Data Processing Agreement – explanatory notes

Introduction
A data processing agreement regulates the responsibilities involved in the processing of personal data **when TU Delft enlists the services of a third party for the data processing.**
The data processing agreement is a contract between the data controller (usually TU Delft) and the data processor, stipulating how the processor should handle personal data.

The data processing agreement is a detailed, but general document that must be adapted to suit the actual situation. It is important to do this in maximum detail as this gives better risk coverage and builds in contingencies for ensuring that the processor actually keeps to the agreement (see for example the provisions relating to fines and liability). These explanatory notes are public, but do not form part of the data processing agreement itself.

When should a data processing agreement be used?
The use of a data processing agreement is appropriate in situations in which, on behalf of the TU Delft Executive Board, a third party is deployed to supply specific services to TU Delft involving the processing of personal data for which the TU Delft Executive Board (referred to jointly as: 'TU Delft') is the data controller.

Please consult the TU Privacy Team (privacy-tu@tudelft.nl) or the intranet for the most recent version of the Model Data Processing Agreement.

When is TU Delft the controller?
TU Delft is the controller if, at its own initiative and in accordance with the General Data Protection Regulation (GDPR), it determines which personal data are collected, for which purpose, by which means and the way in which this happens. For TU Delft data processing, TU Delft itself is generally the controller.

When is the third party the processor?
The third party is the processor – in the sense of the GDPR – if the processing of personal data on behalf of the data controller is the processor's primary task and the third party has no control over the personal data it receives from TU Delft. A TU Delft department or staff member is not considered to be a TU Delft data processor. We only refer to a processor in this sense when the processing is conducted by an external company or person not employed by TU Delft. The third party is permitted to use the personal data solely for the purpose indicated by TU Delft and using the means prescribed by TU Delft.
However, if the third party can make independent decisions about the personal data it receives from TU Delft, the third party is the independent controller or even joint controller together with TU Delft (see below).

When is TU Delft the processor?
In some cases, TU Delft acts as the processor. Unlike the controller, the processor does not independently determine the purpose and means and has no control over these.
A data processing agreement is also required in this case, but the checklist below is not appropriate.

What should I do if the processor is based in a country outside the European Economic Area (EEA)?

The European Economic Area covers the countries of the European Union and Iceland, Norway, Switzerland and Lichtenstein. If the processor (with which TU Delft enters into a data processing agreement) is based outside the EEA, an additional agreement is <u>usually</u> necessary. These are the Standard Contractual Clauses (SCCs) drawn up by the European Commission. This document can be found in Appendix D.

The SCCs also need to be declared applicable in data processing agreements with processors based in the USA. If necessary, additional safeguards need to be taken.

<u>Please note</u>: This also applies to every processor whose parent company is based outside the EEA. It also means that the SCCs must be signed.

It is <u>not</u> permitted to amend the provisions of the SCCs. TU Delft and the processor complete the yellow sections and sign the SCCs separately.

<u>Please note</u>: In the case of a processor from a country with which a so-called adequacy decision has been agreed, the SCCs are not required. Consult with the Privacy Team on which countries this applies to or follow this link.

Completing Standard Contractual Clauses – Appendix D

This document comprises four different modules:

1. Module 1: Data transfer between two controllers.

2. Module 2: Data transfer between a controller and a processor.

3. Module 3: Data transfer between two processors.

4. Module 4: Data transfer between a processor and a controller.

Each module describes the different types of conditions for the transfer of data between the controller and the processor.

Select the appropriate module for your data processing. Please bear in mind that the most frequently-chosen module is 'Module 2': *Data transfer between a controller and a processor.* Depending on the module chosen, complete the appendices. The fields to be completed have been highlighted.

What else?

The data processing agreement (and possibly also the SCCs) is entered into alongside the main contract that describes what has been agreed for the project. When using a third party for the processing of personal data, this means that at least two agreements are required: a main contract and a data processing agreement (possibly supplemented by the SCCs). The data processing agreement is purely used to meet the requirements of the GDPR.

Always make sure you have the data processing agreement, together with the main (existing) contract, checked out by the Privacy team (privacy-tud@tudelft.nl).

Completing the appendices

Completing the appendices is an important step in determining and describing the specific conditions for processing personal data. The appendices determine the specifications agreed, such as the data that will be processed, the purpose of the processing and the security measures.

As the controller, TU Delft also exercises control over the way in which the personal data is processed by the processor. In the appendices, TU Delft gives specific instructions about such issues as data retention (the duration of data storage), additional security measures and instructions on removal and destruction.

The appendices should ideally be completed by the processor and controller together when entering into the data processing agreement.

Joint controllers
In the case of joint controllers, this data processing agreement is not necessary. A more general cooperation agreement (or joint control agreement) will be appropriate in that case. In it, the parties will jointly determine how and why personal data will be processed. This kind of agreement is used to stipulate which party takes on which responsibilities in meeting the obligations of the GDPR. This primarily concerns the handling of requests to consult, rectify or remove data and how obligations to inform data subjects will be met.

(Independent or joint) controller is based outside the EEA
If the (independent or joint) controller is based outside the EEA – i.e. outside the EU, Iceland, Norway or Switzerland – the SCCs are also needed. As an appendix, these SCCs are part of the agreements referred to above and must be included unamended and signed separately by TU Delft and the (independent or joint) controller.

Contact privacy-tud@tudelft.nl for advice on which model clause or agreement is most suitable for the above situations.