

Swiss Transborder Data Flow Agreement

(for outsourcing of data processing)

by and between

[Company Name], [Address]

(hereinafter **Data Exporter**)

and

[Company Name], [Address]

(hereinafter **Data Importer**)

1. Purpose

This Swiss Transborder Data Flow Agreement (the **Agreement**) is entered into by and between the Data Exporter and the Data Importer to provide adequate protection for Personal Data in situations in which such data is transferred from the Data Exporter established in Switzerland to the Data Importer established in another country for the purposes of processing such data on behalf of the Data Exporter. [This Agreement, however, does not in any way oblige the Data Exporter to transfer Personal Data to the Data Importer.]¹

The purposes of the transfer to, and processing by, the Data Importer are described in Annex 1 to this Agreement. Annex 1 forms an integral part of this Agreement and may be amended by the Data Exporter from time to time.

¹ Words or sentences in square brackets are optional.

2. Scope

This Agreement applies to all Personal Data relating to third parties that is

- (i) transferred (which shall include making it available for access) from the Data Exporter to the Data Importer; or
- (ii) processed by the Data Importer on behalf of the Data Exporter.

The catalogue [and classification of sensitivity] of the Personal Data to be transferred and/or processed is found in Section 1 of Annex 1 to this Agreement.

3. Definitions

Unless defined otherwise herein, all terms shall have the same meaning as defined in the Swiss Federal Act of 19 June 1992 on Data Protection (**FADP**). Any reference to the FADP shall always also include a reference to the Ordinance to the FADP (the **OFADP**) and any other provision of the substantive Swiss data protection law.

For the purposes of this Agreement:

- (i) '*Data Exporter*' means the natural or legal person, public authority, agency or any other body established in Switzerland which alone or jointly with others determines the purposes and means of the processing of Personal Data and which transfers such data to another country for the purposes of its processing on his behalf.
- (ii) '*Data Importer*' means a natural or legal person, public authority, agency or any other body established in another country which agrees to receive Personal Data from the Data Exporter for the purposes of processing such data on behalf of the latter after the transfer in accordance with his instructions.
- (iii) '*Subprocessor*' means any processor engaged by the Data Importer (or by any other Subprocessor of the Data Importer) who agrees to receive from the Data Importer (or from any other Subprocessor of the Data Importer) Personal Data exclusively intended for processing on behalf of the Data Exporter after the transfer in accordance with his instructions and the terms of the written subcontract.

4. Obligations of the Data Exporter

The Data Exporter warrants that the Personal Data to be transferred has been collected and processed in accordance with the requirements of the FADP. The Data Exporter further warrants that the transfer of the Personal Data and the processing of such data by the Data Importer as set forth in this Agreement is admissible under the FADP and the Data Exporter undertakes that the transfer is made in accordance with the FADP. [Particularly the Data Exporter warrants that

- (i) prior to any transfer of Personal Data, it has informed the Persons Affected and has complied with any notification and/or registration obligations set forth by the FADP;
- (ii) the intended purposes of the transfer and processing have been communicated to the Persons Affected upon the collection of the Personal Data, were apparent based on the circumstances, are provided for by statutory law, or reflect a preponderant interest pursuant to Art. 13 para. 2 FADP;
- (iii) the transfer to, and processing by, the Data Importer pursuant to this Agreement is not prohibited by a statutory or contractual duty of confidentiality; and
- (iv) it will not require the Data Importer to undertake a processing of Personal Data that the Data Exporter would not be permitted to carry out itself.]

The Data Exporter shall verify that the technical and organizational measures, as required by Art. 7 para. 1 FADP and Art. 8 et seq. OFADP, undertaken by the Data Importer as set forth in Annex 2 to this Agreement, are sufficient to protect the transferred Personal Data from any unauthorized processing. [The Data Exporter warrants that the technical and organizational measures set forth in Annex 2 to this Agreement are sufficient in this regard.] Annex 2 forms an integral part of this Agreement and may be amended by the Data Exporter from time to time.

5. Obligations of the Data Importer

The Data Importer undertakes and warrants that it will process any and all Personal Data received from or made available by the Data Exporter or derived from such data

- (i) solely on behalf and solely for the purposes of the Data Exporter as set forth in Section 2 of Annex 1 or as otherwise expressly provided for by the Data Exporter or agreed with the Data Exporter;
- (ii) in accordance with the instructions of the Data Exporter [(which may be given by any means, including e-mail)]; and
- (iii) in compliance with this Agreement.

The Data Importer undertakes, prior to any processing, appropriate technical and organizational measures as defined by the FADP (particularly Art. 7 para. 1 FADP and Art. 8 et seq. OFADP) and as set forth in Annex 2 to this Agreement to protect the transferred Personal Data from unauthorized processing, including any processing not expressly authorized by this Agreement and including accidental loss or destruction of, or damage to, such Personal Data.

The Data Importer will promptly inform, and cooperate with, the Data Exporter

- (i) if it believes that it may no longer be able, or no longer is able, to comply with this Agreement, particularly in case it receives or must reasonably expect to receive a request or order of a competent authority requiring it to disclose, or refrain from further processing, some or all Personal Data to which this Agreement applies; or
- (ii) if any accidental or unauthorized access has occurred.

The Data Importer shall not subcontract any of its processing operations performed on behalf of the Data Exporter under this Agreement without the prior written consent of the Data Exporter. [No consent shall be given if (i) Personal Data or the processing of such Personal Data is to be transferred to an operation in a third country or to a third party (including an affiliate) which is not subject to substantially similar obligations as the Data Importer under this Agreement, or (ii) the enforcement of the present Agreement by the Data Exporter cannot be reasonably ensured.]

In the event of subprocessing, the Data Importer undertakes that

- (i) it has previously informed the Data Exporter and obtained its prior written consent;

- (ii) the subcontracting of the processing of Personal Data may only consist of the processing operations agreed in this Agreement;
- (iii) Data Importer and Subprocessor shall sign an agreement which will impose the same obligations on the Subprocessor as those imposed on the Data Importer under this Agreement²;
- (iv) it will promptly send a copy of any Subprocessor agreement it concludes under this Agreement to the Data Exporter.

Where the Subprocessor fails to fulfil its data protection obligations under such written agreement, the Data Importer shall remain fully liable to the Data Exporter for the performance of the Subprocessor's obligations under such agreement.

[The Data Exporter has the right to, at any time, in any reasonable manner and with the Data Importer's full cooperation, audit the Data Importer's (and any Subprocessor's) compliance with the Agreement or to have such audit performed by a qualified third party bound by a duty of confidentiality. The costs will be borne by the Data Exporter; if any non-compliance is revealed which may be of significance for Persons Affected, the Data Importer shall bear the costs.]

6. Rights of Persons Affected

The Data Exporter is responsible that the Persons Affected are provided with their right of information (right of access), correction, blocking, suppression or deletion, as available under the FADP. The Data Importer (and any Subprocessor) will fully and without delay cooperate with the Data Exporter in, and provide to the Data Exporter the necessary services for, fulfilling such requests or inquiries of Persons Affected. [The Data Importer (and any Subprocessor) will immediately forward to the Data Exporter any requests or inquiries it directly receives without responding to them on the merits.]

² This requirement may be satisfied by the Subprocessor co-signing this Agreement.

7. Term and Termination

This Agreement shall be binding between the parties upon execution by both parties and shall remain in place for an indefinite period of time. [It shall terminate automatically upon the termination of the services provided by the Data Importer and for which this Agreement was entered into.] Each party may [also] terminate this Agreement at any time with immediate effect by providing a written notice. The Data Exporter may also suspend the transfer of Personal Data and/or its processing at any time.

Upon termination of this Agreement for whatever reason, the Data Importer (and any Subprocessor) shall,

- (i) immediately return any Personal Data and copies thereof to which this Agreement applies, including the Personal Data transferred by the Data Exporter; and, to the extent this is not possible,
- (ii) destroy such Personal Data and copies thereof, and certify to the Data Exporter in writing that it has done so;

unless legislation imposed upon the Data Importer prevents it from returning or destroying all or parts of the Personal Data to which this Agreement applies, in which case the Data Importer informs the Data Exporter and undertakes to keep such Personal Data confidential and not actively process it anymore.

Upon termination of this Agreement, any other contract signed by the Data Importer and the Subprocessor for the purposes of processing and transferring Personal Data under this Agreement shall be terminated automatically. This, however, does not concern any other contract signed by the Data Exporter and Data Importer for other purposes.

8. Miscellaneous

Each party will provide any court or supervisory agency, and the Data Exporter will provide any Person Affected, a copy or the content of this Agreement upon its request or if required by law. [Annex 2 to this Agreement shall be summarized to the extent admissible by law and necessary for security reasons.] [In case of a production request by a Person Affected, the Data Exporter may summarize any part of this Agreement (including its Annexes) to the extent necessary for confidentiality and data protection reasons.]

The rights and obligations of each party to this Agreement are without prejudice and notwithstanding to any other rights and obligations the parties may or may not have under other agreements. This Agreement does not regulate the consequences that the execution of a right and performance of an obligation under this Agreement may have under another relationship among the parties.

[Each party will indemnify the other party in case of claims of third-parties or other damages which result from first-mentioned party's negligent or intentional failure to comply with this Agreement.]

Persons Affected may raise damages and other claims pursuant to the FADP relating to the transfer and/or processing of their Personal Data under this Agreement against either party.

This Agreement may only be modified in writing. The parties shall not assign this Agreement or any rights or obligations hereunder to any third party without the prior written consent of the other party.

This Agreement (and any agreement signed by the Data Importer and any Subprocessor for the purposes of processing and transferring Personal Data under this Agreement) shall be governed by and construed in accordance with the substantive laws of Switzerland. Any dispute arising out of or in connection with this Agreement (or any subprocessor agreement signed by the Data Importer and any Subprocessor for the purposes of processing and transferring Personal Data under this Agreement) or breach thereof, shall be exclusively settled by the ordinary courts at the seat of the Data Exporter in Switzerland. [In addition, each party shall be entitled to request any other competent court to order interim or provisional measures of any kind.]

Place, Date:

For the Data Exporter:

For the Data Importer

[Name], [Function]
[Company]

[Name], [Function]
[Company]

Annex 1

Description of the Transfer and Processing

- 1. Catalogue [and classification of sensitivity] of Personal Data to be transferred and processed:**

- 2. Purpose(s) of the transfer and processing:**

- 3. Categories of the Persons Affected:**

- 4. Persons who may access or receive the Personal Data:**

- 5. Data protection registration information of the Data Exporter:**

- 6. Additional useful information:**

- 7. Contact Information for Data Protection Inquiries:**

Annex 2

**Technical and Organizational Measures implemented by
the Data Importer**
