Brussels, 22 April 2021

Orgalim Legal guide on industrial data

1. Introduction

The Commission's communication 'A European strategy for data' published on 19 February 2020[1] sets up an ambitious action plan touching upon various legal issues relating to 'data sharing' and 'data ownership'. The strategy envisages various legislative proposals for 2021. In addition, the European strategy for data aims at creating a single market for data that will ensure Europe's global competitiveness and data sovereignty. Common European data spaces will ensure that more data becomes available for use in the economy and society, while keeping companies and individuals who generate the data in control.

On 25 November 2020 the Commission published its proposal for the Data Governance Act (DGA)[2]. It proposes rules to accommodate data sharing, aiming to foster the availability of data for use by increasing trust in data intermediaries and by strengthening data sharing mechanisms across the European Union. This proposal is still to be approved by the European Parliament and the Council. The Commission is also considering adopting a Data Act in the second half of 2021.

At the time of publication of this guide (April 2021), the Commission is preparing the proposal for a 'Data Act' (foreseen for the end of 2021), which should focus on fostering business-to-government (B2G) and business-to-business (B2B) data sharing by addressing contractual matters related to the (re)use of co-generated data.

In this context, Orgalim shares the European Commission's objective to focus on a new EU data strategy. We believe that such a strategy should support the further strengthening data sharing for smart manufacturing. This will require an ecosystem that enables data sharing and fosters data access in a safe and secure environment.

To achieve such a vision, we call on policymakers to take into account the following foundational elements of a framework:

- **Contracts in B2B are crucial and freedom of contract** needs to be a foundational aspect of any European Data Space. Orgalim is, for example, working on drafting examples of contractual clauses that can be used by companies, including SMEs. This will facilitate data sharing, whereas mandatory opening-up of private sector data could hinder innovation and investment.

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0066
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767

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- In a B2B context, **liability issues related to data can be addressed by contracts** that are freely negotiated by the two parties. Therefore, we ask policymakers to refrain from any specific legislation on data liability, respecting the companies' freedom of contract.
- Companies need **legal certainty** and a trusted market environment to share, transfer and access data to enable them to innovate in new data-driven business models. To that end, trade secrets and intellectual property rights of companies need to be protected.

2. Objective of this guide

The importance of data for the economy has increased during recent years and the growth continues to accelerate. Established practices for agreeing on rights for use of data are yet to develop, and the rights to data between companies are usually covered in non-disclosure or intellectual property clauses of agreements. As these well-established models are not ideal to use for data, Orgalim wishes to develop good and balanced practices on data agreements.

The objective of this guidance on industrial data is to promote the use and sharing of data within and between companies, and to support the development of balanced practices and business based on data.

To achieve this, the objective is:

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

This guide also contains model terms which are intended to be used in sharing of industrial data, i.e. information other than personal data. Parties may supplement these terms with a data processing appendix, where the parties recognise and agree upon the personal data in question, the roles of the parties and responsibilities for processing personal data. The model terms for data sharing are by their nature not applicable to the processing of personal data.

3. Conditions for data sharing

a. 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 confidentiality and economic significance. Data may be protected under trade secret legislation, which requires recognition and protection of data as trade secrets as a prerequisite for legal protection. The same recognition of the significance of data can, and should, be extended to all data. By definition, trade secrets cover information which is secret, has commercial value because it is secret, and is kept secret by the person or legal entity lawfully in control of

the information. As a starting point, this guidance provides four basic categories, but these may naturally be adjusted to suit companies' specific needs. There may be an overlap in these categories.

When categorising their data, companies should also observe intellectual property rights and trade secrets legislation. Requirements stemming from legislation and contracts impose limitations on usage and disclosure of data, and certain requirements that must be adhered to in order to ensure continuation of legal protection of data – as is the case with trade secrets.

b. Proprietary information

Information concerning trade secrets, financial data, process data and other data which has 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 without strict agreements on use and confidentiality of data.

c. Confidential information

Information which has key importance to the products and processes of the company, but which is also affected by the results and potentially by information received from business partners. Access to confidential information is limited, but may, under certain conditions, be shared with trusted partners such as suppliers or subcontractors – but usually 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. Agreements on use and confidentiality of data are also often used for this category of information.

d. 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.

e. Open information

Information possessed by the company that can be shared with anyone in order to, for example, promote innovations and gain partnerships. There might also be regulatory requirements to make some data public, such as yearly financial statements.

f. Capabilities

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

The company must be capable of controlling information regarding the (i) origin of the data (own data/data produced by a product/data that is based on a contract), (ii) basis for data processing, (iii) restrictions of data processing and the life cycle of data, and (iv) rights to disclose information and further develop data. The company must also be capable of identifying and deleting data, if the basis for its processing no longer exists.

g. Competition law

The importance of data as a competition factor has also been recognised during recent years in competition law. Competition law prohibits any such agreements between entrepreneurs, decisions by their consortia, and concerted practices between entrepreneurs which 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 in the first place intended to be used in companies' existing delivery and subcontracting relations, but they are also suitable for other kinds of data sharing. Competition law aspects must be carefully considered if competing companies want to share information with each other. In such cases, companies should refrain from sharing in particular any data from which the future competition behaviour of a party, such as pricing, production output and other similar information, can be deduced. Alternatively, they should carefully assess, together with legal advisors, the acceptability of such actions under competition law. Furthermore, the impact of clauses governing data usage especially for the after-sales market of a product should be assessed.

How data is regarded under competition law is a relatively new phenomenon, and practices are still developing. In a report published by the European Commission in April 2019[3], the experts appointed by the Commission assessed the competition law aspects of data, with regard to 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 bind customers to the after-sales services of a single supplier. Such conduct may be considered as a restriction of competition even if the primary market would be competitive.

Users of model terms should carefully assess how data sharing and the conditions used in the actual agreement may affect competition. For example, a company should not use terms that unnecessarily limit use of data or bind customers to certain suppliers' services and restrict competition in the after-sales market. It is especially advisable to avoid data practices that may increase the cost of replacing the supplier. Assessment should always be made on a case-by-case basis, taking into account the special characteristics of each contractual relation. The competition law assessment is affected by both (i) whether the market is centralised or fragmented and (ii) how important is access to data for competition. The assessment should be made separately for both the primary and after-sales markets. The report published by the Commission 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 be applicable to trade secrets.

[3] http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

The report also assesses data co-operation between companies and the obligation to grant access to data. With regard to data co-operation, the report refers to the judgment of the European Court of Justice[4] on credit-worthiness registers. In its judgement, the court recognised that co-operation boosted market efficiency. However, as the co-operation provided the parties with a clear competitive advantage, it was necessary for the parties to also allow all other third parties in the industry to use the data covered by the co-operation under equal terms. According to the report, such an 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 developing. The report also forecasts that it might be necessary in the future to develop specific rules on data co-operation. This idea was previously put forward in the Commission's communication 'Shaping Europe's Digital Future' in February 2020.

When using the model terms companies should always carry out self-assessment of the effects on the competition caused by the use of data and consider consulting legal advisors while doing this.

4. Model terms

a. The purpose and the use of the terms

The terms below 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 its related limitations, as well as access to data and other data-related conditions, are not exhaustively regulated in these model terms. For example: conditions regarding services to the customer for which data is used as well as security and back-up measures, and escrow in case of bankruptcy, are not dealt with. The model terms are generally formulated. Both parties are advised to consult qualified lawyers for further customisation to their specific situation.

b. Definitions

i. Data

The definition is a simple reference to section 2.1 of the terms.

Parties. The customer refers to the contracting party ordering the products, software or services defined in the main agreement. The supplier refers to the contracting party supplying the products, software or services defined in the main agreement.

Agreement. The model terms are intended to be part of the main agreement. The parties should ensure that the model terms and the main agreement work together. In particular, the parties should ensure that

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

the model terms and confidentiality clauses of the main agreement do not conflict with each other. The model terms are based on the assumption 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 are given priority.

ii. Definition and use of data

The model terms offer the parties three alternatives to define the data. The general part in section 2.1.1 forms the basis for the definition. Section 2.1.1 may therefore be used in cases where 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 product, software or services 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 defined in the agreement. The second precondition is that the information is formed or processed in relation to a product, 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 indicated in the main agreement between the parties.

The first options in section 2.1.2 provide the parties with a more specific way to define the term data. In the first options, which have been prepared for both product and service operations as well as for expert services, the data is defined based on the product, software, or service covered by the main agreement. In relation to products, software, and software as a service, the definition includes both the information transmitted and received by the product and the information concerning the operating environment necessary for the functioning of such products, software and services. 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 may be used instead of the first alternative (point a.), but the parties may also choose to use it as a supplementary definition. The rationale here is that that the parties specify in detail the products, software and services, or the documents or materials from which the agreed data may be obtained.

The third option is an exclusion that can be used as a complementary definition to 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.

iii. 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 the party can do with the data. The party's right to exploit data in its business is broad-ranging, also covering subcontractors and affiliated companies (2.2.2).

If a party wishes to disclose obtained 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 in light of competition law, taking into account the market situation and the importance of data for 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 the information or results that the other party has, by itself or with the help of a third party, created through using the data under these terms. 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 based on the agreed data.

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

Section 2.2.6, together with the previous sections concerning the definition and use of data, form 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 when the parties are using the data. 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 restrictions applying to the licensing of the same may also justify restrictions on the use of data which is protected by such rights. Additional terms and restrictions must be agreed in writing, with electronic forms of communication, such as email, also considered as being in writing. These agreements should be made clearly, and if the purpose is to deviate from the model terms, it is recommended to state this explicitly. When agreeing upon the restrictions, the concerns raised under the chapter 'Competition law' above should also be considered.

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

c. 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 exploiting the data, the liability clauses of the main agreement apply. In this case, limitations of liability and a maximum amount of damages agreed in the main agreement are also applicable.

d. Personal data

The model terms as such are not suitable as a basis for processing personal data, as the terms are designed to be used when agreeing upon the use of data that is not personal. 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 this, 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.

e. Other clauses

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 between the parties in a separate technical appendix specify how each party has access to data.

The parties should pay special attention to section 5.6 which. sets out the order of precedence. According to the model terms, the rights and obligations concerning the data under these terms shall take priority 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 agreement 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.

Disclaimer: this Orgalim guide reflects the best knowledge of industry experts from all over Europe and the state of the art at the time of its publication. This document **aims at providing a descriptive overview of the relevant legal provisions, interpretation notes and reference documents that technology manufacturers need to be aware of when identifying the precise compliance measures to be taken for their specific products.** A binding interpretation of Community legislation is within the exclusive competence of the European Court of Justice. Subject to new information, this document may be modified to accommodate new developments. Such information will be made available on the Orgalim website.

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Model terms on data use

1. DEFINITIONS

"Agreement" means the agreement between the Customer and the Supplier, to which agreement these terms are incorporated.
"Customer" means the Party ordering products, software or services meant in the Agreement.
"Data" has the meaning set forth in Section 2.1 of these terms.
"Party" means the Customer or the Supplier, and "Parties" means the Customer and the Supplier together.
"Supplier" means the Party supplying products, software or services meant in the Agreement.

2. DEFINITION AND USE OF DATA

2.1. Definition of Data

Data means information, which a Party has received or will receive based on the Agreement, and which information is generated by or in connection with use of the product, software or service supplied by the Supplier, or a combination thereof. The Data may be further specified in Section o below.

The following information is deemed Data:
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OPTION 1: EXAMPLES REGARDING THE PRODUCTS, SOFTWARE AND SOFTWARE SERVICES

a) Information which is received, stored or sent by the product, software or service supplied under the Agreement, or a combination thereof, and which concerns (i) the operation of the product, software or service in question, or a combination thereof, and (ii) the environment, operation conditions or other similar information, such as information concerning the usage conditions of a product, software or service, or a combination thereof;
or
b) Information that is received, stored or sent by the products, software or services, or combinations thereof, specified in further detail by the Parties.

OPTION 2: EXAMPLES REGARDING PROFESSIONAL SERVICES

a) Information that is generated in connection with supplying the software or service referred to in the Agreement; and/or
b) Information that appears from the materials or documentation specified in further detail by the Parties.

OPTION 3: EXCLUSION

Notwithstanding the above, the definition of Data shall not include any such information which the Parties have agreed in writing to be excluded from the definition of Data.

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2.2. Use of Data

2.2.1. Use of Data referred to in these terms shall mean all the measures that a Party exercises or may exercise in respect of Data, including but not limited to collecting, recording, copying, combining, compiling, structuring, amending, analysing, comparing, utilizing, assigning or publishing the Data either as such or in connection with other information.

2.2.2. A Party may use the Data in all of its present and future operations where the Data is not assigned or disclosed to third parties (excluding the Party's subcontractors and Affiliated Companies)

2.2.3. When using the Data, a Party may however assign and disclose the Data to third parties provided that the other Party, or any confidential information of the other Party, cannot be identified from the Data used in this manner.

2.2.4. A Party shall not have any rights to such information or materials which the other Party, either independently or through third parties, has developed, derived or otherwise created through the use of Data in accordance with these terms, unless otherwise agreed by the Parties.

2.2.5. Unless otherwise agreed by the Parties, the rights and limitations set forth in this Section are perpetual and shall survive the termination or expiration of the Agreement.

2.2.6. The Parties may separately agree upon additional terms and conditions concerning the use of Data. The said additional terms and conditions shall however be agreed by the Parties in writing in order to be binding upon the Parties.

2.2.7. Upon request of the other Party, a Party is required to show, as far as is reasonable practicable, the ways in which it has complied with the terms and conditions set forth in Section 2.2.3 above. In such case, the Party may fulfil said obligation by providing a sample of the Data used in accordance with these terms.

3. LIABILITY

The use of Data takes place under each Party's own responsibility. Neither Party shall be responsible for the accuracy or non-infringement of the Data, or for damages caused by the Data to the Party using the Data. However, if the Party acts in violation of these terms when using the Data or otherwise, the Party shall be liable according to the liability clauses of the Agreement.

4. PERSONAL DATA

If the Data contains personal data within the meaning of applicable law, each Party shall be responsible for notifying the other Party of the same, after which the Parties shall separately agree upon processing of such personal data in a manner required under the applicable law.

5. OTHER TERMS AND CONDITIONS

5.1. Professional Skills and Experience

These terms shall not limit a Party's right to utilize the professional skills and experience gained from Data by the Party during the Agreement.

5.2. Subcontractors

A Party may transfer data to its subcontractors when acting under these terms. The Party shall be liable for the acts and omission of its subcontractors as for its own.

5.3. Intellectual Property Rights

No assignment or right is granted by these terms to the other Party's patents, utility patents, trademarks, designs, works enjoying copyright protection (or related rights) or to other forms of intellectual property rights, whether registered or not.

5.4. Affiliated Companies

The rights and the related obligations shall benefit in full the Party's Affiliated Companies, which Affiliated Companies shall not be deemed a third party or subcontractor meant in these terms. However, a Party shall be responsible for the acts and omissions of its Affiliated Companies as for its own. A Party may not invoke these terms against the other Party's Affiliated Companies, but shall direct such claims concerning the Affiliated Companies to the Party in question.

An affiliated company meant in this Section refers to a company or other legal entity which at any given time (a) controls the Party, (b) is directly or indirectly controlled by the Party or (c) is under the same control as the Party. "Control" in this section means a minimum of fifty per cent (50 %) stake of the shares or voting rights in the company or entity, or right to name or dismiss minimum of fifty per cent (50 %) of the board members or members in an equivalent body, or other effective control in the company or entity.

5.5. Interfaces and Other Technical Requirements

Insofar as the use of the Data requires access to the other Party's or third party's products, software or other technical environments, the Parties shall separately agree upon the related interfaces, data security requirements and other technical issues.

5.6. Order of Precedence

To the extent the rights and obligations related to the Data meant in these terms contradict with the terms and conditions of the Agreement or a related contract between the Parties, these terms shall prevail in respect of Data.

The Agreement or a related contract between the parties shall not be changed in any other way with regard to Data than specified in these terms. All other terms in the Agreement or a related contract between the Parties shall remain unaffected.

The potential restrictions regarding the use of Data set out in these terms shall not be applied to the extent the same would prevent the Party from fulfilling the Agreement.

- END -