

## DA.125 Contract w/ holder on trade secret TOMs

Authors: Winfried Veil

Last update: 2023-08-06 15:10:14 | By: Winfried Veil

Created at: 2023-08-06 11:36:29

### Art. 5 (8) - (8c) Data Act - Trialogue Agreement

8. **Trade secrets shall be preserved** and shall only be disclosed to third parties to the extent that they are strictly necessary to fulfil the purpose agreed between the user and the third party. The data holder or the trade secret holder when it is not the data holder shall identify the data which are protected as trade secrets, including in the relevant metadata, and **shall agree** with the third party all proportionate **technical and organisational measures** necessary to preserve the confidentiality of the shared data, such as model contractual terms, confidentiality agreements, strict access protocols, technical standards and the application of codes of conduct.

8a. Where there is no agreement on the necessary measures or if the third party fails to implement the agreed measures or undermines the confidentiality of the trade secrets, the **data holder may withhold or**, as the case may be, **suspend the sharing of data identified as trade secrets**. The decision of the data holder shall be duly **substantiated** and provided in writing without undue delay to the third party.

In such cases, the data holder shall **notify** the national competent authority designated in accordance with Article 31 that it has withheld or suspended the sharing of data and identify which measures have not been agreed or implemented and, where relevant, which trade secrets have had their confidentiality compromised.

8b. In exceptional circumstances, when the data holder who is a trade secret holder can demonstrate that it is highly likely to suffer serious economic damage from the disclosure of trade secrets, despite the technical and organisational measures taken by the third party, that data holder **may refuse** on a case-by-case basis **the request for access** to the specific data in question. Such demonstration shall be duly **substantiated**, based on objective elements, in particular the enforceability of trade secrets protection in third countries, the nature and level of confidentiality of the data requested, the uniqueness and novelty of the product, and provided in writing and without undue delay. When the data holder refuses to share data pursuant to this Article, it shall **notify** the national competent authority designated in accordance with Article 31.

8c. Without prejudice to the **third party's right to seek redress** at any stage before a court or a tribunal of a Member State, the third party wishing to challenge the data holder's decision to refuse, withhold or suspend the sharing of data in accordance with paragraphs 8a and 8b may:

(a) **lodge** in accordance with Article 31(3), point (b), **a complaint** with the national competent authority,

which shall, without undue delay, decide whether and under which conditions the data sharing shall start or resume; or

(b) agree with the data holder to **refer the matter to a dispute settlement body** in accordance with Article 10(1b).

#### **Art. 8 (6) Data Act - Trialogue Agreement**

Unless otherwise provided by Union law, including Articles 4(3), 5(8) of this Regulation, or by national legislation adopted in accordance with Union law, an obligation to make data available to a data recipient shall not oblige the disclosure of trade secrets within the meaning of Directive (EU) 2016/943.