

# EXPLANATORY REPORT

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**Date:** February 29, 2024

**To:** The Swiss Federal Institute of Intellectual Property (IPI) – Mr. Anaic Cordoba

**From:** Juliette Ancelle – id est avocats Sàrl

**Concerns:** **Technical Data Sharing – Template Agreements**

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## I. INTRODUCTION

1. The IPI has entrusted id est avocats Sàrl (**id est, we**) with the drafting of template agreements for the transfer and exchange of technical data between private actors (**Template Agreements**). This mandate is part of the Federal Council's more general mission entrusted to IPI to analyze the issue of access to technical data in Switzerland and abroad, and to formulate proposals and solutions to promote data sharing<sup>1</sup>. IPI was therefore instructed to examine the relevance of a possible system of compulsory licensing and also to look for alternative solutions allowing access to technical data<sup>2</sup>.
2. As a general rule, the concept of technical data is defined negatively with reference to personal data within the meaning of the applicable legislation<sup>3</sup>. Thus, this concept commonly covers non-personal data, i.e. data that does not relate to an identified or identifiable natural person, as well as anonymized personal data. This may include, for example, meteorological or environmental data, statistical data, data generated automatically by machines, such as sensors or captors, or data generated by natural persons, e.g. data relating to the frequency or intensity of use of a product<sup>4</sup>. If made accessible, such data has the potential to contribute to technological innovation and represents a major economic interest. However, such data, the circulation and use of which is essential for the development of a data economy, is often held by private entities that restrict access to it voluntarily or in the absence of sharing solutions. The objective of our intervention is to propose standardized contractual documentation in order to facilitate the sharing of this technical data, i.e. transactions by which technical data held by private sector actors are made available to other organizations or private entities for their own use.
3. Initially, the methodology applied to this intervention led to the identification of the needs to be covered, based on the recurrent issues raised by the existing literature and in particular the

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<sup>1</sup> *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 Security, Acquaintance and further proceedings*, DETEC, 15 October 2019.

<sup>2</sup> *Report on the recommendations of the expert group*, DETEC, 15 October 2019, p. 9.

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

<sup>4</sup> *Communication from the Commission* of 29 May 2019, p. 6 ff.; see also Gefion Thuermer, Johanna Walker, Elena Simperl, *Data Sharing Toolkit*, p. 16; and practical examples available at <<https://eudatasharing.eu/data-sharing-practice-examples>> (last accessed 20 May 2020).

European work carried out in the field of data sharing. Once these needs were identified, we then sought to address them through an appropriate contractual framework. Our analysis was carried out independently of the questions of qualification or legal ownership of the data concerned and the possible technological modalities of sharing, which are beyond the scope of this intervention.

4. This Report presents the recurring themes and needs identified in the context of data sharing between private sector actors (*infra*, II.), and then the contractual framework developed on this basis, in the form of a user guide (*infra*, III.).

It accompanies the contractual documentation developed in the execution of our mandate, i.e. the various templates, written in neutral versions and commented versions in order to facilitate their use.

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## II. ANALYSIS OF NEEDS

5. The purpose of Template Agreements is to address the main issues raised by the sharing of technical data from a legal and practical perspective, independently of the technological aspects of such sharing and questions of legal ownership.
6. In this regard, the topics and needs to be addressed have been identified on the basis of the existing literature, including in particular the various works carried out by the European Union in the field of data sharing and portability<sup>5</sup>. This work highlights the emergence of a data economy, the value of data as an asset, and the paramount importance of its accessibility<sup>6</sup>. Data sharing is defined as allowing specifically authorized third parties access datasets in order to generate value<sup>7</sup>, with a view to promoting data-driven innovation<sup>8</sup>. At the Swiss level, the report of the expert group of 17 August 2018 shares this vision and notes that the issue of access to and ownership of data represents "*major challenges for the B2B sector*".<sup>9</sup>
7. In the context of data sharing between private actors, certain issues are repeatedly debated by the various studies taken into consideration, namely:
  - the contractual relationship model;
  - the type of data being shared;
  - the quality of the data shared; or
  - the use made of the data shared by the recipient.
8. In addition to these elements, there are the following concerns, which are most often mentioned seen as an obstacle to sharing by private actors:
  - loss of control over shared data;

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<sup>5</sup> See the work of the Support Centre for Data Sharing set up by the European Commission, as well as: *Commission Staff Working Document, Guidance on Private Sector Data Sharing 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 Standard Contract Terms Collected from 26 July 2019*; SCDS, *Analytical report on EU law applicable to sharing of non-personal data*, 24 January 2020.

<sup>6</sup> See the toolkit developed by the EU Horizon 2020 Data Pitch programme: Thuermer, Walker, Simperl, *Data Sharing Toolkit*, available under <<https://datapitch.eu/datasharingtoolkit/>> (last accessed 14 May 2020).

<sup>7</sup> Traduction libre de "*Data sharing in this sense means allowing third parties specifically permissioned access to datasets to generate value*" (Gefion Thuermer, Johanna Walker, Elena Simperl, *Data Sharing Toolkit*, p. 4).

<sup>8</sup> Thuermer, Walker, Simperl, *Data Sharing Toolkit*, p. 5).

<sup>9</sup> *Report*, p. 4 ff.

- identification of data or interests to be protected in the context of sharing (e.g. competitiveness, trade secrets, etc.);
  - the complexity of the applicable legal and regulatory framework and its compliance by the data provider and the recipient;
  - lack of best practices; or
  - the cost of preparing the data for sharing.
9. At the same time, our analysis also identified a multitude of potential business models related to data sharing, influenced by the type of data disclosed and the interests of the parties involved. By way of illustration, sharing can take place through online sales spaces or exchange platforms acting as intermediaries or not<sup>10</sup>, on the basis of bilateral contracts, or on models close to open data, it being specified that studies carried out at European level have found that exchanges between private entities are based above all on bilateral or multi-party<sup>11</sup> contracts. From a technical point of view, data is most often shared through application interface programs (APIs), as well as through platforms hosting this data<sup>12</sup>.
10. While questions of a technical nature are likely to be addressed by technical standards, issues related to the regulatory and contractual framework can be addressed by means of streamlined contractual models.
11. In the context of the development of such models, the first question arises of the relationship between the parties to the transaction, which may or may not be long-term, provide for monetary consideration for data sharing, mutual exchange or intervene free of charge. Secondly, the data concerned by a sharing can only be technical data, to the exclusion of any personal data within the meaning of the applicable regulations. This last point, as well as that of possible data quality requirements, raises the question of possible contractual guarantees that can be provided by either party, and their enforceability. With regard to potential restrictions on the use of data, this topic includes possible limitations on the scope of use of the data, but above all prohibitions to protect trade secrets and other confidential information of the data provider. Once again, however, the question arises as to how the parties will be able to enforce such clauses and invoke the rights arising from them, since any contractual penalties appear from the outset to be unsuited to the objective of standardization sought by the templates.
12. Indeed, the contractual apparatus must apply to exchanges between private actors who do not currently have access to technical data. It is therefore primarily aimed at SMEs and other private legal entities of similar size. Indeed, the literature observes that large economic actors have the means to exploit and benefit from their data. The documentation must therefore correspond to the needs of the target users and allow for easy and large-scale use. On the one hand, this documentation is subject to requirements of standardization and pragmatism, which leave little room for the creativity of its users. On the other hand, it must have a sufficient degree of granularity to adequately cover the needs and concerns of these stakeholders.

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<sup>10</sup> For example, see the platforms Hazy <[www.hazy.com](http://www.hazy.com)> or Truata <[www.truata.com](http://www.truata.com)> (last accessed May 20, 2020).

<sup>11</sup> See, in particular, *the Staff Working Document* of 25 April 2018, p. 6.

<sup>12</sup> Sur les aspects techniques du partage de données en général, voir 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.

13. Finally, the use of the proposed documentation assumes that organizational learning has been successfully implemented among the actors concerned and that they have the structural means to enable the preparation of the data for sharing and the use of the data for the set purpose.

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### III. TEMPLATE AGREEMENTS – USER GUIDE

#### A. Introduction and Contract Categories

14. The contract documentation was developed in light of the needs and concerns identified in our analysis (*supra* II), which made it possible to identify the most frequent types of use. More specifically, the documents should cover the following scenarios:
    - the ad hoc provision of data;
    - access to a data feed or the regular provision of data over time; and
    - the exchange of data between the parties.
  15. In addition to the most frequent cases of availability identified, a fourth model, this time on the use of an API to facilitate technical access to data, has been drafted, aimed at complementing the first three models to govern the conditions of use of technical tools developed to facilitate the provision of access to technical data.
  16. The Contracts are thus articulated in 3 different main models drafted on the basis of a common structure, which are intended to be accessible both from the point of view of their content and their form and a model of API terms of use.
  17. The proposed sharing agreements are bilateral and include agreements that are either time-based or ad hoc in nature. Sharing can take place unilaterally or bilaterally, through an exchange.
18. The proposed Template Agreements are as follows:
    - a **Technical Data Transfer Agreement**;
    - a **Subscription Agreement for access to technical data**;
    - a **Technical Data Exchange Agreement**.
19. In order to facilitate the user's selection of these Model Agreements, we can summarize the scenarios covered by each Model Agreement as follows:
    - a) **The Technical Data Transfer Agreement (unilateral)**. This model is intended for less common cases where data are made available on an ad hoc basis or where the parties wish to test a sample of data, with a view to subsequently concluding one of the other two agreements. This exchange can be free or paid.
    - b) **The 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 provider having any interest in the results of the processing or in the further use of the data provided. This access can be provided free of charge or in the form of a paid subscription, if the data provider wishes to monetize its service. This

model gives the supplier the possibility to reserve an audit right in order to ensure compliance with the agreement. This mainly applies to cases where the data provider does not aim to exploit the data it collects itself, but may identify an economic interest in making the data available to third parties for remuneration, whether for research purposes or for commercial exploitation.

- c) **The Technical Data Exchange Contract (Mutual).** This Agreement is the most extensive sharing model. It refers to the situation where synergy is possible between the parties, who have a mutual interest in the sharing of their respective technical data. In this case, access is in principle free of charge and covers all updates, as well as data newly collected by either party. The parties may also grant each other mutual access to the results of the use of the data thus obtained, as well as a reciprocal right of audit.

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## B. Formal Elements of Template Agreements

20. The proposed models are bilateral acts between a data provider and a recipient, user of the data, to the exclusion of any third-party intermediary.
21. In order to ensure simple use adapted to multiple scenarios, the Template Agreements are presented in a standardized form and all have the same structure, i.e.:
- A coverage sheet to be completed by the parties, in which they indicate and respectively choose:
    - The date, their names and contact information
    - The type of data concerned
    - The format of the data
    - The technical modalities of the provision of the data
    - Financial Elements
    - Possible restrictions on use
    - Term and Termination
  - A list of definitions
  - A set of contractual clauses
  - Signatures of the parties
22. The involvement of the parties is reduced. It mainly concerns the cover sheet, which they will complete either with factual data (identity, address, technical details, prices, etc.) or by choosing from the options offered there in the form of checkboxes. In the body of the contract, the parties will also have to choose from alternatives that do not leave them any margin of appreciation, but allow them to adapt the agreement to their specific relationship. Comments have been included in the commented versions to facilitate the process of selecting the appropriate option.
23. This articulation reflects the desire to adopt a single format that can be implemented and automated for ease of use by the parties, with fields to be filled in in the cover sheet and the potentially automated selection of pre-recorded choices within the contractual clauses. In

practice, the Template Agreements will thus be made available to users online, in a format compatible with amendments and signature, executed in electronic form<sup>13</sup>.

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## C. Content of Template Agreements

24. As a preliminary point, we note that these Model Agreements do not take a position on legal issues related to the ownership or ownership of technical data, the aim being simply to facilitate their circulation and not to rule on the existence or otherwise of a possible property right. However, since the legal and regulatory context cannot be ignored, certain clauses have been inserted to take account of the existence of any intellectual property rights which may govern (even partially) the use of the data made available (*infra* N 32) and to anticipate possible problems relating to the applicable legislation on the protection of personal data (*infra* N 27 and 37).
25. In addition to the cover sheet, the 3 Template Agreements are based on a common structure, which is divided into six parts:
- Main provisions: This section is intended to cover the general framework relating to the provision and use of the data covered by the Agreement, including the principle of making the data available, the financial terms, the applicable restrictions and other conditions related to sharing. Its content differs from model to model.
  - Additional services: This section deals with any additional services provided by the parties, and provides for the conclusion of separate agreements where necessary.
  - Attribution: This clause covers the question of the origin of the data and whether or not the identity of the provider is communicated in the event of subsequent distribution by the recipient.
  - Warranties: This section includes the parties' disclaimers of warranties relating to the content of the data, its quality, etc., as well as the parties' commitments to comply with the law and confidentiality.
  - Term and Termination: Model Agreements set out terms and conditions for duration and voluntary termination, or automatic termination in the event of a breach of contract, as well as the consequences of termination.
  - Miscellaneous: This section includes the usual final clauses on form, modification, interpretation, applicable law and place of jurisdiction in particular. As far as the form is concerned, the parties may use electronic signatures.
26. On the basis of this common core, the 3 Template Agreements vary according to the situations they cover. As for the substance, certain choices have been made with regard to the actual content of these Template Agreements, which can be summarized as follows.
27. **Type of data being shared.** The contracts relate exclusively to technical data, to the exclusion of any personal data within the meaning of Art. 3 let. a FADP. From this point of view, technical data therefore covers data that has never concerned an identified or identifiable person (e.g. weather data), or personal data that has been anonymized and can no longer be attributed to a

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<sup>13</sup> See Article 7.2 of the Template Agreements. Although the electronic signature via the DocuSign or PDF program does not meet the requirements of the Electronic Signature Act (SCSE), 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, it being specified that it is recommended to opt for a method of conclusion which sufficiently demonstrates their intention to enter into a contract. An electronic signature of Model Agreements enables these necessary evidentiary functions to be fulfilled.

specific person. The Template Agreements also do not cover the transfer of mixed data, i.e. bundles of technical data that also include personal data, which are also subject to data protection rules. In practice, it is necessary that no link can be made between data and a particular person, despite advances in technology and data analysis. The provider will therefore need to have the technology to sort their data, separate it if necessary or anonymize it properly before any transfer. To mitigate this data protection risk, the Contracts provide for a mutual obligation of the parties to comply with legal obligations on the subject, through contractual guarantees (*infra* N 37).

28. **Technical modalities of sharing.** The format of the data (sample data, synthetic data, etc.), as well as the technical modalities of the sharing are specified by the parties in the cover sheet. In practice, it is likely that the data will be made available via an API or platform, with the use of these tools in principle subject to a separate contractual framework, in the form of terms of use, which will also have to be accepted by the recipient of the data.
29. **Compensation.** Parties can choose between free or paid sharing. In the case of paid provision, it will be up to the parties to set the price and frequency of payment, in the event of regular payments, in particular within the framework of the Subscription Agreement. By default, we have provided for payment in advance, allowing the data provider not to make it available until payment has been made, or to simply interrupt access in the event of an unpaid monthly or annuity payment.
30. **Lack of exclusivity.** As the objective of these Template Agreements is to facilitate the circulation of technical data, it is provided by default that the provision of the data referred to is on a non-exclusive basis, which means that the provider can continue to use the data referred to for itself and make it available to third parties if it so wishes.
31. **Restrictions on the use of data.** In order to address concerns related to the loss of control over shared data over its use by the recipient, the Coverage Sheet allows the provider to prohibit the commercial use, as well as the distribution to third parties, of the data or the result of its processing. Both the concepts of "commercial use" and "distribution" are the subject of uniform definitions in the three Template Agreements, in order to define a standardized scope of restrictions. In this context, we have aligned the notion of commercial use with that used in the Creative Commons licenses, which offer a sufficiently broad and publicly recognized definition<sup>14</sup>. The concept of distribution, on the other hand, refers to cases where data are made available to third parties both in their original format and in a modified format, in so far as the original data could be reconstituted. Indeed, the objective is to prevent the recipient party of the data concerned from slightly changing the format and then redistributing it to third parties, if the provider wishes to retain control over the recipients of the data. It should also be noted that distribution could take place without commercial purposes, which is why this concept is treated separately from that of commercial use. In addition, restrictions on use may apply to the data transmitted, but also to the results obtained by the user on the basis of this data. Indeed, in certain contexts, it is possible that a provider may be willing to give access to some of its technical data in order to promote research, while wishing that no commercial exploitation should be made of the data transmitted and the results resulting from them, thus allowing only internal use of the data concerned.
32. **Intellectual property rights.** Model Agreements define the concept of intellectual property rights and stipulate that none of these rights belonging to one party shall be transferred in any way to the other party. In addition, without pronouncing on the existence or otherwise of intellectual property rights over the data concerned, account is taken of the fact that some of

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<sup>14</sup> Licenses accessible under <<https://creativecommons.org/>> (last accessed May 28, 2020).

these rights may be taken into account, in particular a copyright or even a right *sui generis* on databases (*supra*, N 24.). In order to prevent such rights from impeding the implementation of the contract, the provider shall grant the recipient a user licence for the purpose of enabling the use contemplated by the contract.

33. **Confidentiality.** Recurring themes in data sharing also include concerns about possible interests or information that need to be protected in the context of sharing. This subject is dealt with by means of a confidentiality clause, which prohibits the recipient of the data from obtaining confidential information from the provider through the provision of technical data, including by means of reverse engineering techniques, and from transmitting any confidential information transmitted to third parties. However, it will be the primary responsibility of the data provider to ensure that the data transferred does not contain sensitive business information (or personal data).
34. **Audit.** Since Template Agreements allow parties to select strict restrictions on use, the question arises as to how these restrictions are respected and monitored. In a commercial context, a tool often used is that of contractual penalties, requiring the party who violates its obligations to pay an amount defined in advance by the parties. However, such a tool did not seem to me to be suitable in the context of Template Agreements, since the conditions of such penalties could vary greatly from one particular case to another, and the choice therefore fell on automatic termination in the event of infringement (*infra* N 39). In order to implement such a termination, it is still necessary to allow the supplier to be aware of the breach, which is why an optional audit clause has been inserted. It should be noted, however, that such a clause is justified only in cases where the parties have actually provided for restrictions on use, in which case the supplier has an interest in ensuring that they are complied with.
35. **Complementary services.** Template Agreements are intended only to provide technical data. However, it cannot be ruled out that the data provider, in addition to access to the data, in particular through a platform, may also offer additional services, such as support or maintenance services, hosting services, etc. In view of the multitude of possible services and the conditions for the provision of these services, these cannot be covered by the Template Agreements, but if they exist, it seemed appropriate to be able to refer to them, specifying that they are subject to separate contractual conditions.
36. **Attribution.** Depending on the case, the data provider has an interest in having its name and the origin of the data provided mentioned in the event of authorised dissemination of the data in question. In other cases, the provider may be reluctant to be associated with certain releases, or at least wish to be consulted before being mentioned as the provider of the data in question. This point will have to be settled between the parties, who will have to choose between the two options provided for in the Template Agreements.
37. **Contractual warranties.** To alleviate concerns related to the quality of the data provided, its use by the recipient or compliance with applicable law in particular, participants in sharing are frequently encouraged to set up various contractual guarantees. Nevertheless, such provisions, although common in traditional contracts, almost necessarily entail a contractual complexity that does not correspond to the purpose pursued here. To ensure their effectiveness, they often have as a corollary penalty clauses and compensation rights, which are difficult to reconcile with standardised agreements, concerning simple and sometimes only one-off transactions, where nothing or almost nothing can be negotiated. For these reasons, Template Agreements are designed as the only link and vehicle of trust between the parties, who should not have sophisticated relationships in this context, beyond sharing. The only contractual guarantees provided by the Model Agreements are limited to compliance with applicable law, the relevant Model Agreement and confidentiality. In this context, the attention of the recipient of the data



is drawn to the fact that, although the data made available is defined as not including personal data, the provider cannot exclude the possibility that by accessing this technical data, the recipient is in a position to process personal data, e.g. by combining it with other data. In such a case, the user undertakes to comply with any applicable data protection obligations. In addition, the data provider does not offer any guarantee of quality and accepts no liability.

38. **Regulatory compliance restrictions and requirements.** Although there are no dedicated regulations on data sharing in Switzerland, certain obligations or restrictions may arise from specific legislation, for example in the field of competition law, which may restrict the sharing of data or information that may result in price agreements. In addition, although it is not directly applicable in Switzerland, the European Union adopted a new regulation in 2022, applicable since September 2023, on the sharing of industrial data, the *Data Act*. This legislation proposes a uniform definition of the concept of data, which is included in the models to facilitate European compatibility, and also provides for certain obligations aimed at facilitating access to industrial data and improving interoperability. Provisions have thus been incorporated into the contracts aimed at ensuring that these contracts are compatible with European legislation, reserving any restrictions that may arise from them and incorporating the interoperability obligations by which a possible European co-contractor would be bound.
39. **Term and termination.** Although the Technical Data Transfer Agreement is only intended for the one-time provision of data, the three Model Agreements are long-term, as the use of the data made available can take place over the long term. In this way, the parties can define the duration of their contractual relationship and any notice periods. An automatic termination mechanism is provided in the event of a breach of the contractual terms, and the consequences in the event of termination include the cessation of the use of the data provided. In this regard, it is recommended that the contractual mechanism be supplemented by technical means that would allow, inter alia, an interruption of access to the data, to the extent possible according to the transfer modalities chosen by the parties.
40. **The place of jurisdiction and the applicable law.** During the development of the models, the question arose of the establishment of an alternative dispute resolution procedure, through prior mediation or the inclusion of a possible arbitration clause. Since there is currently no specialised body in Switzerland that could deal with such disputes, this route has not been followed. It is therefore the judicial authorities that will have to be referred to by the parties in the event of a dispute. Finally, in view of the context in which our mandate is situated, Template Agreements are subject exclusively to Swiss law. The selection of this legal regime allows the parties to rely in particular on the general mechanism of Articles 97 et seq. CO to obtain compensation in the event of a breach of contract, based on the presumption of fault and on the concept of damage as abundantly defined in the doctrine and case law in connection with these legal provisions, whether it's the lost gain or the loss experienced.

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## D. API Terms of Use

41. As a preliminary point, we note that the format of these Terms of Use deviates from the format of the Model Agreements in order to take into account the practices and modalities under which the contractual terms are usually communicated and accepted in the event of the use of an API. As a reminder, an API (*application programming interface*) is a software interface that connects a platform or software to another platform or software in order to exchange data and features. It is primarily a technical tool to facilitate the exchange of data, and the terms of use are rarely negotiated but rather communicated in the form of general terms and conditions to the user wishing to use them.

42. The choice was therefore made to draft technologically neutral terms of use, including options to be chosen by those wishing to use these model terms and offering the possibility of referring to additional documentation covering both the conditions for sharing data and the provision of additional services.
43. As the terminology is aligned with that of the Model Agreements, these Terms of Use are primarily intended to be used in addition to one of the Model Agreements, mainly the subscription or exchange agreement.
44. The structure of these Terms of Use can be summarized as follows:
45. **Scope and definition of the API.** To the extent that these are terms of use, the API user is required to adhere to the applicable terms and conditions, which are non-negotiable. This format is more suitable for facilitating access to tools that are often downloaded or made available by technical means, as the terms of use can be inserted at the time of download, during which the user will be able to confirm acceptance of them by means of a "tick-the-box" system. In this context, it is important to provide that the user who accepts these terms and conditions also does so on behalf of the organization they represent. In addition, the field also defines the interface concerned, either by referring to a designated API or one that is or will be downloaded.
46. **License and Terms of Use.** Because an API is a software solution, its use requires the grant of a user license. It is usual for the license to be broad, as the API aims to facilitate interoperability between solutions, and it is therefore not in the interest of the parties to restrict its use too much in terms of time, geography or rights of use. On the other hand, it is useful to counterbalance this broad license with specific restrictions on use, both in terms of the use of the API for hacking or other similar actions and in its use to collect and exploit technical data. Here, reference is made to the contract dedicated to the use of the Technical Data or any other relevant contract. It is also possible to impose technical restrictions on use by providing separate technical documentation or instructions.
47. **Ancillary services.** In addition to accessing and using the API, the API provider may need to provide maintenance or support services. As this is likely to vary from case to case, the model provides alternatives with references to separate documentation that the API provider can use. By default, no service is offered for API maintenance and user support.
48. **Financial Conditions.** An API can be made available free of charge or for a fee. While service providers will prefer to be remunerated on the data made available rather than on the provision of the tool facilitating this access, the opposite is also possible, especially since a paid license model is known on the market. The model provides for a subscription system, with an API aimed more frequently at regular data exchange rather than single transfer cases. It should be noted that in the case of remuneration, the user will probably be more likely to expect minimal support and maintenance services.
49. **Intellectual Property.** Unlike Model Agreements, which deal with data for which ownership of intellectual property rights is not acquired, there is little doubt that the API code is protected by copyright. It is therefore expected that these rights will remain with the person making this API available. In this context, it is common for APIs to incorporate portions of third-party code, which is why the clause refers to third-party terms of use that may apply, including open source licenses. It is thus the responsibility of the person making the API available to ensure that they are entitled to do so under these third-party licenses.
50. **Data Protection.** As with Model Agreements, this API Terms of Service template is primarily intended to be used to enable access to non-personal data. However, two contexts must be

taken into account in which personal data may be processed: on the one hand, if the data to which the API provides access includes personal data, and on the other hand, the data of API users may be collected for the purposes of using the tool (username, logs, etc.). A general reference is made to the privacy policy of the person making the API available, who will have to do the analysis and set up the relevant documentation.

51. **Warranties and Liability.** In the context of a model, the default regime provides for a lack of guarantees on the tool but also more generally on the Data to which the API gives access, and a limitation of liability.
52. **Term and Termination.** The use of an API is usually a long-term one. In this way, the parties can define the duration of their contractual relationship and any notice periods after the API is provided. An automatic termination mechanism is provided in the event of a breach of the contractual terms, and the consequences in the event of termination include the cessation of the use of the API but also the cessation of the use of the data provided. In this regard, it is recommended that the contractual mechanism be supplemented by technical means that would allow, inter alia, an interruption of access to the API.
53. **Place of jurisdiction and applicable law.** During the development of the models, the question arose of the establishment of an alternative dispute resolution procedure, through prior mediation or the inclusion of a possible arbitration clause. Since there is currently no specialised body in Switzerland that could deal with such disputes, this route has not been followed. It is therefore the judicial authorities that will have to be referred to by the parties in the event of a dispute. Finally, in view of the context in which our mandate is situated, Template Agreements are subject exclusively to Swiss law. The selection of this legal regime allows the parties to rely in particular on the general mechanism of Articles 97 et seq. CO to obtain compensation in the event of a breach of contract, based on the presumption of fault and on the concept of damage as abundantly defined in the doctrine and case law in connection with these legal provisions, whether it's the lost gain or the loss experienced.

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## E. CONCLUSION

54. Template Agreements are not intended to participate in legal debates surrounding issues of data ownership and ownership. They have been designed as independent instruments, intended to be validly applied regardless of the responses that will be given to these problems. These contracts reflect a desire to offer private players who do not have the means to develop a real strategy for sharing technical data simple legal tools to put these assets to good use. However, the use of these tools requires awareness and organizational learning within the entities concerned. Indeed, it will be up to them to prepare the data to be shared in order to protect their trade secrets and comply with the applicable law on the one hand, and to process the data received in order to benefit from it, on the other hand. Finally, it is also the parties who will choose the technology used to carry out the sharing.