

Model terms of the Technology industries for data sharing

OBJECTIVE

The significance of data to the economy has increased during the last years and the growth continues to accelerate. Established practices for agreeing on the rights of the use of information or data are yet to develop, and the rights to data are usually agreed between the companies, for example, in confidentiality or intellectual property clauses of the agreement.

The objective of the model terms of the Technology industries for data sharing is to promote the utilisation of data within companies, and to support the development of practices and business based on data. For this purpose, the objective is:

- To bring the use of data openly to negotiations between companies. When the use of data is subject to clear legal provisions, it can be utilised efficiently.
- To develop practices around agreements concerning the use of data. Model terms can be used to shorten negotiation times and facilitate agreement of data usage so that the agreements will promote efficient use of data.
- Model terms can also be used to encourage companies to better recognise the value of their own data and develop partnerships that further promote the use of data in business development.

CONDITIONS FOR DATA SHARING

Analysis of data

Companies possess various kinds of data. One way to observe data and data sharing possibilities is to divide it into

different categories based on the level of confidence and economic significance. Trade secret legislation requires the recognition and protection of trade secrets as a prerequisite for legal protection. The same recognition of the significance of the data can and should be extended to all data.

1 Proprietary information

Trade secrets, financial data, process data and other data which have key importance to the business of a company. Processing of such data is strictly limited within the company and it is not typically shared outside the company.

2 Confidential information

Information which has key importance to the products and processes of the company, but which is also affected by the results and possibly the information received from business partners. Access to confidential information is limited. However, under certain conditions, it can be shared with trusted partners, such as suppliers or subcontractors, but not with competitors of the company. The business partners that process such confidential information must have the basic capabilities to maintain the confidentiality of the information.

3 Decentralised information

Information possessed by the company that is generic and possibly possessed by other companies in the same industry. This category does not include any significant trade secrets or key information of the business that could create a competitive advantage for the company.

4 Open information

The information possessed by the company that can be shared with anyone, for example to promote innovations and gain partnerships.

Capabilities

Both the company sharing data and the company receiving data must have basic capabilities to comply with the prerequisites of data processing.

The company must be capable of controlling information regarding

- **the origins of the data (own data/data produced by a product/data that is based on a contract),**
- **basis for data processing,**
- **restrictions of data processing and the life cycle of data,**
- **rights to disclose information and further develop data,**
- **to identify, delete and return the data, if the basis for data processing no longer exists and erasure or return of the data has been agreed upon.**

COMPETITION LAW

The importance of data as a competition factor has been recognised during recent years in competition law. Competition law prohibits any agreements between entrepreneurs, decisions by their consortia, and concerted practices between entrepreneurs that aim to significantly prevent, restrict or distort competition, or which result in a significant prevention, restriction or distortion of competition.

Model terms for data sharing are primarily intended to be used in companies' existing delivery and subcontracting relations, but they are also suitable for other kinds of data sharing. The competition law aspect must be carefully considered if competing companies start to share information with each other. In such cases, companies should refrain from sharing any such data from which the competition behaviour of a party (such as pricing, production output and other similar information) can be deduced, or alternatively, carefully assess the acceptability of such actions under the competition law with legal advisors. Furthermore, the impact of data use, especially on the after-sales market of a product, should be assessed.

How data is observed under the competition law is a relatively new phenomenon, and practices are yet to develop. In its report published in April 2019¹, the European Commission has assessed the competition law aspects of data regarding data platforms and prohibited restrictions of data. The prohibited restriction of competition may apply to conduct where competition is restricted in the after-sales market by using data to bound customers to the after-sale services of a single supplier. Such conduct may be considered as competition restriction even though there would be competition in the primary market.

The users of model terms should carefully assess how data sharing and the conditions used in the terms may affect competition. For example, a company should not use terms that limit the use of data, and unnecessarily bind customers to a certain supplier's services and restrict competition in the after-sales market, especially in a manner that increases the costs of replacing the supplier. The assessment should always be made on a case-by-case basis, considering the special characteristics of each contractual relation. The competition law assessment is affected by both whether the market is centralised or fragmented and what the importance of data access is on the competition. The assessment should be made separately for both the primary and after-sales markets. The Commission's report provides that the protection of intellectual property rights may serve as an example of a legitimate reason to limit the access to data. The same principle may also apply to trade secrets.

The Commission's report also assesses data co-operation between companies and the obligation to grant access to data. With regard to the data co-operation, the report refers to the judgment of the European Court of Justice² which stated that co-operation boosted the market efficiency. However, as the co-operation provided the parties with a clear competitive advantage, it was necessary for the parties to allow all other third parties in the industry to use data covered by the co-operation under equal terms. According to the report, such obligation may concern data co-operation that creates a significant competitive advantage, especially if the parties have market power.

The report also suggests that companies contact the Commission for more specific guidance, since the legal assessment framework for data co-operation is still underdeveloped. The report also forecasts that it might be necessary in the future to develop specific rules on data co-operation.

When using the model terms the companies should always assess the effects of data usage on competition and consider consulting legal advisors for the assessment.

MODEL TERMS

The purpose and the use of the terms

The terms are intended to be used as part of the main agreement between the parties. The terms have been prepared under the assumption that the parties have reached an agreement on data sharing in the main agreement. The use of data and the related limitations, as well as access to data and other data related conditions, can then be agreed on using these model terms.

¹ <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

² Case C-238/05, *Asnef-Equifax on credit information registers*: especially parts 47, 48, 58.

Model terms for data sharing are intended to be used in the sharing of industrial data, i.e. information other than personal data. Parties may supplement these agreements with an appendix that addresses the processing of personal data, and where the parties recognise and agree upon the personal data in question, the roles of the parties and the responsibilities of processing personal data. The model terms for data sharing are not applicable as such in the processing of personal data, and the parties must, if necessary, supplement it with an agreement on the processing or assignment of personal data.

Definitions

Data. The definition of data is very significant for the terms. The definition is a simple reference to section 2.1 of the terms.

Parties. The customer refers to the contracting party ordering the devices, software or services meant in the main agreement. The supplier refers to the contracting party supplying the devices, software or service meant in the main agreement.

Agreement. The model terms are meant to be part of the main agreement. The parties should ensure that the model terms and the main agreement work together. The parties should ensure that the model terms and confidentiality clauses of the main agreement aren't conflicting. The model terms assume that in the event of a conflict with the terms of the main agreement, the rights and obligations of the model terms in respect of data have the priority.

2 Definition and use of data

The model terms offer the parties three alternatives to define the data. The general part in the section 2.1.1 forms the basis for the definition. Said section 2.1.1 may be used as such in cases the parties have already established practices in their co-operation, there are no specific confidentiality or other claims related to the data covered by the agreement, and the parties are willing to give each other wide-ranging rights of use to the data related to the device, software or service supplied under that contractual relationship. The first precondition for the data defined in the model terms is that the parties have received such information during the agreement and by virtue of the operations meant in the agreement. The second precondition is that the information is formed or processed in relation to a device, software or service, or a combination thereof, supplied by the supplier. The data defined in the model terms relates in one way or another to the scope of the actual delivery meant in the main agreement between the parties.

The first options in section 2.1.2 (point (a) in options 2-3) provide the parties with a more specific way to define the term data. In the first options, which have been prepared for both device and service operations, as well as for expert services, the data is defined based on the device, software, or service being referred to in the main agreement. In relation to devices, software and software as a service, the definition includes both the information transmitted and received by the device and the information on the operating environment necessary for the functioning of such devices, software and service. These options can be used if it is not necessary to specifically define or narrow the definition of data.

The second option in section 2.1.2 (point (b) in options 2-3) may be used instead of point (a), but the parties may also choose to use it as a supplementary definition. The rationale here is that the parties specify in detail the devices, software and services or the documents or materials from which the agreed data may appear.

The last option (option 4) is an exclusion that can be used as a complementary definition to the sections 2.1.1 and 2.1.2. The parties should also define whether the agreed list under section 2.1.2 is exhaustive or not.

Use of data

The concept of data use in the model terms is broad and covers practically all types of processing, use and modification of the agreed data. The purpose of the terms is to clarify what a party can do with the data. The party's right to utilise data in its business is broad, also covering subcontractors and affiliated companies (2.2.2).

If a party desires to disclose data to third parties or publish it, the data must be modified according to section 2.2.3 so that the other party or its confidential information cannot be identified from the data. This section must be assessed carefully, taking into account the competition law, market situation and importance of data in the functioning of the market. Remarks under the above heading "Competition law" should also be considered.

Section 2.2.4 clarifies that a party may use the data freely and that the other party does not have any rights to their information or results, created through using the data under these terms, either independently or with the help of a third party. This condition secures the use of data and clarifies the fact that the party's access to data is limited only to the data defined under these terms, and not to such data or materials which the other party has refined, enriched or created.

According to the section 2.2.5, the rights of use are permanent and remain in force regardless of the termination of the main agreement. This section secures that the agreed data which has been collected during the main agreement may be utilized even after termination of the main agreement.

Section 2.2.6, together with the previous sections concerning the definition and use of data, forms the essential scope of the agreement. For instance, the parties may agree on more specific procedures for data processing, such as the removal of certain identifications. This section is also necessary if the practices regarding the use of data in the industry in question deviate from these terms. Intellectual property rights and the restrictions applying to the licensing may also justify restrictions on the use of data protected by intellectual property rights. Additional terms and restrictions must be agreed in writing. Electronic forms of communication, such as email, are also considered to be in writing. These agreements should be made clearly, and if the purpose is to deviate from these model terms, it is recommended to state this explicitly. When agreeing upon the restrictions, the notions raised under the chapter "Competition law" above should also be accounted.

Section 2.2.7 is intended to increase trust between the parties. In reasonable limits, the party is responsible to disclose how it will in practice render the data unrecognizable or how it will implement the additional terms or restrictions agreed between the parties. In practice, such obligation could be fulfilled by giving for instance a sample of the redacted data used according to these model terms.

Liability

The use of data on the basis of model terms takes place at the party's own risk. If the party breaches or otherwise violates these conditions while utilising the data, the liability clauses of the main agreement apply. In this case, limitations of liability and maximum amount of damages agreed in the main agreement are also applicable.

Personal data

The model terms as such are not suitable as a ground for processing personal data. The terms are designed to be used when agreeing upon the use of such data that is not personal data. The parties may supplement these conditions with an appendix on personal data. However, if the data in fact contains personal data, section 4 instructs the parties to inform the other party of the same, after which the parties are obliged to agree on the processing of such personal data. The purpose of the section is to create a mechanism for the parties to react to and address any unintentional processing of personal data.

Other conditions

The final parts of the model terms contain typical provisions on professional experience, intellectual property rights, subcontractors and group companies. Section 5.5 is significant for the entire agreement, since it deals with interfaces, data security requirements and other technical facts relating to the access to data. The interfaces and other technical issues to be agreed on between the parties are in a separate technical appendix and specify how each party has access to the data.

The parties should pay special attention to section 5.6. This section sets out the order of precedence. According to the model terms, the rights and obligations concerning the data under these terms shall prevail over the terms and conditions of any other agreement between the parties. The parties should ensure that the model terms and the main agreement, including any non-disclosure agreements or confidentiality clauses, constitute a logical contractual entity, and that the parties have a common understanding of the implications and order of precedence of the various terms.



Technology Industries of Finland

Eteläranta 10, P.O.Box 10, FI-00131 Helsinki, Finland

Tel. +358 9 192 31

www.teknologiateollisuus.fi

Business ID: 0215289-2