

These terms and conditions govern how LucaNet processes personal and other confidential data on the Customer's behalf in order to render services agreed upon in a corresponding contract.

1 Definitions

A **processor** is a *legal entity* that processes *personal data* on behalf of a *controller*.

Terms and conditions are those contained herein regarding the protection of data processed on the behalf of another party.

A **data subject** is an identified or identifiable natural person as defined by *data protection law*.

Cloud Service refers to all the *services* LucaNet provides to enable the Customer to use its software over the Internet. These include, for example:

- Software as a service (the *Customer* rents LucaNet software and uses it via the Internet)
- Hosting (here, the *Customer* has purchased an unlimited license and LucaNet runs the licensed software on its own servers)

Data protection law comprises the applicable legal provisions designed to protect individuals' rights with regard to the processing of their *personal data* within the framework of the *primary contract* in question and these terms and conditions. In this context, data protection law includes the *GDPR* as a minimum standard regardless of whether the *personal data* at hand is subject to the *GDPR*.

Data protection violations include the following:

- the inadvertent and/or unlawful destruction, modification, or disclosure of the *Customer's data*
- instances in which the *Customer's data* is lost or made accessible to a third party in an inadvertent and/or unlawful manner
- a comparable incident involving *personal data* that obligates the *controller* to notify the supervisory authority responsible or the *data subjects* in question in accordance with *data protection law*

The **General Data Protection Regulation** (GDPR), which governs the protection of *personal data*, will take effect throughout the EU on May 25, 2018.

EEA refers to the European Economic Area, which comprises the EU member-states, Iceland, Liechtenstein, and Norway.

The **primary contract** is the agreement between *LucaNet* and the *Customer* regarding *LucaNet's* provision of its *services* to the *Customer*.

The Customer is the party specified as *LucaNet's* contract partner in the *primary contract* in question.

Customer data includes all confidential data that the *Customer* transfers or otherwise makes accessible to *LucaNet* in connection with using its *services*. In addition to *personal data*, this data may comprise the trade secrets of the *Customer* or those of third parties.

LucaNet is the company within the *LucaNet* corporate group that is specified as the *Customer's* contract partner in the respective *primary contract*.

Personal data refers to all the information pertaining to a *data subject* that is protected by *data protection law* and transferred or otherwise made accessible to *LucaNet* by the *Customer* in connection with its use of *LucaNet's services*.

Professional Service comprises all other services that are not part of the Cloud Service, such as:

- Consulting
- Support
- Custom development services
- providing software updates for the licenses purchased by the Customer
- other services

A **legal entity** is a natural or legal person.

Services is a collective term for all the activities *LucaNet* has agreed to perform based on the primary contract (*Cloud Service* and/or *Professional Service*).

The **standard data protection clauses** are the European Commission's standard contractual clauses for *processors* (see Annex 1 to these data protection terms and conditions).

A **subcontracted processor** is a company affiliated with *LucaNet* or a third party that *LucaNet* engages to support the provision of its *services*.

A **controller** is a *legal entity* that dictates (either solely or in cooperation with others) the purposes for and means by which corresponding *personal data* is processed.

2 Scope of Application

1. These terms and conditions pertain to the processing of the Customer's data by LucaNet or its subcontracted processors for the purpose of providing services to the Customer.
2. These terms and conditions do not apply to non-production environments (beta systems) provided by LucaNet as part of its Cloud Service. The customer is to refrain from using beta systems as a storage location for any data that requires protection.
3. These terms and conditions do not apply to instances in which LucaNet is the controller within the meaning of the GDPR.

3 Controller, Processor, Interlocutor

1. LucaNet and the Customer hereby agree that both parties are responsible for reviewing and meeting the requirements stipulated for controllers and processors by data protection law.
2. The Customer is the controller within the meaning of the GDPR. The following legal entities are also controllers:
 - Legal entities enabled by the Customer to import personal data into systems that are accessible to LucaNet
 - legal entities permitted by the Customer to use the Cloud Service
3. LucaNet is the processor within the meaning of the GDPR.
4. The Customer will be LucaNet's sole interlocutor.
 - The Customer alone is responsible for obtaining all the approvals and consent relevant to the processing of its data in accordance with these terms and conditions.
 - When required in its role as a processor, it falls on the Customer alone to obtain the consent of all the relevant controllers regarding the use of LucaNet.
 - To the extent that the Customer grants approval or consent, issues directives, or indicates its agreement, it will do so on behalf of not only the Customer as a collective entity, but all other controllers that use the services in question, as well.
 - When LucaNet provides the Customer with information, this information will be considered received by the controllers the Customer has enabled to import personal data or use the Cloud Service. The Customer is responsible for passing such information and notifications on to the corresponding controllers.

4 Processing of the Customer's Data

Data Exporter

- The Customer (read: the controller) is considered the data exporter.
- If the Customer permits other controllers to use LucaNet's services, they will also be considered data exporters.

Data Importer

- LucaNet (read: the processor) is considered the data importer.
- In cases where LucaNet engages subcontracted processors to provide its services to the Customer, these processors are also data importers.

Type and Purpose of Processing

The type and purpose of the processing in question relates to the provision of the service agreed upon in the respective primary contract.

Data Subjects

Unless otherwise indicated by the data exporter, the personal data transferred can typically be placed in one of the following categories of data subjects:

- employees of the Customer
- employees of the Customer's business partners
- other individuals whose personal data is stored in the Cloud Service or transferred or otherwise made accessible to LucaNet as part of its Professional Service

Categories of Personal Data

Professional Service Most personal data can be placed in one of the following data categories:

- names, telephone numbers, e-mail addresses, time zones, addresses
- contract and invoice data
- Support messages
- other personal data the Customer makes accessible to LucaNet to facilitate the provision of Professional Service

Cloud Service

- In the context of the Cloud Service, the Customer alone is responsible for determining which data categories are processed.
- Most personal data can be placed in one of the following data categories:
 - names, telephone numbers, e-mail addresses, time zones, addresses
 - logs of instances in which authorized users have accessed systems
 - personal data typically contained in financial, accounting, and controlling data
 - other application-specific personal data that the customer's authorized users store in the Cloud Service

Using Data for LucaNet's Own Purposes

LucaNet will not use the Customer's data for its own purposes unless doing so is necessary to provide or improve the Customer's service.

Disclosure

1. LucaNet will not reveal any of the Customer's data outside of its systems and facilities or those of its affiliated companies unless:
 - at the Customer's request
 - doing so was agreed upon in the primary contract
 - as required by law.
2. LucaNet will not disclose the Customer's data to law enforcement authorities unless required by law. Should any enforcement authorities request the Customer's data from LucaNet, LucaNet will propose that the authorities obtain the data from the Customer directly. If LucaNet is obligated to disclose the Customer's data to a law enforcement authority, it will notify the Customer immediately and provide a copy of the corresponding request unless doing so is prohibited by law.
3. LucaNet will deny requests from any other third parties regarding the Customer's data unless accommodating them is required by law. Should a given inquiry be permissible, LucaNet will propose that the third party in question obtain the requested data from the Customer directly. In such situations, LucaNet is authorized to provide the third party with the Customer's basic contact information.
4. LucaNet will not provide the following to any third party:
 - direct, indirect, extensive, or unrestricted access to the Customer's data
 - any encryption keys used to secure the Customer's data or any means of circumventing such encryption

5 Security

LucaNet's Efforts to Ensure Security

1. To protect the Customer's data, LucaNet has taken (and will continue to uphold) the technical and organizational measures described in a separate IT Security Guideline.
2. The current IT Security Guideline is available for download at the LucaNet website.
3. LucaNet may modify its IT Security Guideline at any time and without prior notice provided that it ensures a comparable or higher level of protection.
4. At LucaNet's website, the Customer can subscribe to a newsletter that will provide updates on any changes made to the IT Security Guideline.
5. Having reviewed the IT Security Guideline, the Customer hereby acknowledges that the measures it describes are appropriate in consideration of the current state of the corresponding technology; the costs of their implementation; and the type, scope, context, and purposes of LucaNet's efforts to process the Customer's data in connection with the services it uses.

The Customer's Efforts to Ensure Security

1. In cases where LucaNet renders its services on the Customer's premises or the Customer grants LucaNet access to its data (including that which is stored in the Cloud Service), LucaNet will, to a reasonable extent, follow the technical and organizational measures undertaken by the Customer to protect its data.
2. The Customer will, on its own authority, provide LucaNet with passwords and authorizations for every instance in which its data is to be accessed. The Customer will terminate this access at its own discretion.
3. The Customer will not grant LucaNet access to its data unless it is essential to the provision of a given service.
4. The Customer is obligated to notify LucaNet immediately of any potential misuse of its user accounts or authentication data (and any other security-relevant incidents) related to its usage of LucaNet's services.

Transmission of Customer Data

Those who send e-mails or physical data media or provide upload or download functionality online must ensure that the Customer's data is sufficiently protected in this regard.

6 Customer Directives

1. LucaNet will process the Customer's data solely in accordance with the Customer's documented directives.
2. The Customer's primary contract, including these terms and conditions, constitutes a documented directive of this kind.
3. The Customer's use of the Cloud Service and any further directives issued in writing (including in e-mails) by the Customer in the course of its use of LucaNet's Professional Service will also be considered documented directives.
4. LucaNet will make every reasonable effort to follow the Customer's directives, provided that they are:
 - required by data protection law
 - technically feasible
 - without modifying the provision of the service in question

If one of the aforementioned exceptions applies, LucaNet is otherwise unable to accommodate a given directive, or believes that a directive may violate data protection law, LucaNet will notify the Customer immediately by e-mail.

7 Authorized Individuals

With respect to individuals assigned to process the Customer's data (authorized individuals), LucaNet will ensure the following:

1. Authorized individuals will process the Customer's data solely in accordance with the Customer's directives unless another type of processing is absolutely required by law.
2. Authorized individuals are obligated to maintain the confidentiality of the Customer's data, including after their respective assignments end.

8 Inquiries from Data Subjects

1. Should LucaNet receive an inquiry from one of the Customer's data subjects who wishes to exercise one of the rights granted by data protection law, LucaNet will refer said data subject to the Customer.
2. LucaNet will accommodate any reasonable requests it receives from the Customer regarding assistance in handling inquiries from data subjects.

9 Data protection violations

1. Upon learning of a data protection violation, LucaNet will immediately take appropriate measures to mitigate the ramifications thereof and minimize any resulting damage.
2. LucaNet will immediately inform the Customer of the data protection violation at hand and provide adequate information to assist the Customer in fulfilling any of its obligations to report such violations.
3. Any notification of this kind does not constitute an admission of fault or liability on the part of LucaNet and may not be construed as such.

10 Rectification and Erasure of Personal Data

Cloud Service

1. LucaNet provides functions that aid the Customer's ability to correct and delete personal data in the Cloud Service or limit its processing in accordance with data protection law. If a function of this kind is not provided, LucaNet will correct, delete, or limit the processing of personal data in accordance with the Customer's directives and data protection law.
2. At the end of the respective contract, the Customer hereby directs LucaNet to delete any of its data that remains in the Cloud Service within a reasonable time frame (read: within six months at the latest) unless retaining it is required by law.

Professional Service

1. In accordance with the Customer's directives and data protection law, LucaNet will correct, delete, and/or restrict the processing of the personal data it has in its possession in order to render its Professional Service.
2. Once the respective contract is fulfilled, the Customer hereby directs LucaNet to delete any of its data that remains in LucaNet's possession within a reasonable time frame (read: within six months at the latest) unless retaining it is required by law.

11 Audits

Audits Conducted by the Customer

1. The Customer (or an independent external auditor commissioned by the Customer and deemed appropriate by LucaNet) is entitled to assess compliance with the IT Security Guideline in connection with the service it has requested provided that one of the following requirements is met:
 - LucaNet has not provided sufficient proof of its compliance with the IT Security Guideline. Such proof can be rendered in the form of certification of the service used by the Customer based on ISO 27001 or a comparable standard.
 - A Data protection violation has occurred.
 - The supervisory authority responsible for the Customer is performing an official audit.
 - In accordance with data protection law, the Customer has the right to perform a direct audit once every 12 months (unless a particular data protection law requires more frequent auditing).
2. Auditors who are not sufficiently qualified or independent or constitute competitors of LucaNet will not be considered appropriate.
3. The Customer will announce audits at least eight weeks in advance unless a shorter notice period is required by data protection law or the supervisory authority responsible.
4. LucaNet and the Customer will exercise good faith and reasonable discretion in agreeing on the scope and frequency of audits.
5. When an audit is conducted, the Customer will bear both its own costs and those incurred by LucaNet. Should an audit reveal a significant violation of these terms and conditions on the part of LucaNet, LucaNet will bear its own costs and remedy the violation immediately at its own expense.

Audits Conducted by Other Controllers

1. Every other controller may only audit compliance with the IT Security Guideline in connection with the service requested as described in the previous section if one of the cases specified applies to the other controller in question.
2. An audit of this kind must be conducted by the Customer unless the applicable data protection laws demand that it be carried out by the other controller in question.
3. Should multiple controllers request an audit, the Customer will use any and all reasonable means to combine these audits in order to avoid redundant efforts.

12 Subcontracted Processors

General Consent

The Customer hereby grants its general consent to having services provided and its data processed by subcontracted processors provided that the following requirements are met:

1. LucaNet or one of its affiliated companies will commission the subcontracted processor by entering into written contracts in advance (which may include electronic formats).
2. LucaNet or an affiliated company is confident that the technical and organizational measures undertaken by the subcontracted processor afford the level of protection required by these terms and conditions.
3. LucaNet will be liable to the Customer for any violations of these terms and conditions that are committed by its subcontracted processors.
4. LucaNet will provide the Customer with an opportunity to learn more about the new subcontracted processor prior to its engagement (see next section).
5. The Customer is entitled to raise justifiable objections.

List of Subcontracted Processors

1. The current list of LucaNet's subcontracted processors is available for download at the LucaNet website.
2. At minimum, the list is to include the name and region of each subcontracted processor and the services it provides to LucaNet.
3. At LucaNet's website, the Customer can subscribe to a newsletter that will provide updates on any changes made to this list.
4. Should LucaNet be planning to engage a new subcontracted processor, a corresponding newsletter will be issued at least four weeks before this occurs.

Objections

1. Should the Customer have a justifiable objection to having the new subcontracted processor provide services and process its data, the Customer is entitled to raise said objection in writing (including by e-mail) no later than one week after the respective newsletter is issued. If the Customer does not raise an objection in accordance with the applicable time restrictions and formal requirements, the new subcontracted processor will be viewed as accepted by the Customer.
2. Should an objection be raised in line with the applicable time restrictions and formal requirements, LucaNet and the Customer will come together in good faith to discuss a corresponding solution. LucaNet will then choose one of the following options:
 - LucaNet will not use the new subcontracted processor.
 - LucaNet will take the corrective measures requested by the Customer in its objection and use the new subcontracted processor.
3. If neither of these options is reasonably feasible and the Customer maintains its justifiable objection, either party is entitled to terminate the primary contract in writing with respect to the services for which the new subcontracted processor is to be engaged within one week. This termination will not affect the remaining provisions of the primary contract. The time at which any such termination is to take effect may not be more than four weeks after the newsletter regarding the new subcontracted processor is issued.
4. If the Customer's objection remains unresolved within this four-week period and LucaNet does not receive a termination that meets the applicable time restrictions and formal requirements, the subcontracted processor will be viewed as accepted.
5. Neither party will consider a termination effected within the meaning of this section as the fault of the other party and no penalties will be imposed.

Emergencies

1. LucaNet is entitled to replace a subcontracted processor without prior notice should it become immediately necessary due to security reasons or other pressing concerns.
2. In such cases, LucaNet will notify the Customer of the new subcontracted processor immediately after one is appointed.
3. The Objections section applies accordingly.

Expanded Services

This section applies to cases in which the services of a subcontracted processor are extended in a significant manner.

13 International Processing

LucaNet is authorized to engage subcontracted processors located outside of the country in which the Customer operates in the processing of the Customer's data provided that it complies with these terms and conditions and the provisions of data protection law.

Standard Data Protection Clauses

This section applies to each of the following cases:

- Within the purview of the GDPR, a third country, or an international organization, the personal data of a given controller is not being processed with a sufficient level of data protection within the meaning of Article 45 of the GDPR.
- Personal data pertaining to another controller is to be processed internationally, which requires (in accordance with the applicable rights of the controller) an appropriate level of data protection that can be achieved by establishing standard data protection clauses.

In these cases, the following provisions apply:

1. The Customer (the data exporter) and LucaNet (the data importer) agree to the validity of the standard data protection clauses.
2. In its role as an independent holder of rights and obligations, the Customer hereby accedes to the standard data protection clauses that have been agreed upon between LucaNet (or one of its affiliated companies) and the subcontracted processor.
3. Other controllers the Customer permits to use LucaNet's services must agree to the standard data protection clauses with LucaNet and/or the subcontracted processors in question in the same manner as the Customer. In such cases, the Customer will agree to the standard data protection clauses on behalf of these other controllers.
4. Should any of them prove contradictory, none of the provisions of the primary contract in question or of these terms and conditions may be formulated to take priority over any provision of the standard data protection clauses.
5. The standard data protection clauses that apply upon contract conclusion are enclosed.
6. The standard data protection clauses are subject to the laws of the country in which the controller maintains its base of operations.
7. Should the European Commission publish subsequent versions of the standard data protection clauses, they will automatically take effect.
8. The details to be specified in Annexes 1 and 2 of the standard data protection clauses can be found in the Processing of the Customer's Data section.

EU-Cloud Service (Optional)

This section applies to the following case:

- The primary contract in question includes an explicit agreement between the Customer and LucaNet regarding the EU-Cloud Service option.

In these cases, the following provisions apply:

1. All the servers that house the Customer's data as part of the Cloud Service are located within the EEA or Switzerland.
2. In providing its Cloud Service to the Customer, LucaNet will only employ subcontracted processors located within the EEA or Switzerland.
3. LucaNet will not export any of the Customer's data that is stored in its Cloud Service to locations outside of the EEA and Switzerland.

14 Documentation Obligations

1. Each party is responsible for meeting its own documentation obligations. In particular, this applies to maintaining the processing records required by data protection law.
2. Each party is to provide appropriate support to the other in fulfilling its documentation obligations.

15 Additions and Other Modifications

1. LucaNet may expand or otherwise modify these terms and conditions:
 - when instructed by a supervisory authority
 - to comply with mandatory laws
 - to comply with a recognized code of conduct or a certification procedure that is to be approved or accredited in accordance with Articles 40, 42, and 43 of the GDPR
2. At LucaNet's website, the Customer can (and is hereby obligated to) subscribe to a newsletter that will provide updates on any changes made to these terms and conditions.

16 Contact Information

1. Should it believe that LucaNet is not meeting these terms and conditions, the Customer can contact LucaNet by mail or through its website.
2. Postal address:

LucaNet AG
Data Privacy
Alexanderplatz 1
10178 Berlin, Germany

Standard contractual clauses (2010-87-EU)

ANNEX

STANDARD CONTRACTUAL CLAUSES (PROCESSORS)

For the purposes of Article 26(2) of Directive 95/46/EC for the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection

Name of the data exporting organisation:

Address:

Tel.; fax; e-mail:

Other information needed to identify the organisation

.....

(the data **exporter**)

And

Name of the data importing organisation:

Address:

Tel.; fax; e-mail:

Other information needed to identify the organisation:

.....

(the data **importer**)

each a 'party'; together 'the parties',

HAVE AGREED on the following Contractual Clauses (the Clauses) in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1.

*Clause 1***Definitions**

For the purposes of the Clauses:

- (a) 'personal data', 'special categories of data', 'process/processing', 'controller', 'processor', 'data subject' and 'supervisory authority' shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾;
- (b) 'the data exporter' means the controller who transfers the personal data;
- (c) 'the data importer' means the processor who agrees to receive from the data exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country's system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;

⁽¹⁾ Parties may reproduce definitions and meanings contained in Directive 95/46/EC within this Clause if they considered it better for the contract to stand alone.

- (d) 'the sub-processor' means any processor engaged by the data importer or by any other sub-processor of the data importer who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for processing activities to be carried out on behalf of the data exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;
- (e) 'the applicable data protection law' means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established;
- (f) 'technical and organisational security measures' means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Clause 2

Details of the transfer

The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

Clause 3

Third-party beneficiary clause

1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.
2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

Clause 4

Obligations of the data exporter

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;
- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;

- (c) that the data importer will provide sufficient guarantees in respect of the technical and organisational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;
- (e) that it will ensure compliance with the security measures;
- (f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;
- (g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;
- (h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;
- (i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and
- (j) that it will ensure compliance with Clause 4(a) to (i).

Clause 5

Obligations of the data importer ⁽¹⁾

The data importer agrees and warrants:

- (a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (c) that it has implemented the technical and organisational security measures specified in Appendix 2 before processing the personal data transferred;

⁽¹⁾ Mandatory requirements of the national legislation applicable to the data importer which do not go beyond what is necessary in a democratic society on the basis of one of the interests listed in Article 13(1) of Directive 95/46/EC, that is, if they constitute a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of breaches of ethics for the regulated professions, an important economic or financial interest of the State or the protection of the data subject or the rights and freedoms of others, are not in contradiction with the standard contractual clauses. Some examples of such mandatory requirements which do not go beyond what is necessary in a democratic society are, inter alia, internationally recognised sanctions, tax-reporting requirements or anti-money-laundering reporting requirements.

- (d) that it will promptly notify the data exporter about:
- (i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
 - (ii) any accidental or unauthorised access; and
 - (iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;
- (e) to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (f) at the request of the data exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (g) to make available to the data subject upon request a copy of the Clauses, or any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;
- (h) that, in the event of sub-processing, it has previously informed the data exporter and obtained its prior written consent;
- (i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;
- (j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the data exporter.

Clause 6

Liability

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.

2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.

The data importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.

3. If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

Clause 7

Mediation and jurisdiction

1. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:

(a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;

(b) to refer the dispute to the courts in the Member State in which the data exporter is established.

2. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

Clause 8

Cooperation with supervisory authorities

1. The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.

2. The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.

3. The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the data importer, or any sub-processor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(b).

Clause 9

Governing law

The Clauses shall be governed by the law of the Member State in which the data exporter is established, namely

Clause 10

Variation of the contract

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

Clause 11

Sub-processing

1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses ⁽¹⁾. Where the sub-processor 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 sub-processor's obligations under such agreement.

2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.

3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established, namely

⁽¹⁾ This requirement may be satisfied by the sub-processor co-signing the contract entered into between the data exporter and the data importer under this Decision.

4. The data exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority.

Clause 12

Obligation after the termination of personal data-processing services

1. The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.

2. The data importer and the sub-processor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.

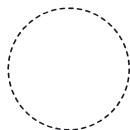
On behalf of the data exporter:

Name (written out in full):

Position:

Address:

Other information necessary in order for the contract to be binding (if any):



(stamp of organisation)

Signature

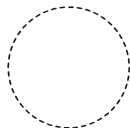
On behalf of the data importer:

Name (written out in full):

Position:

Address:

Other information necessary in order for the contract to be binding (if any):



(stamp of organisation)

Signature

Appendix 1

to the Standard Contractual Clauses

This Appendix forms part of the Clauses and must be completed and signed by the parties

The Member States may complete or specify, according to their national procedures, any additional necessary information to be contained in this Appendix

Data exporter

The data exporter is (please specify briefly your activities relevant to the transfer):

.....
.....
.....

Data importer

The data importer is (please specify briefly activities relevant to the transfer):

.....
.....
.....

Data subjects

The personal data transferred concern the following categories of data subjects (please specify):

.....
.....
.....

Categories of data

The personal data transferred concern the following categories of data (please specify):

.....
.....
.....

Special categories of data (if appropriate)

The personal data transferred concern the following special categories of data (please specify):

.....
.....
.....

Processing operations

The personal data transferred will be subject to the following basic processing activities (please specify):

.....
.....
.....

DATA EXPORTER

Name:

Authorised Signature

DATA IMPORTER

Name:

Authorised Signature

Appendix 2
to the Standard Contractual Clauses

This Appendix forms part of the Clauses and must be completed and signed by the parties.

Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(c) (or document/legislation attached):

.....

.....

.....

.....

ILLUSTRATIVE INDEMNIFICATION CLAUSE (OPTIONAL)

Liability

The parties agree that if one party is held liable for a violation of the clauses committed by the other party, the latter will, to the extent to which it is liable, indemnify the first party for any cost, charge, damages, expenses or loss it has incurred.

Indemnification is contingent upon:

- (a) the data exporter promptly notifying the data importer of a claim; and
- (b) the data importer being given the possibility to cooperate with the data exporter in the defence and settlement of the claim ⁽¹⁾.

⁽¹⁾ Paragraph on liabilities is optional.