflect the weight of the contractual commitments made by each party and seek a balance between their contributions.

> **Example:**
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> A hairdressing cooperative has shared a batch of data relating to the quantity and types of products used for its clients (hair dyes, shampoos, treatments, etc.), the times of year at which the products are used more or less frequently, etc. The cooperative wants to make this data available on a non-exclusive basis to a list of the ten biggest suppliers of these products. It sets the remuneration as follows:
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> (cost of collecting the data by person/day) + (cost of a consultant for structuring and organising the data) + (recurrent hosting fees) + margin/number of interested suppliers

45   If the valuation method applied is based on the potential income generated from making the data available, it is important to identify what (new) income could result from the use of the data in question, particularly in terms of potential marketing scenarios (see No 47 et seq. below). This is not always easy to do, particularly if there is no product or service already resulting from the use of the data in question. In order to mitigate this uncertainty, companies often set the remuneration in the form of a percentage of the income that will be generated by leveraging the data in question, as is frequently the case for licences for intellectual property rights. In the latter case, the percentage will depend on the importance of the data in proportion

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[7] For more information, see https://www.pwc.co.uk/data-analytics/documents/putting-value-on-data.pdf

to the service or product offered on this basis, but also on the importance of the rights granted for the use of the data.

> **Example:**
>
> An SME that installs heat pumps wants to make data available to a start-up on the energy consumption of its pumps to allow for the development of more energy-efficient models. As the SME does not yet know if such a product could be marketed, it charges a fixed fee based on the cost of programming the interface for accessing the meter data and reserves for itself a percentage of the price of future pumps sold.

46   Regardless of the method chosen, the fee paid could correspond to the extent of the rights granted by the data holder or the possible benefit that the data transfer offers the recipient. This would be the case if the data recipient obtains exclusive rights to the data or if it derives significant value from it, for example because of the results it can obtain with it or any potential market opportunities that could be opened up by its use. Equally, a data holder who undertakes specific contractual commitments in regard to the quality and accuracy of the data (e.g. warranties) could receive a higher fee than a holder who provides the data in its raw form, without having verified or structured it (see No 23 et seq. above). Lastly, criteria like the rarity of the data made available, the volume, the longevity and the frequency of its provision should be considered when setting remuneration.

How can companies find third parties interested in accessing technical data?

47   To benefit the most from making technical data available and to determine the best model agreement to use, it is important to identify the parties likely to be interested in the data in question. In practice, such parties are usually identified by searching for data use cases.[8] It is easier to identify the use cases by applying the deductive method (see No 13 above).

48   Another approach is to identify the different players in the value chain who could identify potential use cases themselves. This would facilitate complementary use of the shared data rather than competing use.

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> **Example:**
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> A company that collects data on its production machines could use the data to increase its efficiency. It could also approach other companies in the value chain, such as the seller of the machines in question, who could make improvements based on the data collected, or the machine maintenance provider, who might be more familiar with the sources of problems and offer more efficient services.

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[8] See https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Finance/Valuation-Data-Digital.pdf

What are the risks and what should companies watch out for?

50   **Changing legal framework.** In Switzerland, there is no specific regulation or a general right of access to technical data established by law. However, the international regulatory framework is changing due to the recent approval of the Data Act in the EU. This regulation, which is yet to be formally adopted before it comes into force, establishes rights on access to and the use of data generated by products or services (Internet of Things, **IoT**). If the current version is adopted as it is, the Data Act could have an impact on Switzerland and apply for businesses that supply connected products or services to the EU.

51   The model agreements factor these changes into account and draw inspiration from the Data Act in certain areas, such as the applicable technical standards and restrictions on use. However, they are not intended to implement the Data Act or its requirements, the application of which is expected to depend on various criteria such as the entities involved in the data sharing and the target markets.

52   **Respecting the legal framework.** Although Switzerland has no specific regulation on the sharing of technical data, the international regulatory framework is changing. Moreover, certain provisions in Swiss law are likely to apply to the obligations of the parties, for example copyright law (particularly software protection), the rules protecting trade secrets, the law on unfair competition and the law on the abuse of a dominant position and cartels.

53   The model agreements are subject to applicable law (including possible access rights established by the Data Act) and require the parties to comply with it.

54   **Warranties.** The parties agree to respect the applicable law. In regard to the data, the agreements provide for a mutual warranty exclusion within the limits of the applicable law. The parties are free to individually negotiate a different warranty system, particularly if the sharing is subject to a fee.

55   **IT security.** To make data available or access data, each party must have an IT infrastructure that meets the applicable security standards and enables the proposed sharing to be supported and implemented.[9]

56   Under the terms of the model agreements, the recipient of the data also agrees to respect the applicable rules on data confidentiality, integrity and security. To do so, it will need to take suitable technical and organisational measures. These measures relate, in particular, to controlling who has access to the data and its carriers, regularly updating operating systems and other application software, and identifying and fixing security vulnerabilities (e.g. deploying adequate firewalls and antivirus software).

57   **Confidentiality.** Swiss law provides protection for trade secrets. In the case that the technical data contains trade secrets or makes it possible for them to be discovered, the model agreements include a confidentiality obligation, which is binding for each party.

58   **Applicable law and disputes.** The model agreements are subject to Swiss law. In the event of a dispute, the model agreements allow the parties to choose between

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[9] Trust4SMEs. *Digital security: A practical guide for SMEs, https://guide.trustvalley.swiss.*

litigation before the Swiss courts or arbitration before a specialised institution, such as the ITDR[10] in Bern.

How can companies choose a model agreement to use?

59 The choice of model should be based on several criteria, which are mainly the following:

- The needs and purpose of the proposed processing.

- The type and format of the data to be made available and/or obtained, depending on the identified needs and processing.

- Any warranties that could be provided or obtained in connection with the data, particularly regarding quality and accuracy, the collection method, technical compatibility or interoperability.

- Whether the data is made available free of charge or for a fee. This may depend on any warranties which may or not be given, or the costs associated with making the data available, or the usefulness of the data access to the recipient (see No 37 et seq.).

60 There are three different model agreements. Their main characteristics are presented in the table below.

Type of agreement	Characteristics
Data transfer agreement	• Unilateral • Ad hoc • Subject to a fee or free of charge • Access to results possible Example: A company develops and trains an artificial intelligence engine for the remote maintenance of thermal sensors based on data provided by a machine tool manufacturer.
Subscription agreement	• On a regular basis, long-term • Subject to a fee or free of charge • Data holder has no interest in results Example: The maker of a machine that manufactures products has access to data collected by its customers relating to the quality testing of the end products. By

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[10] Institute for IT Dispute Resolution. For more information, see https://www.itdr.ch/en/.

	analysing the data, the maker can identify factors that could help to improve the machine.
Data exchange agreement	• Bilateral (synergy) • Free of charge (usually) • Mutual access to the results <u>Example</u>: Architectural firms share information relating to how long it takes to obtain planning permission by municipality and time of year.

How can companies use their chosen model agreement?

61   The model agreements are all structured in the same way. They consist of a cover sheet, a list of definitions, a set of contractual clauses and a signature page.

62   There are two version of each agreement – a commented and a non-commented version. The commented version provides specific explanations on the proposed contractual clauses, particularly where there are multiple options to choose from. The options are enclosed in square brackets.

> **Once the model agreement has been chosen, the parties must:**
>
> -   Decide between the different options and terms proposed, using the commented version if needed.
>
> -   Complete the cover sheet using the commented version if needed.
>
> -   Complete and sign the signature page.
>
> -   Perform the agreement: make the data available and use it in accordance with the law and the agreement.

63   For more information about each model agreement and its use, see https://www.ige.ch/en/intellectual-property/ip-and-society/access-to-non-personal-data-in-the-private-sector/model-agreements.

What happens when the agreement ends?

64   If the agreement is terminated, the right to use the data received ends too. In the case of continuous access to data, for example in the form of a subscription, the data holder must ensure that it has the technical means to terminate access.

65   In principle, the data recipient can continue to use the result of the processing of the data received.

66   The recipient remains subject to the confidentiality obligations even after the agreement has ended. The recipient must maintain the confidentiality of any information of a confidential nature that it may have obtained or received from the data holder.