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Revised Technology Transfer Rules and Data Licensing

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Key Points

- The 2026 revision of the EU Technology Transfer Block Exemption Regulation and its accompanying Guidelines addresses, for the first time, data licensing as a distinct category of technology transfer.
- The revised rules create a five-tiered scheme of (safe-harbour) protection whose availability turns chiefly on the type of data entitlement licensed, ranging from full exemption for technology rights to a case-by-case filter for certain entitlements.
- New guidance on information exchange and on the interplay with the Data Act can and should be read to signal a pragmatic, transaction-friendly approach, although its partial confinement to database (copy-)rights creates uncertainties.
- 'Tangled' data portfolios test the limits of the tiered architecture; enforcers should use their discretion to secure an aligned assessment of such transactions as a whole.

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I. Introduction

Data licensing has become a focus of both commercial practice and legal analysis. Large, high-quality datasets are a critical input for innovation and value creation - and potentially a source of market power. The rise of AI has amplified this demand as large language models (LLMs) cannot be developed or fine-tuned without access to vast and varied datasets.

This importance has been explicitly recognised by the European Union, not only in its policy pronouncements but also in concrete legislative reforms. For example, as part of the EU's 'European Data Strategy' the Commission committed to fostering a single market for data, encouraging the emergence of common data spaces, and ensuring that rules on access and reuse are clear, fair and supportive of innovation across sectors.[1] In line with that strategy, the EU has adopted the Data Act[2], which entered into force on 11 January 2024 and has become applicable from 12 September 2025. The Data Act aims to establish harmonised rules on fair access to and use of IoT-data, so as to reduce contractual imbalances, enable users of connected devices to share generated data with third parties, facilitate switching between data-processing service providers, and promote interoperability and portability across the EU.[3]

Data access and the transactions necessary to organise it – licensing in particular – raise issues not only of intellectual property and data protection law, but very much also of competition law. For a considerable while, legal and policy debates have concentrated on

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[1] Commission, 'European Data Strategy' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en> (last accessed: 19 September 2025).

[2] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 [2023] OJ L2023/2854 (the 'Data Act').

[3] Data Act, recital 5.

issues of data-related market power and its abuse. By contrast, the transactional and, as it were, agreement dimension of data licensing has been somewhat neglected by EU competition law. Most notably, the 2014 Technology Transfer Block Exemption Regulation (TTBER)[4] with its accompanying 2014 TT Guidelines[5] (hereinafter jointly: '**TT Rules**') – centrepieces of the Union's secondary competition law framework on IP licensing – did not even explicitly address data licensing as a distinct area of technology transfer. When the TT Rules became due for revision,[6] the gap between this legislative silence and the relevance data licensing has meanwhile acquired elicited calls[7] for a data-specific extension of the 2014 TT Rules, especially for guidance on the requirements a data licensing transaction must fulfil to enjoy safe harbour-style protection. Heeding this stakeholder feedback, the Commission ordered, inter alia, an expert report on data licensing and competition, which was produced by one of the present authors.[8] As suggested also in this report, the definitive 2026 TT Rules, published in April of this year, do now address data licensing as one of their major novelties compared to the 2014 predecessors.

Against this background, the present contribution analyses the revised TT Rules as follows: section II. recalls the structure of the technology transfer block exemption and section III. highlights major overall differences between the 2014 and the 2026 TT Rules. The

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[4] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] OJ L93/17 (the '2014 TTBER').

[5] Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3 (the '2014 Guidelines').

[6] See art 11 of the 2014 TTBER: expiration on 30 April 2026.

[7] Cf, on the respective input during the review consultation process 2024/25, Summary of the stakeholder workshop on the evaluation of the Technology Transfer Block Exemption Regulation and Guidelines (6 December 2023) 2 (the 'Summary of the stakeholder workshop').

[8] Peter G. Picht, *Data licensing and data-related provisions in technology transfer agreements* (Expert Report commissioned by the European Commission, 2025) ('Picht, Expert Report').

subsequent sections focus on three data-specific aspects of the revision, namely on how the various entitlements to data sort into the TT Rules' grid of relevant IP rights and safe harbours available for them (IV.), on the interplay between data licensing and information exchange (V.), and on selected aspects of the interaction between the TT Rules and other elements of the EU legal framework for data licensing (VI.). Section VII. concludes with some desiderata for the further trajectory of data licensing competition law.

II. The Technology Transfer Rules in a Nutshell

The 2026 TT Rules maintain the architecture of their predecessors. They only address technology transfer agreements, defined as transactions by which a licensor authorises a licensee to use specific technology rights – including patents, software copyrights, and know-how – for the primary purpose of the production and delivery of contract products (Article 1(1)(a)–(c) TTBER).[9] With their production focus, the rules are designed to facilitate the integration of licensed technology into a manufacturing process rather than governing pure R&D collaborations or distribution arrangements, to which distinct block exemptions may apply.

To achieve full-fledged, automatic exemption from Article 101(1) TFEU under the TTBER, an agreement must satisfy several cumulative criteria, including market share thresholds (Article 3 TTBER) and the absence of hardcore restrictions, such as price-fixing or output limitations (Article 4 TTBER).[10] So-called excluded restrictions, such as exclusive grant-

[9] See Stephan Nagel, 'TT-GVO Art 1' in Franz Jürgen Säcker and Peter Meier-Beck (eds), *Münchener Kommentar zum Wettbewerbsrecht*, vol 1 (4th edn, C.H. Beck 2022) para 2 et seq.

[10] Nagel, 'TT-GVO Einleitung' (n 10) para 85.

back obligations for improvements, result only in the specific clause losing the protection of the safe harbour, while the remainder of the agreement can still be exempted (Article 5 TTBER).[11]

As for other block exemptions, the Commission flanks the TTBER with Guidelines that serve as an explanatory and interpretive aid.[12] Furthermore, for settings where market share thresholds are exceeded or the transaction type is not directly covered by the regulation – as is the case for technology pools or settlement agreements – the Guidelines set out criteria for an individual assessment under Article 101(1), (3) TFEU (Article 6 TTBER).[13] They also provide 'soft safe harbours' for certain agreements, i.e. they define conditions under which such agreements are unlikely to violate Article 101 TFEU.[14] In contrast to 'hard' safe harbours, which provide a statutory, automatic exemption under a BER, a soft safe harbour functions as a self-binding administrative commitment. While it creates a legitimate expectation that the Commission will follow its own guidance and abstain from intervention, it lacks the statutory immunity of a Regulation.[15] The Commission retains power to intervene if the specific market dynamics lead to atypical anti-competitive outcomes.[16]

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[11] Nagel, 'TT-GVO Einleitung' (n 10) para 86.

[12] Marc Schweda, 'TT-GVO Einleitung' in Christian Kersting, Hans Jürgen Meyer-Lindemann and Rupprecht Podszun (eds), *Kartellrecht: Kommentar zum Deutschen und Europäischen Kartellrecht* (5th edn, Beck 2025) para 7.

[13] Nagel, 'TT-GVO Einleitung' (n 10) para 87.

[14] Schweda (n 15) para 7.

[15] Cf Josef Drexl, Beatriz Conde Gallego and Daria Kim, 'Position Statement of the Max Planck Institute for Innovation and Competition of 25 April 2025 in the framework of the revision of the Technology Transfer Block Exemption Regulation and the accompanying Guidelines' (2025) GRUR Int 736, 743.

[16] See Drexl, Conde Gallego and Kim (n 18) 743 on the point that market shares in technology markets are often not a very reliable indicator of market power, as these markets are highly dynamic.

III. 2026 Novelties to the TT Rules

A. Regulation Level

Besides the new data licensing framework, there are some other noteworthy changes from the 2014 to the 2026 Rules. At the level of the Regulation itself, novelty lies in three clarifications regarding market share thresholds. First, Recital 13 explains the rule that technology rights which have not yet generated sales of contract products are deemed to hold a zero market share for the purposes of the Regulation.[17] Second, Article 8(b) allows the market share to be calculated as the arithmetic mean of the three preceding calendar years where the most recent year is unrepresentative.[18] Third, Article 8(e) extends the grace period – during which the block exemption continues to apply after the threshold is first exceeded – from two to three consecutive calendar years.[19]

Two further structural amendments deserve mention. Recital 8 makes explicit that neither technology pools nor licensing negotiation groups ('LNGs') fall within the material scope of the Regulation.[20] And Article 1(1)(s), (t) introduce, for the first time in the TTBER,

[17] Commission Regulation (EU) 2026/877 of 16 April 2026 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2026] OJ L2026/877 (the '2026 TTBER'), recital 13 (final sentence); see also Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2026] OJ C2026/2323 (the '2026 Guidelines'), para 111, which reproduces the rule in the body of the guidance.

[18] 2026 TTBER, art 8, point (b). The averaging option over the three preceding calendar years had no counterpart in the 2014 TTBER, which confined itself to the 'preceding calendar year'.

[19] 2026 TTBER, art 8, point (e) (three consecutive calendar years), contrasting with the 2014 TTBER, art 8, point (e) (two consecutive calendar years).

[20] 2026 TTBER, recital 8. The exclusion of technology pools was already present in recital 7 of the 2014 TTBER; the explicit exclusion of licensing negotiation groups is new.

definitions of ‘active sales’ and ‘passive sales’ aligned with the Vertical Block Exemption Regulation.[21]

B. Licensing Negotiation Groups

The novel Section 4.5 of the 2026 Guidelines addresses LNGs. It defines an LNG as an arrangement whereby ‘technology implementers agree to negotiate the terms of technology licences jointly’, and applies irrespective of the LNG’s legal form, of whether its members compete downstream, and of whether the counterparty is an individual technology holder, a pool or an intermediary licensing platform.[22] Any technology licensing agreement concluded between the technology holder and an individual LNG member remains subject to regular assessment under the TTBER and/or Chapter 4 of the Guidelines; Chapter 4 of the Horizontal Guidelines (joint purchasing) is disapplied, and Article 102 TFEU is reserved.[23]

The specific treatment of LNGs results mainly from their pro-competitive effects of reducing transaction costs and pooling implementer expertise on the validity, essentiality (in standard-setting contexts) and value of technology rights. At the same time, they rais anti-competitive concerns (para 302), namely the conferral of excessive bargaining power (including the risk of driving standard-essential patent royalties below FRAND levels),

[21] 2026 TTBER, art 1(1), points (s) and (t), mirroring the definitions in art 1(1), points (l) and (m) of Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2022] OJ L134/4 (the ‘VBER’). The 2014 TTBER contained no such definitions.

[22] 2026 Guidelines, para 298.

[23] 2026 Guidelines, para 299, 300.

downstream coordination through information exchange or commonality of costs, and foreclosure of rival implementers.[24]

Against this double-edged background, LNGs need, first, to escape the qualification as a buyer cartel which constitutes a by-object restriction of competition. For this, they need to be transparent and limit their activity to joint negotiation.[25] Two factors that make a buyer-cartel characterisation at least less likely are (i) disclosure by the LNG of the identity of its members to technology holders and (ii) the existence of a written founding agreement defining the form, scope and functioning of the cooperation. These factors do, however, not generally shield the LNG from enforcement.[26] Exchanges of commercially sensitive information capable of removing strategic uncertainty may, in and of itself, constitute a by-object restriction.[27]

For LNGs not amounting to restrictions by object, the Guidelines envisage an effects-based assessment. The analytical framework includes a substitutability test for the upstream technology market oriented by reference to the alternatives available to technology holders.[28] A combined market share of no more than 15 per cent indicates that market power is, in most cases, unlikely on both the upstream technology market and the downstream product or service market.[29] Joint buying power is less likely to raise concerns

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[24] 2026 Guidelines, para 301, 302. The express reference to essentiality is new; the 'first-mover disadvantage' rationale of para 300(c) of the 2025 Draft has been removed.

[25] 2026 Guidelines, para 304–305.

[26] The 2025 Draft (para 307(a)) only required the LNG to 'make clear' that it negotiates on behalf of its members; the final text requires actual disclosure of 'the identity of its members to technology holders'.

[27] Para 309 softens the corresponding provision of the 2025 Draft (para 309), which had characterised an LNG aimed at excluding rivals as 'a form of horizontal boycott' constituting a restriction by object; the final text states more cautiously that such an LNG 'may constitute' such a restriction.

[28] 2026 Guidelines, para 311–316.

[29] 2026 Guidelines, para 317, 318, with a 'soft indicator' threshold for absence of market power, namely a combined share of 15 per cent on each of the upstream technology market and the downstream product or service market.

where countervailing bargaining power exists on the licensor side, where technology holders remain free to enter and leave negotiations, and where members remain free to negotiate bilaterally. A bilateral-negotiation moratorium is permitted 'for a limited period not exceeding the expected duration of the joint negotiations', and a binding-acceptance agreement is equally tolerated – but the final text declines to fix any specific temporal cap.[30]

Temporary coordinated delays during negotiations are highlighted as an element in the LNG's effects assessment, and participation in such delays may bar reliance on Article 102 TFEU as a defence to a prohibitory injunction brought by a FRAND-committed SEP holder.[31] The Guidelines describe three foreclosure-mitigating factors, namely open membership on objective criteria, non-discriminatory operating rules, and no restriction on bilateral licensing between technology holders and non-member implementers. Relevant downstream effects are, in particular, the risks of commonality-of-cost effects and of information-exchange spill-overs, and recommend clean teams, independent managers, anonymisation and aggregation as mitigation techniques.[32]

The single most consequential difference between this final version and the 2025 draft of the Guidelines' LNG section lies in the removal of the soft safe harbour that had been proposed in the 2025 Draft. That version would have exempted LNGs satisfying seven cumulative conditions from Article 101(1) TFEU or would have at least presumed them to satisfy Article 101(3) TFEU. The two most contentious conditions were, arguably, the permitted bilateral-negotiation moratorium of up to six months and the cap for licensing fees

[30] 2026 Guidelines, para 319–323. Para 326(e) of the 2025 Draft stipulated a six-month cap.

[31] 2026 Guidelines, para 322.

[32] 2026 Guidelines, para 324–328. Para 327, 328.

negotiated through the LNG at 10 per cent of the sale price of the contract products. Paragraph 327 of the 2025 Draft, providing that non-conforming LNGs would be subject to case-by-case assessment without any presumption either way, has also been deleted. The Guidelines now recast the substance of the abandoned conditions as non-dispositive guidance on the buyer-cartel and effects-based assessments.[33] In the materials accompanying the adoption of the package, the Commission explains that in view of the limited enforcement experience with LNGs a formal safe harbour would risk being either under- or over-inclusive. Most likely, it will have also played a role that publicly available consultation responses and commentary were sharply divided, with many voices opposing the draft safe harbour in the terms in which it had been cast.[34]

C. Further Guidelines Novelties

Also at the Guidelines level, the soft safe harbour for technology pools is tightened in three respects. Pools must now disclose in an effective manner to existing and potential

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[33] See, in particular, 2026 Guidelines, para 307, 321, 323, 327 and 328. See also Commission, 'Commission updates EU competition rules for technology licensing agreements' IP/26/809 (Brussels, 16 April 2026).

[34] See, for example, IP Europe, 'How should the EU's Technology Transfer Block Exemption (TTBER) guidelines handle patent pools and LNGs?' (IP Europe, 5 May 2025) <https://ipeurope.org/position-papers/how-should-the-eus-ttber-guidelines-handle-patent-pools-and-lngs/> (last accessed: 4 May 2026); Geoffrey A. Manne, Dirk Auer, Giuseppe Colangelo and Selcukhan Ünekbas, 'ICLE Comments on EU TTBER and Technology Transfer Guidelines' (22 October 2025) <https://laweconcenter.org/resources/icle-comments-on-eu-ttber-and-technology-transfer-guidelines/> (last accessed: 4 May 2026); Joseph V. Coniglio, 'Comments on the Draft Revised TTBER and Technology Transfer Guidelines' (Information Technology and Innovation Foundation, 23 October 2025) <https://itif.org/publications/2025/10/24/comments-eu-draft-tevised-technology-transfer-block-exemption-regulation-technology-transfer-guidelines/> (last accessed: 4 May 2026); Florian Müller, 'European Commission proposes condoning group boycott by implementers of standards for six months' (ip fray, 11 September 2025) <https://ipfray.com/european-commission-proposes-condoning-group-boycott-by-implementers-of-standards-for-six-months-licensing-negotiation-groups/> (last accessed: 4 May 2026); Sophia Lawrance and Edwin Bond, 'A bump in the road? US DOJ subjects automotive licensing negotiation group to antitrust scrutiny' (Bristows, 26 March 2026) <https://inquisitiveminds.bristows.com/post/102mo4z/a-bump-in-the-road-us-doj-subjects-automotive-licensing-negotiation-group-to-ant> (last accessed: 4 May 2026).

licensees the technology rights included in the pool and the methodology and results of the essentiality assessments;[35] the FRAND obligation is expressly coupled with a no-'double dipping' requirement under which licensees may not be charged more than once for the same technology rights;[36] and paragraph 288 clarifies that essentiality is to be assessed on an ongoing basis, so that a technology that becomes redundant after pool formation must be priced out of the package.[37] The balance of the safe harbour conditions – openness of participation, safeguards on information exchange, non-exclusive licensing-in, freedom to challenge validity and to develop competing technology – is carried over from the 2014 Guidelines.[38] Furthermore, Section 4.3 on settlement agreements is updated to accommodate recent Court of Justice case-law on pay-for-restriction and pay-for-delay arrangements.[39]

IV. Data Entitlements – Technology Rights – Safe Harbours

The TTBER itself and the exemption it promises apply only to 'technology rights' (Article 1(1)(b) TTBER) – viz. know-how in the Regulation's sense (Article 1(1)(i) TTBER), patents, utility models, software copyrights, and a few other types of IP rights – whereas the Guidelines can address further types of entitlements to IP, for example non-software copyrights[40]. Given this two-tiered legal framework, it is important to understand which

[35] 2026 Guidelines, para 286, point (b), (c).

[36] 2026 Guidelines, para 286, point (f).

[37] 2026 Guidelines, para 288 (ongoing essentiality assessment).

[38] 2026 Guidelines, para 286, points (a) to (h); compare para 261, points (a) to (g) of the 2014 Guidelines.

[39] 2026 Guidelines, para 257–266; the updating of this section incorporates, in particular, Case C-307/18 *Generics (UK)*, EU:C:2020:52; Case C-176/19 P *Commission v Servier*, EU:C:2024:549; Case C-151/19 P *Commission v Krka*, EU:C:2024:546; and Case C-2/24 P *Teva Pharmaceutical Industries and Cephalon v Commission*, EU:C:2025:825.

[40] See 2026 Guidelines, para 62.

categories of main entitlements cover data portfolios and constitute, hence, the assets to be licensed in a technology transfer.

A. Data Entitlements

Entitlements to data are heterogeneous and not uniformly 'full-fledged' intellectual property rights in the classical sense.[41]

1. Copyright

For data to be protected by copyrights, they must embody 'works' (e.g. photographs, sound recordings, audiovisual material, literary texts) that are the author's own intellectual creation and meet the requirement of 'originality'.[42] Raw datasets, sensor readings, or databases organised strictly according to standard classifications (e.g. alphabetically, numerically, or chronologically) will often not qualify for copyright protection.[43] More sophisticated database arrangements can, however, be copyright-protected.[44] Software copyright protection extends to the source code and object code of computer programs, provided they meet the general requirements for protection, which are embodied in digital

[41] On the following, see also Picht, Expert Report (n 9), para 72 et seq.

[42] Philipp Hacker, 'Immaterialgüterrechtlicher Schutz von KI-Trainingsdaten' (2020) GRUR 1025, 1028; Matthias Leistner, '§ 9' in Ulrich Loewenheim (ed), *Handbuch des Urheberrechts* (3rd edn, C.H. Beck 2021) para 309.

[43] Leistner, '§ 9' (n 45) para 319.

[44] Picht, Expert Report (n 9), para 97 et seq, in particular para 109.

data.[45] According to a meanwhile broad consensus,[46] Union and Member State laws extend copyright protection only to works created by humans, meaning in particular that content autonomously generated by AI without sufficient human intervention – wherever the blurry line between autonomous and human-induced work generation may have to be drawn – cannot be copyright protected.[47] Due to AI's rapid progress in software code generation, software works and the digital data embodying it are, arguably, an area in which this exclusion from protection comes already to bear.[48]

2. Database Rights

According to Article 1(2) Database Rights Directive, a 'database' is a 'collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'. The sui generis database right (DaR) is distinct from copyright in that it does not protect creativity, but rather the investment made in 'obtaining, verifying or presenting' database contents (Article 7(1) Database Directive 96/9/EC) by granting the maker exclusive rights to control certain uses of the

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[45] Peter G. Picht, Florent Thouvenin, Valerie Brunner and Joël Donzé, *New Software Protection Approaches in a World (Co)shaped by AI* (Swiss Federal Institute of Intellectual Property (IPI) Publication No 13, 2024) para 112.

[46] Ulrich Loewenheim and Matthias Leistner, '§ 2 UrhG' in Loewenheim (n 45) para 38; Loewenheim and Leistner, '§ 6 UrhG' in Loewenheim (n 45) para 15; Winfried Bullinger, '§ 2 UrhG' in Artur-Axel Wandtke and Winfried Bullinger (eds), *Praxiskommentar Urheberrecht* (6th edn, C.H. Beck 2022) para 15; Benjamin Raue, '§ 2 UrhG' in Thomas Dreier and Gernot Schulze (eds), *Urheberrechtsgesetz* (8th edn, C.H. Beck 2025) para 21; Jan Bernd Nordemann, '§ 2 UrhG' in Fromm and Nordemann (eds), *Urheberrecht* (13th edn, Kohlhammer 2024) para 29.

[47] Loewenheim and Leistner, '§ 2 UrhG' (n 49) para 39 with further evidence; Loewenheim and Leistner, '§ 6 UrhG' (n 49) para 16; Raue (n 49) para 21.

[48] Picht, Thouvenin, Brunner and Donzé (n 48), para 181; cf also Sébastien Ragot and others, 'Copyright in artificially generated works' (2019) sic! 573, 574; Florent Thouvenin and Peter G. Picht, 'AI & IP: Empfehlungen für Rechtsetzung, Rechtsanwendung und Forschung zu den Herausforderungen an den Schnittstellen von Artificial Intelligence (AI) und Intellectual Property (IP)' (2023) sic! 507, 511.

database. The 'substantial investment' constitutes a core prerequisite for protection. Pursuant to Article 10(3) Database Directive, every substantial change to a database that qualifies as a 'substantial new investment' triggers a fresh 15-year term of protection. Intended to reward continuous investment, this mechanism can effectively extend exclusivity to long periods of time, raising concerns of overprotection and foreclosure of data access.

Under Recitals 19 and 39 Database Directive, only investments in obtaining existing data – for instance, the categorisation or arrangement of generated data into structured metadata – qualify as protectable. By contrast, investments in the generation of raw data, such as sensor outputs, cannot give rise to DaR protection. This distinction[49] is both challenging and crucial, since licensing of raw or minimally refined data often does not involve licensing of DaRs at all.[50]

Curated AI training datasets may qualify for DaR protection if substantial investments were made in their verification and structuring. However, independence of elements (Article 1(2) Database Directive) and the presence of qualifying investments (Article 7(1) Database Directive) are controversial requirements in this context.[51] As to the pre-processing, cleaning, or even generation of synthetic datasets it is debated whether such efforts amount to 'obtaining' under Article 7 Database Directive.[52]

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[49] See Case C-203/02 *The British Horseracing Board and Others*, EU:C:2004:695; Case C-338/02 *Fixtures Marketing*, EU:C:2004:696; Case C-444/02 *Fixtures Marketing*, EU:C:2004:697; Thomas Dreier, '§ 87a UrhG' in Dreier and Schulze (n 49) para 13; Andrea Ottolia, *Big Data e innovazione computazionale* (Giappichelli 2017) 77 et seq, also on Italian case law; Tanya Aplin, Alfred Radauer, Martin Bader and Nicola Searle, 'The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis' (2023) 54 IIC 826, 833.

[50] Matthias Leistner, 'Datenbankschutz - Abgrenzung zwischen Datensammlung und Datengenerierung' (2018) CR 17, 19 et seq.

[51] Hacker (n 45) 1029 et seq.

[52] Hacker (n 45) 1030.

Importantly, Article 43 Data Act excludes from DaR protection data 'obtained from or generated by a connected product or related service falling within the scope of [the Data Act], in particular in relation to Articles 4 and 5 thereof'. As shown below (VI.A.), this protection carve-out – legislated to prevent data transfers endorsed by the Data Act from being blocked by DaR exclusivity objections[53] – affects the interplay between the Data Act and the TT Rules.

3. Trade Secrets

The Trade Secret Directive (EU) 2016/943 and its national implementations protect data portfolios if they embody information that is secret, of economic value, and subject to reasonable confidentiality measures (Article 2(1) Trade Secret Directive).[54] Even machine-generated data fall within the protective scope, provided they satisfy these statutory criteria,[55] as the Directive does not limit the scope of protection to human-generated intellectual outputs.[56] Only a subset of trade secrets subsumes under the TTBER definition of 'know-how' (Article 1(1)(i) TTBER), namely 'practical information resulting from experience and testing' which is 'significant and useful for the production of the contract

[53] Stephan Koloßa, 'Art 43 Data Act' in Anne Paschke and Pascal Schumacher (eds), *EU Data Act Kommentar* (C.H. Beck 2026) para 11; Philippe Heinzke, 'Art 43 Data Act' in Christian Czychowski, Tobias Lettl and Björn Steinrötter (eds), *Data Act* (C.H. Beck 2025) para 1.

[54] Erhard Keller, '§ 2 GeschGehG' in Erhard Keller, Marcus Schönknecht and Anna Glinke (eds), *Geschäftsgeheimnisschutzgesetz* (C.H. Beck 2021) para 41; Stefan Krüger, Julia Wiencke and André Koch, 'Der Datenpool als Geschäftsgeheimnis' (2020) GRUR 578, 580; Michael Fuhlrott, '§ 2 GeschGehG' in Michael Fuhlrott and Mayeul Hiéramente (eds), *BeckOK Geschäftsgeheimnisgesetz* (25th edn, C.H. Beck 2025) para 8.

[55] Keller (n 57) para 16, 43; Krüger, Wiencke and Koch (n 57) 580 et seq.

[56] Keller (n 57) para 16.

products'.[57] Summarily speaking, commercial trade secrets, as opposed to technical ones, fall thus outside of the TTBER's 'technology rights' scope.

4. Patents

Data-contained 'information as such' is excluded from patentability (Article 52(2), (3) of the European Patent Convention (EPC)).[58] However, data processing that constitutes a technical solution to a technical problem can be patent-protected, especially as part of computer-implemented inventions.[59] Examples include physical interactions within and between machines,[60] or data as a product directly obtained by a patented process.[61] In such cases, the licensing of data and their processing modalities as part of a patented invention can amount to the licensing of a technology right.

5. Data Act Entitlements

The EU Data Act grants users of connected devices enforceable rights to access and share their usage data. Before its adoption, IoT data access was, to a large extent, a matter of factual control (often held by manufacturers),[62] partly complemented by contractual

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[57] Nagel, 'TT-GVO Art 1' (n 10) para 80 et seq.

[58] Louisa Specht-Riemenschneider, 'Art 3 DGA' in Louisa Specht and Moritz Hennemann (eds), *Nomos Handkommentar Data Act, Data Governance Act* (2nd edn, Nomos 2025) para 39 et seq; Sarah Bussmann, Carolin Glasowski, Michael Niehaus and Sarah Stecher, 'Die Schutzfähigkeit von KI-Trainingsdaten de lege lata: What would Machlup find?' (2022) RDi 391, 393.

[59] EPO, Guidelines for Examination, G-II, 2 and 3.7; Ottolia (n 52) 143 et seq; Specht-Riemenschneider (n 61) para 39.

[60] EPO, *Datenstrukturprodukt/PHILIPS* (2001) GRUR Int 167, 169; Peter Mes, '§ 1 PatG' in Peter Mes (ed), *Patentgesetz, Gebrauchsmustergesetz* (6th edn, C.H. Beck 2024) para 124; Klaus Bacher, '§ 1 PatG' in Klaus Bacher (ed), *Benkard Patentgesetz* (12th edn, C.H. Beck 2023) para 131.

[61] Specht-Riemenschneider (n 61) para 40; Bussmann, Glasowski, Niehaus and Stecher (n 61) 393.

[62] Data Act, recitals 5 and 20; Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' (2023) ZEuP 42, 45; Lucy Antoine, 'Datenzugangsrechte im finalen Data Act – Fortschritt,

arrangements and general regimes such as trade secret, competition, or data protection law. Under Article 4 and 5 Data Act, users now have, in particular, (i) a right to obtain data generated by their products or services; they may (ii) request its transfer directly to third parties, creating a triangular structure between data holder, user, and recipient; and (iii) data holders shall not use or make available data unless mandated in their contracts with the respective users. These relations must be formalised in contracts, namely (i) access and permitted usage contracts between holder and user,[63] (ii) transfer agreements between holder and third-party recipient, governed by FRAND conditions and confidentiality safeguards,[64] and (iii) agreements between user and recipient, including restrictions on use and disclosure without permission by the user.[65] Article 13 Data Act subjects unilaterally imposed terms of such contracts to an unfairness control, provided they are concluded B2B. Article 41 Data Act provides for guiding model contract clauses which can be assumed fair[66] and constitute an important point of reference also for the competition law assessment of Data Act-related data licensing. While the Data Act stops short of introducing property rights in data, the above grid of rights and contracts creates user

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Rückschritt, neue Fragen?' (2024) CR 1; Philipp Etzkorn, '(Vertragliche) Datenzugangsansprüche nach dem Data Act' (2024) RDi 116, 118; Josef Drexl and others, *Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act)* (2022) para 34 (the 'Position Statement Data Act 2022').

[63] Data Act, art 4(13); the contract determines the conditions of access to the data, including confidentiality measures, see Data Act, art 4(2) and (6).

[64] Data Act, art 8(1) for business-to-business relations and in general Data Act, art 12(2) as well as recital 35, sentences 8 and 9.

[65] Data Act, art 6(1).

[66] Lothar Determann and Moritz Hennemann, 'Art 13 Data Act' in Specht and Hennemann (n 61) para 49.

entitlements to data portfolios,[67] but for example also a commercial exploitation entitlement for data holders under Article 9 Data Act.

6. Factual and Contractual Control

Finally, factual control (e.g. over data servers) and contractual positions (e.g. data trusteeship) can establish (de facto) entitlements which market participants seek to – and do – 'license', even though IP law provides no category of rights that could serve as a doctrinally neat object of such licensing.[68]

B. Entitlement Categories and ((Super) Soft) Safe Harbours

As the preceding discussion has shown, of the various (legal) positions constituting the assets actually licensed in data-licensing transactions, only a subset counts as technology rights and thereby falls within the TTBER's immediate reach. DaRs are not among them. However, drawing database rights into the framework of the TT Rules was a central concern for the Commission. It would, indeed, have looked incongruous for DaRs to go unaddressed altogether, the more so as that right is itself a creature of EU law and sets the Union apart from the many legal orders that recognise no comparable related right.[69] As for the remaining data-licensing subject assets, the aim was to supply at least a measure of orienting guidance, notwithstanding how varied and, in places, doctrinally opaque that terrain is.

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[67] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data Acts – Neue Spielregeln für die Data Economy' (2022) RDi 168, 175; Antoine (n 65) 2; Etzkorn (n 65) 118.

[68] Picht, Expert Report (n 9), para 53, 75.

[69] Kai Hermes, 'Vor § 87a UrhG' in Wandtke and Bullinger (n 49) para 49.

1. (Non-)ancillary application of ***Article*** 2(1) TTBER

Taken together, the TT Rules yield a five-tiered scheme of safe-harbour availability, with the governing variable mainly being the licensed entitlement at issue. On the first tier sit technology rights in data: provided the Regulation's further requirements are satisfied, such rights draw on the strong safe harbour of the exemption under Article 2(1) TTBER, which is not subject to Commission discretion.

On the second tier, Article 2(3) TTBER extends this exemptive protection to 'provisions in technology transfer agreements that relate to […] the licensing or the assignment of other intellectual property rights or know-how to the licensee if, and to the extent that, those provisions are directly related to the production or sale of the contract products'. The Guidelines (para 63) now make clear that the provision reaches data licensing too, so that data which are not themselves covered by a technology right, yet are licensed together with one under the same licence, can enjoy ancillary protection. However, consistently with the narrow compass of the new data soft safe harbour (cf. below IV.B.2.), the Guidelines (para 63, fn 51) treat only database (copy-)rights – and no other data entitlements – as 'other intellectual property rights' for the purposes of Article 2(3) TTBER. The direct-relation requirement, for its part, serves to secure that 'other types of intellectual property rights are exempted only in so far as those other rights enable the licensee to better exploit the licensed technology rights'.[70] This constitutes a threshold, but not a very high one, as its economic interests will usually lead a licensee to in-license only data which further the overall economic purpose of the transaction. A further,

[70] 2026 Guidelines, para 60.

and significant, novelty in the 2026 Guidelines is the clarification that the ancillary safe harbour under the TTBER remains open even when, economically, the parties care more about the co-licensed asset than about the technology right that nominally anchors the operation of Article 2(1) and (3) TTBER. Suppose, for instance, that a licensor grants (i) a patent for the production of a patent-based product, alongside (ii) technical know-how and (iii) commercial information held in a database that enjoys sui generis database right protection. Here, subject to the TTBER's other requirements, Article 2(1) TTBER confers exemptive protection on the patent and know-how dimensions of the technology transfer, while Article 2(3) TTBER carries ancillary protection across to the DaR element, even if access to this DaR element is the licensee's main interest.

Thirdly, the Guidelines (para 184) offer a general, non-data-specific soft safe harbour for situations in which technology rights are licensed, the parties' combined market shares cross the TTBER thresholds, and no hardcore restrictions have been stipulated – on condition that the market contains at least four independently controlled, competing substitute technologies.[71] Quite what this rule will come to mean for data licensing is, for now, hard to predict. It will frequently be no easy matter to judge whether the market genuinely holds such a number of technologically substitutable, equivalent[72] data portfolios.[73] Beyond sheer numbers, network effects – flagged in the Guidelines as a substitutability impediment – together with data-

[71] Andreas Fuchs and Peter G. Picht, 'TT-GVO Art 3' in Immenga and Mestmäcker, *EU-Wettbewerbsrecht* (7th edn, C.H. Beck 2025) para 13; Christian Klawitter and Volker Jänich, '§ 14' in Gerhard Wiedemann (ed), *Handbuch des Kartellrechts* (5th edn, C.H. Beck 2026) para 60; Klawitter, *Lizenzverträge und Kartellrecht* (Nomos 2015) para 60.

[72] The Commission reads the equivalence assessment expansively, taking in royalties, the market strength of the technology (a different matter from the licensor's market share, which is usually easier to pin down) and the uses to which the technology is put. A comparison of this breadth can prove decidedly difficult for technology data pools, not least because such pools are, in many instances, not exposed to intensive and transparent transactional activity.

[73] Drexl, Conde Gallego and Kim (n 18) para 36.

specific lock-in effects, may remove the competitive pressure that rival portfolios, even if they can be identified, would otherwise bring to bear.

2. Aligned assessment for database (copyright) rights

The fourth tier houses a soft safe harbour that arises from carrying the TT Rules assessment over to database copyrights and *sui generis* database rights: 'The Commission will […] generally apply the principles of the TTBER and these Guidelines when assessing under Article 101 of the Treaty data licensing agreements between two undertakings for the purpose of producing goods or services where the licensed data concerns a database that is protected by copyright or by the sui generis right defined in the Database Directive'.[74]

Market participants will focus their attention on what this wording mainly promises – even allowing for the latitude it leaves the Commission – namely that the licensing of database (copy-)rights, too, can ordinarily profit from a safe harbour wherever the general TTBER requirements applicable to the licensing of technology rights (market share thresholds, the absence of restrictions, etc.) are met. As explained below (VI.A.), a corresponding soft safe harbour opens to licences under the Data Act. It bears stressing, though, that the extension of the TT Rules assessment framework reaches further, including, for instance, aspects for why the licensing of a database (copy-)right may, once the market share thresholds are overstepped, appear problematic under competition law.[75]

[74] 2026 Guidelines, para 64.

[75] Cf, for example, 2026 Guidelines, para 186 et seq.

As a basis for their extension to database (copy-)rights, the Guidelines (para 65, 66) offer two complementary observations: The creation of databases may entail significant investments, and their licensing promotes innovation by allowing database creators to earn a return on their R&D costs. It also leads to the dissemination of data, which may increase downstream innovation by reducing the production costs of licensees or by enabling them to produce new or improved products. At the same time, 'the licensing of data is a fast-evolving practice, and it cannot be excluded that certain restrictions of competition included in such licences are either not covered by these Guidelines or they produce effects on competition or consumers that are substantially different from those described in these Guidelines'. Hence, the innovation incentives of database (copy-)right holders, together with the static and dynamic gains from disseminating information, justify extending the protective ambit of the TT Rules to this category. The variety and fluidity of data-licensing practice, in turn, explains why the Guidelines retain discretion for atypical cases.

3. Case-by-case filter for other licence assets

The fifth and final tier catches assets other than technology rights or database (copy-)rights. As to them, 'the Commission will assess whether it is appropriate to apply the principles of the TTBER and these Guidelines, based on the circumstances of each case', since '[d]ue to differences in the characteristics of the data and in the levels of investment involved in obtaining and processing the data, the principles set out in the TTBER and these Guidelines […] may not be appropriate for assessing such agreements in all cases'.[76]

[76] 2026 Guidelines, para 67.

Measured by the protection it affords, this tier may be described as a 'super soft safe harbour'. Rather than applying the TT Rules outright, it first inserts a case-specific inquiry into whether those rules actually suit the transaction – an inquiry that, in contrast to the approach for database (copy-)rights, is not governed by a general presumption of transferability. Screening factors likely to be crucial are the character of the licensed data and the investments necessary for turning them into a licensable asset (generation, collection, processing, provision, and the like). These screening criteria do not give parties very much ex ante legal certainty for appraising their own transaction. However, by explicitly envisaging a transposed application of the TT Rules, the approach affords more orientation – and, very likely, a more permissive regime overall – than would a categorical referral of such settings to assessment under the general principles of Article 101 TFEU.

C. Coherency and Tangled Portfolios

The tiered availability of ((super) soft) harbour protection combines a rather clear structure with strong endorsement of certain important types of data licensing – namely for data covered by technology rights or the ancillary privilege under Article 2(3) TTBER – and flexibility regarding the rich universe of other types of data licensing transactions. Even from a perspective that is critical of the sui generis database right in principle, it seems sensible to integrate this entitlement into the Technology Transfer framework as long as EU legislature does not decide to abandon it.

At the same time, capturing complex phenomena by a set of rules geared to practicability and to preserving leeway for enforcers is not usually an exercise that could provide granular solutions to all settings in scope. One may ask, for example, whether the licensing of

database copyrights is really a phenomenon so much more in flux and potentially dangerous to competition that it does not qualify for the strong safe harbour accessible to technology rights for, by now, at least 30 years.[77] Does the acquisition of a sui generis database right – the protection threshold for which is low – really imply, as a rule, investments so much more significant than those for the acquisition of a commercial trade secret (which requires commercial value and protective measures) that it seems, from this perspective, compelling to qualify the former for a soft, the latter, however, merely for a super soft safe harbour?

A challenging test for the new harbour structure lies in its treatment of mixed, or 'tangled' data portfolios the licensing of which is a frequent practical reality.[78] Such portfolios typically consist of a high volume of data the legal situation of which, including pertinent legal entitlements, is partly unclear. For example, such a portfolio may likely contain software code (software copyrights), digitalised texts (non-software copyright), non-public technical (TTBER know-how) and commercial (non-know-how trade secrets) information relating to a production technique (process patents), as well as sensor data (possibly Data Act entitlements, contractual control entitlements), part of which may constitute personal data (GDPR) and which is partly organised in more (database copyrights) or less (sui generis database rights) sophisticated databases. Oftentimes, parties have neither a commercially reasonable way nor an interest to minutely determine all entitlements to the portfolio, they just want to engage in a technology transfer and license it. Notwithstanding the doctrinal jumble and absent specific, anti-competitive modalities, this

[77] Cf Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements [1996] OJ L31/2.

[78] Picht, Expert Report (n 9), para 69.

mindset and transaction align with the goals (technology dissemination, dynamic efficiency) of the TT Rules. As these Rules should, hence, clear the competition law pathway for it, it seems not helpful that parts of our exemplary portfolio qualify for a strong safe harbour (patents, know-how, software copyrights), other parts only – but at least – for a soft safe harbour (database rights and non-software copyrights; Data Act entitlements, including databases stripped of their sui generis protection by Article 43 Data Act, cf. below VI.A.), whereas the remaining data entitlements (commercial trade secrets, contractual control positions) threaten to trigger a case-sensitive assessment of the whole transaction as a prerequisite for a super soft harbour. Article 2(3) TTBER consolidates in favour of a strong safe harbour also for ancillary licensed entitlements, but as per the Guidelines 'other intellectual property rights', which qualify for this ancillary protection, are only database copyrights or sui generis rights, not the further entitlements in our exemplary portfolio. Competition law enforcers should urgently use their super soft safe harbour discretion to ensure an aligned assessment and, where possible, protection for the entirety of tangled portfolios. Residual uncertainty for the licensing parties remains, though, which more explicit language on the treatment of such portfolios could have mitigated.

V. Information Exchange

Since (digital) data embody information, the potential of their licensing to also transfer information of a commercially sensitive nature is evident. Fittingly, therefore, the TT Guidelines also contain a new subsection (para 68 et seq) on data licensing and information exchange. It sets out that the information may be exchanged as the content of the licensed asset or as a complementary element in the implementation of the licence.

Either way, the Horizontal Guidelines and their specific rules on information exchanges between competitors take precedence, in principle, including their distinction between exchanges as restrictions by object or by effect.

However, two aspects of the TT Guidelines seem to signal that the Commission is ready to take a pragmatic, transaction-friendly position towards information exchanges in the course of data licensing. First, the Guidelines dedicate a separate paragraph (70) to explaining that the ancillary restraints doctrine, which exempts an agreement from Article 101(1) TFEU and, consequently, also from a finding of infringement under the Horizontal Guidelines, applies where the information exchange is objectively necessary for, and proportionate to the objectives of, a licensing agreement that itself has positive or at least neutral effects on competition. Second, the Guidelines (para 72) state that, 'in many cases', a by-effect rather than a by-object assessment will apply to non-ancillary information exchanges.

Sensible as this approach appears, the respective Guidelines section may read somewhat narrow, or even confusing because it only speaks about the licensing of database (copy-)rights as a context for information exchanges. Can information exchanges not also occur in the context of technology rights licences or of the licensing of other data entitlements? Arguably, the narrow wording flows from the section's close proximity, and logical nexus, to the section granting a soft safe harbour (only) to database rights, from the existence of a separate Guidelines paragraph (31) on the applicability of the Horizontal Guidelines to information exchanges in the context of technology rights licensing, and from the case-by-case filter for the applicability of the Guidelines – including their sections on information exchanges – to other entitlements. It remains a little lopsided, though, that the aforementioned two lenient passages on ancillary restraints and the by-effect standard

limit themselves to database (copy-)rights and have no equivalent for, say, information exchanges in the context of know-how or software copyright licensing, even though the latter two technology rights even qualify for a strong safe harbour. The licensing of commercial trade secrets, on the other hand, may, indeed, carry a structurally higher risk of problematic information exchanges. It aligns with this assumption that paragraphs 68 et seq of the TT Guidelines make no encouraging mention of commercial trade secrets licences in the context of information exchange.

VI. Data Exchanges Mandated or Protected by Other Union Law

Union and Member State laws have created a complex, in some respects a convoluted legal framework for data transactions.[79] The TT Rules and their application must endeavour to fit into this landscape as best they can. Against this backdrop, it comes as no surprise, but neither as a substantive interplay guidance, that the TT Guidelines (para 73) declare themselves to apply 'without prejudice' to the GDPR and 'other Union law applicable to the exchange of data'. In two respects, however, the TT Guidelines do provide more detailed guidance.

[79] Cf Digital Omnibus, Proposal for a Regulation of the European Parliament and of the Council, COM(2025) [...] final, 2, 5 et seq; Drexl, Conde Gallego and Kim (n 18) 740; Drexl and others, Position Statement Data Act 2022 (n 65), para 4 et seq, 34 et seq (for an analysis of the complex relationship between the Data Act and existing rights such as the *sui generis* right and the protection of trade secrets), 163 et seq (for an analysis of the complexity and the potentially 'confusing' situation arising from the rules on international data transfers (Chapter VII of the Data Act)).

A. Data Act

First and foremost, 'the Commission considers that data-sharing agreements mandated by Chapter II of the Data Act will generally fall outside the prohibition of Article 101(1) of the Treaty and/or will satisfy the conditions of Article 101(3)'[80] unless such data sharing disguises other agreements restricting competition by object. The parallel use of the term 'generally' in paragraphs 64 (database rights) and 75 suggests that this language establishes a soft safe harbour also for the pertinent Data Act sharing agreements. It points in the same direction that Article 43 Data Act withdraws sui generis protection for databases under the Data Act, thereby in principle also removing their soft safe harbour protection under the TT Guidelines – a general soft safe harbour for Data Act sharing reinstates said protection because it applies irrespective of whether shared databases enjoy sui generis protection or not.

On the other hand, paragraph 75 was clearly introduced into the Guidelines to express strong competition law restraint vis-à-vis Data Act-governed transactions. The 2025 draft Guidelines did not yet contain such language and were apparently, in this respect, considered unsatisfactory. Both strong and soft safe harbours under a Block Exemption regime operate, in their doctrinal core, as a generalized application of Article 101(3) TFEU to a typified class of agreements.[81] One prong of paragraph 75 locates, however, the pertinent Data Act sharing agreements outside of Article 101(1) TFEU in the first place, which amounts to a stronger protection than the typical safe harbour mechanism, not only at a doctrinal but also at a practice level because, without applicability of Article 101(1) TFEU,

[80] 2026 Guidelines, para 75 (citation omitted).

[81] Cf 2026 TTBER, art 2(1): 'pursuant to Article 101(3)'; Klawitter and Jänich (n 74) para 17 et seq.

the Commission can have no discretion – as it does for soft safe harbours – on whether to enforce the provision against a given sharing agreement.

Nonetheless, it seems more convincing to interpret the TT Guidelines restraint towards Data Act agreements as a protection that is at least not stronger than the strong safe harbour in Article 2(1), (3) TTBER. The second prong of paragraph 75 TT Guidelines ('and/or will satisfy the conditions of Article 101(3)') leaves room for a safe harbour based on Article 101(3) TFEU, while also reflecting some incertitude ('and/or') over whether Data Act sharing agreements belong outside Article 101(1) TFEU or inside the provision's scope, albeit shielded by an Article 101(3) TFEU safe harbour. More importantly, the Data Act mechanisms for controlling the content of Chapter II sharing agreements, especially Article 8 Data Act on FRAND access and Article 13 Data Act on unfair terms, ensure no scrutiny for hardcore or excluded restrictions in the sense of Article 4, 5 TTBER. The Data Act rationales do not generally require competition law to tolerate hardcore or excluded restrictions because of the specific Data Act context. Why should, for example, a data holder sharing IoT data with a recipient pursuant to Article 5 Data Act enjoy unfettered latitude to dictate the recipient's prices for products that are based on the shared data (Article 2(1)(a), (2)(a) TTBER) or to restrict the territory into which the recipient can sell such products (Article 2(1)(c), (2)(b) TTBER)? Theoretically, Data Act enforcement may develop the broad concepts of FRAND compliance and contractual fairness to cover the TTBER's hardcore and excluded restrictions. Some more specific Data Act provisions may have potential as well, for example Article 13(5)(b) Data Act (illegitimate access to the other party's data) regarding exclusive back-licensing (Article 5(1)(a) TTBER). However, relying solely on the operationalisation of such Data Act concepts to safeguard competition law seems too uncertain and slow to justify – at least at present – a categorical exemption

from competition law scrutiny.[82] Such scrutiny must be exercised by TT Rules which must, consequently, remain applicable under a soft safe harbour approach.

In any case, any exemption of Data Act transactions from competition law scrutiny can only be limited to a sharing that is mandatory under the Data Act. If competition law (enforcement) were to completely stand aside whenever such an element of mandatory Data Act sharing is present, it could not reliably detect and scrutinize voluntary additional data transactions the parties may engage in at the occasion of a mandatory sharing.

The soft safe harbour approach proffered here does not disregard the restrained language of paragraph 75 TT Guidelines but accepts it to constitute a strong protection for sharing agreements under Chapter II of the Data Act by narrowing the room for discretion of competition law enforcers and orientating it towards a finding that – 'generally' but not necessarily always – such agreements comply also with competition law.

B. Further Sharing Mandates

Much weaker TT Guidelines language privileges data licensing 'mandated by a data-sharing obligation imposed by Union legislation' (para 74). Such obligations will merely be taken 'into account' when applying the 'principles of' the TTBER and TT Guidelines. Furthermore, the Guidelines (para 73) note that 'to the extent that undertakings retain discretion on how to implement such legislation, Article 101 of the Treaty continues to apply'.

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[82] A need for scrutiny beyond the general level of the Data Act is further evidenced by the sectoral complexities of specific data regimes, such as those governing rail data. In the railway sector, specialised regulations for interoperability and capacity management already mandate data sharing under much stricter technical and competitive constraints than the horizontal Data Act. Cf Commission Delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services [2017] OJ L272/1.

A fitting example for such a sharing obligation would be Article 6(10) DMA which orders gatekeepers to provide business users with real-time access to data related to the use of the relevant gatekeeper services by those business users and their customers. Taking Article 6(10) DMA 'into account', an assessment under the TT Guidelines should not find fault with gatekeeper conduct to the extent it is objectively necessary to fulfil the requirements of this provision. Where, however, the gatekeeper decides on modalities of its conduct not prescribed by the DMA or a Commission decision implementing the DMA, as for example on data formats and APIs provided to its business users, there is room for an infringement of Article 101 TFEU.

As another example, Article 53(1)(b) AI Act obliges the providers of general-purpose AI (GPAI) models to 'make available information and documentation to providers of AI systems who intend to integrate the general-purpose AI model into their AI systems'. Since the provision of such information for usage by the AI system providers will frequently amount to a license for the production of AI system services, data transactions under Article 53(1)(b) AI Act will partly fall under the TTBER and TT Guidelines. Again, beyond the steps mandatory for complying with the provision, and to be accounted for as such by competition law, competition law scrutiny can be appropriate, for example where the provider of the GPAI model ties[83] receipt of the information described in Article 53(1)(b) AI Act to the use of an additional service – e.g. a specific transmission service – beyond its GPAI model.

[83] On tying elements of TT licences, see 2026 Guidelines, para 245 et seq.

C. Data Licensing in Scope of Other BERs

Data licensing can be in scope not only of the TTBER but also of other BERs. Their data-specific delineation[84] – for example as to whether distributed data processing as such constitutes specialisation or as to when data-based services are sufficiently identified in an agreement to qualify that agreement as a 'technology transfer' instead of a more open-ended R&D agreement – is a task beyond this contribution's remit. A passing remark notes, however, that neither the Specialisation BER, nor the R&D BER, nor their accompanying chapters in the Horizontal Guidelines contain, so far, specific language akin to the TT Guidelines' chapter on data licensing. Until a future revision of these rules may remedy this lacuna, pertinent principles of, and implementing practice under, the TT Guidelines could be used as helpful guidance across BERs.

An example of such relevance is the treatment of 'grant-back' obligations in data-driven R&D: in AI-related R&D collaborations, one party frequently provides a 'raw' dataset (e.g., sensor data from industrial machines) which the other party then processes, cleans, and labels to train an AI model. This data optimization process often creates a new, highly valuable asset. The provider of the raw data (the 'licensor' in spirit) may stipulate that any optimizations or enriched datasets created by the developer (the 'licensee') must be made available (exclusively or non-exclusively) to it. The TT Guidelines provide an assessment framework for such obligations which distinguishes between exclusive and non-exclusive grant-back obligations.[85] Whereas exclusive grant-back obligations qualify as

[84] According to its art 9, the TTBER does not apply to licensing arrangements in research and development agreements covered by the R&D Regulation or in specialisation agreements covered by the Specialisation Regulation, see also recital 7 TTBER. The delineation depends primarily on the objective 'centre of gravity' of the agreement, see Nagel, 'TT-GVO Einleitung' (n 10) para 90 et seq.

[85] 2026 Guidelines, para 156 et seq.

excluded restrictions (Article 5(1)(a) TTBER) which carry a high risk of violating Article 101(1) TFEU, the assessment of non-exclusive grant-back obligations is more sensitive to the case-specific context, for example the degree of market power held by the licensor. While the R&D BER focuses on the joint use of 'results', it is silent on grant-backs regarding intermediary data products of the cooperation. Applying the TT Guidelines' logic in such settings can help to identify a potential stifling of broader innovation dynamics, for example because the licensee is prevented or disincentivized from using its optimized data in fields not covered by the R&D agreement.

VII. Conclusions

The revised TT Rules make an important, pioneering contribution to the EU competition law treatment of an increasingly significant type of technology transfers. Taken as a whole, their tiered architecture is a workable and in many ways convincing approach to a heterogeneous set of transaction assets.

As practical enforcement experience builds up, the development of a richer and more differentiated body of guidance, possibly also for integration into future iterations of the Guidelines, would be desirable. Such future guidance might address, inter alia, data-specific sources of transactional leverage; contractual provisions both typical in commercial practice and material for competition, including the allocation of background and foreground entitlements to data, restrictions on licensee transactions with third parties, or also data processing infrastructure guardrails. It might further engage with the particularities of network licensing structures, characteristic for example of digital ecosystems, where data flow multilaterally between platform operators, complementors and end-users in ways the essentially bilateral concept of the TT Rules does not capture well.

Sectoral specificities could be addressed as well: data licensing can take quite different shapes in the context of, for example,[86] software or AI models as a service (SaaS/MaaS), AI training, analytics tools drawing on transaction data from multi-sided digital platforms, connected IoT devices, utility infrastructure, life-sciences patient or treatment data, or the defence sector.

As regards the broader framework, the prospect of comprehensive Union legislation on data transactions in the short to medium term appears unrealistic. Nonetheless, the constituent instruments of the existing framework and the bodies applying them ought to aspire towards a system that is not merely coherent in principle but also well-integrated in its practical operation. The joint guidance issued by the European Data Protection Board and the European Commission on the interplay between data protection and competition law[87] offers a promising, if still early, illustration of what such coordination can yield. Initiatives of this kind, oriented towards a coherent and operationally robust treatment of data licences, would correspond well to the steadily growing importance of these transactions.

[86] On important data licensing areas in the economy, see also Picht, Expert Report (n 9), para 36 et seq.

[87] European Data Protection Board, 'DMA and GDPR: EDPB and European Commission endorse joint guidelines to clarify common provisions' <https://www.edpb.europa.eu/news/news/2025/dma-and-gdpr-edpb-and-european-commission-endorse-joint-guidelines-clarify-common_en> (last accessed: 5 May 2026).