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# DATA PROCESSING AGREEMENT

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**THIS AGREEMENT** is a service between

(1) **Opentracker**

a company incorporated under the laws of the Netherlands having its offices at Torenallee 45, Eindhoven NL, (the “Service Provider”)], and

(2) **Client Company**

a company using the services of Opentracker with a paying subscription (referred to in this document as the “Company”);

each referred to as a “party” and together “the parties”.

## BACKGROUND

- A. The Company and the Service Provider are parties to purchase orders under which the Service Provider provides certain specified marketing services (the “Services”) to the Company.
- B. The parties acknowledge that, in relation to the provision of the Services the Service Provider will process Personal Data on behalf of the Company.
- C. The parties agree to govern the processing of the Personal Data by the Service Provider and the rights and obligations of each of the parties in relation to the processing is explained in these terms of agreement.

## Interpretation

### *1.1 Defined Terms*

“**Appropriate Security Measures**” means appropriate security measures required by Data Protection Law to protect against unauthorised access to, alteration, disclosure or destruction of Data and against its accidental loss or destruction and, in particular, where the processing involves the transmission of Data over a network, it shall mean having regard to the state of technological development and the cost of implementing the measures, and ensuring that the measures provide a level of security appropriate to:

- A. the risks that are presented by the processing;
- B. the harm that might result from unauthorised or unlawful processing, accidental or unlawful destruction or accidental loss of or damage to the data concerned, and
- C. the nature of the Data;

“**Authorised Person**” means the persons occupying the roles in the Company specified in Schedule 1;

“**Confidential Information**” means all information, documents or reports, in whatever form communicated or recorded, relating to the Company, its business affairs or activities, including but not limited to Data, files, charts, medical records and contact information relating to any employee, contractor, patient or client of the Company; know-how, formulae, processes, specifications and software programs belonging or relating to the Company;

“**Data**” means the Confidential Information and the Personal Data;

“**Data Protection Acts**” means the Data Protection Acts 1988-2003, as amended, revised, modified or replaced from time to time;

“**Data Protection Law**” means all legislation and regulations relating to the protection of personal data including (without limitation) the Data Protection Acts (as amended, revised, modified or replaced from time to time), the GDPR (when the GDPR comes into force in The Netherlands) and all other statutory instruments, industry guidelines (whether statutory or non-statutory) or codes of practice or guidance issued by the Data Protection Commissioner relating to the processing of personal data or privacy or any amendments and re-enactments thereof;

**“GDPR”** means the General Data Protection Regulation (Regulation (EU) 2016/679);

**“Loss”** includes any claim, suit, proceeding, judgement, loss, liability, cost, expense, fee, penalty or fine;

**“Personal Data”** means personal data and sensitive personal data and special categories of data as defined in the Data Protection Acts or in the GDPR when the GDPR comes into force in The Netherlands, as specified in Schedule 2;

**“Personnel”** means those employees of the Service Provider to whom disclosure of Data is necessary for the provision of the Services and who are appropriately trained in and committed to data security and confidentiality; and

**“Services Agreement”** means the services agreement in place or to be put in place between the Company and the Services Provider.

## *1.2 Construction*

In this Agreement, unless the contrary intention is stated, a reference to:

- A. ‘data controller’, ‘data processor’, ‘data subject’, ‘personal data’, ‘sensitive personal data’, ‘special categories of personal data’, ‘processing’ and ‘appropriate technical and organisational measures’ shall have the meanings given to them in the Data Protection Acts, or, following the coming into force of the GDPR, in the GDPR;
- B. the singular shall include the plural and vice versa;
- C. either gender includes the other and the neuter, and vice versa;
- D. a person shall be construed as a reference to any individual, firm or company, corporation, governmental entity or agency of a state or any association or partnership (whether or not having separate legal personality) or two or more of the foregoing;
- E. a person includes that person’s legal personal representatives, successors and permitted assigns;
- F. time shall be construed by reference to whatever time may from time to time be in force in The Netherlands;
- G. any agreement document or instrument is to the same as amended, novated, modified, supplemented or replaced from time to time;
- H. ‘this Agreement’ mean the Clauses of, and the Schedules to, this Agreement, all of which shall be read as one document;
- I. a clause or other provision is a reference to a clause or provision of this Agreement, and any reference to a sub provision is, unless otherwise stated, a reference to a sub provision of the provision in which the reference appears;
- J. ‘including’ means comprising, but not by way of limitation to any class, list or category;
- K. a law includes any provision of any constitution, statute, statutory instrument, order, by-law, directive, regulation or decision of any governmental entity and any judicial or administrative interpretation of any of the foregoing, in each case, as amended, revised, modified or replaced from time to time; and
- L. ‘writing’ shall include a reference to any electronic mode of representing or reproducing words in visible form.

### **Certain Rules of Construction dis-applied**

If any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favouring or disfavouring any party by virtue of the authorship of any of the provisions of this Agreement.

#### *1.3 Exercise of powers of control*

Where any obligation in this Agreement is expressed to be undertaken or assumed by any party, that obligation is to be construed as requiring the party concerned to exercise all rights and powers of control over the affairs of any other person which it is able to exercise (whether directly or indirectly) in order to secure performance of that obligation by each such person as if that person were bound by that obligation.

## **2. STATUS OF THE PARTIES**

The parties acknowledge that, in relation to the Data, and for the purposes of Data Protection Law, the Service Provider is a data processor and all Data shall be the property of and is owned by the Company.

## **3. DATA PROCESSOR'S OBLIGATIONS**

The Service Provider undertakes and agrees with the Company that:

- A. it shall Process
  - a. Data strictly in accordance with the documentation as provided on our website.
  - b. in accordance with the nature and purpose of the processing set out in Schedule 2;
  - c. the minimum volume of Data which is strictly necessary for the performance of the Services;
- B. it shall comply at all times with the Data Protection Law and shall ensure that any Processing of Data by the Service Provider shall be carried out in full compliance with the Data Protection Acts and the GDPR (when the GDPR comes into force in The Netherlands);
- C. it shall disclose Data only to those members of its Personnel to whom such disclosure is necessary for the exercise of its rights, and performance of its obligations, under this Agreement and the Services Agreement, and shall procure that such persons are made aware of, and agree in writing to observe the obligations of confidentiality in Clause 4 and security in Clause 5;
- D. it shall not sell, transfer, disclose or otherwise allow access to any Personal Data to any party other than its Personnel, save where the prior written approval of the Company has been obtained;
- E. it shall not copy or maintain any Data on any other systems, application or other medium other than required for the provision of the Services;
- F. it shall not transfer any Data outside the European Economic Area without the Company's prior written consent;
- G. it shall take all steps reasonably required to ensure that the Data is accurately recorded and kept up to date;
- H. it shall not sub-contract or delegate or purport to transfer any of its obligations to the Company from time to time to any third party, without the prior written consent of the Company and, any consent if given by the Company shall, be subject to the pre-condition that the Service Provider shall have in place a contract with the proposed third party

- providing the same or a higher level of protection of Data as is set out in this Agreement;
- I. it shall not perform the Services in such a way as to cause the Company to breach any of its obligations under Data Protection Law; and
  - J. it shall make available to the Company all information necessary to demonstrate its compliance with the obligations set out in Data Protection Law and shall allow the Company access to the Service Provider's premises, Personnel and relevant records to the extent necessary to enable it to verify the Service Provider's compliance with Data Protection Law and its obligations under this Agreement.

## **4. CONFIDENTIALITY**

### *4.1 Keep Confidential*

The Service Provider shall keep confidential the Confidential Information and shall not, without the prior written consent of the Company, use, disclose, copy or modify the Confidential Information other than as necessary for the exercise of its rights, and performance of its obligations, under this Agreement.

### *4.2 Notify Misuse*

The Service Provider shall give notice to the Company of any unauthorised use, disclosure, theft or other loss of the Confidential Information immediately upon becoming aware of it.

### *4.3 Mandatory Disclosure*

If the Service Provider is required by law or by any order of any court or governmental or regulatory authority to disclose the Confidential Information, it shall promptly notify the Company of receipt of notice of that requirement and, at the request and cost of the Company, shall assist it in opposing any such disclosure.

## **5. SECURITY**

### *5.1 Implement Appropriate Security Measures*

The Service Provider shall implement Appropriate Security Measures to prevent accidental or unauthorised, loss, destruction, damage, alteration, disclosure or unlawful or unauthorised access to any Data in the custody of the Service Provider, and the Service Provider shall ensure that its Personnel are aware of and comply with those measures.

### *5.2 Warranty*

The Service Provider represents, warrants and undertakes to the Company that its Appropriate Security Measures shall on a continuing basis meet or exceed the requirements of Data Protection Law.

## **6. DATA BREACH**

### *6.1 Notify Breach*

The Service Provider shall promptly upon becoming aware of it notify the Company of any unauthorised access to, or unauthorised use, alteration, disclosure, accidental loss or destruction of, any Data in the custody of the Service Provider (each a "data breach").

## 6.2 *Obligations in Case of Breach*

In the event of any data breach, the Service Provider shall:

- A. take prompt action at its own expense on the instruction of the Company to remedy the cause of the data breach;
- B. bear the costs of investigation into said data breach;
- C. promptly, at its own expense, provide the Company on request with all information required to fulfil its obligations, as data controller, under all Data Protection Laws; and
- D. promptly, at its own expense, assist the Company in complying with its obligations under Articles 32 to 36 of the GDPR.

## **7. DATA SUBJECT REQUESTS AND COMPLAINTS**

### *7.1 Notification*

The Service Provider shall promptly notify the Company of any request from a data subject to exercise any of his or her rights under Data Protection Law or any complaint from any data subject.

### *7.2 No Accession*

The Service Provider shall not accede to any such request or deal with any complaint except on the written instructions of the Company.

### *7.3 Assistance*

The Service Provider shall, at its own expense, on request of the Company and taking into account the nature of the processing, assist the Company by appropriate technical and organisational measures, for the fulfilment of the Company's obligation to respond to requests for exercising the data subject's rights under Data Protection Law.

## **8. DESTRUCTION AND DELIVERY OF DATA**

At any time during the course of the provision of the Services, or upon termination of this Agreement, the Service Provider shall, upon the request of the Company, immediately securely deliver to the Company or destroy all Data as may be requested by the Company and shall certify such destruction or delivery in writing to the Company on request from time to time.

## **9. INDEMNITY**

The Service Provider shall do everything in its power to indemnify the Company against Losses suffered or incurred by the Company arising out of or in connection with any use by the Service Provider of Data.

## **10. TERM AND TERMINATION**

### *10.1 Commencement*

It is agreed that this agreement will be valid for the duration of the Services Agreement.

### *10.2 Termination of Services Agreement*

This Agreement shall continue in full force and effect until termination or expiry of the Services

Agreement whereupon the Service Provider's authority to process Data in accordance with this Agreement shall terminate automatically, unless otherwise agreed between the parties in writing.

### *10.3 Survival of Obligations*

The provisions of Clauses 4, 6, 7, 9, 10.3 and Clause 11 shall survive the expiry or termination of the Services Agreement and this Agreement however it arises, and shall continue to bind the Service Provider.

## **11. GENERAL**

### *11.1 Duty to Mitigate*

Nothing in this Agreement shall or shall be deemed to relieve the Service Provider of any common law duty to mitigate any loss or damage incurred by it.

### *11.2 Severability*

If the whole or any part of a provision of this Agreement is or becomes illegal, invalid or unenforceable, that will not affect the legality, validity or enforceability of the remainder of the provision in question or any other provision of this Agreement

### *11.3 Binding on Successors*

This Agreement and all of its provisions shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors and permitted assigns.

### *11.4 No Assignment*

The Service Provider may not assign, transfer (whether voluntarily or involuntarily, by operation of law or otherwise) or create or permit to exist any right, title or interest (including, without limitation, any security interest and any beneficial interest under any trust) in, to or under, any of its rights under this Agreement.

### *11.5 Counterparts*

This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

### *11.6 Governing law*

This agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with the laws of The Netherlands.

### *11.7 Jurisdiction*

This Clause 11.7 is for the benefit of the Company only. Subject as provided below, the Dutch courts shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and any non-contractual obligations arising out of or in connection with this Agreement and the parties submit to the exclusive jurisdiction of the Dutch courts for that purpose. Nothing in this clause limits the right of the Company to bring proceedings against the Service Provider arising out of or in connection with this Agreement:

- A. in any other court of competent jurisdiction; or
- B. concurrently in more than one court of competent jurisdiction.

## **SCHEDULE 1 AUTHORISED PERSONS**

The Company will supply a list of authorised persons and roles, and will update the Service Provider if any changes happen in relation to this document and services.

## **SCHEDULE 2 PERSONAL DATA**

- A. Types of personal data to be processed; IP Address of the visitor, Company provided data such as email, name, address, etc.
- B. Categories of data subjects  
Visitors to Company's website
- C. Nature of the processing  
Collection, recording, storage, adaptation or alteration, retrieval, use, combination, erasure, destruction
- D. Purpose of the processing  
Marketing, Identification of related companies and contacts

AS WITNESS the hands of the duly authorized representatives of the Parties the day month and year first above written:

Signed on behalf of (Signature, Name, Position)

Opentracker VOF.

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Signed on behalf of (Signature, Name, Position)

[COMPANY NAME]