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# Outsourcing und Data Protection

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### Subject Matter

- Outsourcing: depending on area different meaning and requirements
- However always personal data are involved:
  - Outsourcing of business divisions or tasks
  - Mandating external services
  - Transfer of data processing within the group or to a third party
- Legal Basis:
  - Art. 10a and 6 DPA
  - Cantonal Data Protection Laws: IT-Outsourcing of cantonal and communal administrations
- Responsibility always remains with outsourcer/controller

### Applicability of Swiss Data Protection Act?

- Offshoring, Farshoring or Nearshoring?
- When does the Swiss DPA apply?
  - Principle of territoriality: data processing in Switzerland and access from abroad to server in Switzerland
  - However onwards transfer of personal data originating from Switzerland from a country abroad not subject to DPA
  - DPA does not apply, if personal data are directly acquired abroad (e.g. via Webserver)
- Caution: secrecy obligations (e.g. bank secrecy, professional secrecy obligations, etc.) or Blocking Statutes can generally prohibit the export
- No crossborder disclosure if personal data is anonymized or encrypted

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#### Art. 10a DPA

#### Article 10a DSG: Data Processing by Third Parties

<sup>1</sup>The processing of personal data may be assigned to third parties by agreement or by law if:

- a. the data is processed only in the manner permitted for the instructing party itself; and
- b. it is not prohibited by a statutory or contractual duty of confidentiality
- <sup>2</sup> The instructing party must in particular ensure that the third party guarantees data security.
- <sup>3</sup> Third parties may claim the same justification as the instructing party.

# Requirements of Art. 10a DPA

- Principal (Outsourcer)
- Mandate for data processing
- **Third party**
- Written agreement
- Subordinate relationship
- Processing in the same scope as the principal
- No adverse legal or contractual confidentiality obligations
- Data security

### Provisions in Outsourcing Contract

#### ■ Required data protection clauses:

- Reference to DPA provisions
- Warranty of provider to comply with DPA provisions
- Warranty of fulfilment of data protection claims of data subjects
- Consent of controller for subcontracting by processor
- Purpose definition for data processing by processor
- Obligation of processor to subject its employees, auxiliary personnel, freelancers etc, to the comply with DPA provisions
- Obligation of processor to comply with data security obligations

## Outsourcing Privilege

#### ■ Benefits of Outsourcing Privilege:

- Processor is not third party in the meaning of DPA
- No registration requirement according to Art. 11a Abs. 3 lit. b DPA
- No justification reasons necessary according to Art. 12 Abs. 2 lit. c DPA
- No limitations of justification reasons according to Art. 9 Abs. 3 DPA
- No obligations to inform data recipients according to Art. 7a DPA
- No application of transparency principle (Art. 4 Abs. 4 DPA) and duty of information (Art. 7a DPA)

### Special Questions Art. 10a DPA I

#### Data Flows within the Holding:

- Usually: transfer of data processing from one group company to another (inter-company agreements)
- Question: data processing for own purposes and not for the outsourcing group company?
- Access of several group companies to data use however only for own purposes (Shared Service Center)
- Mutual ownership of data collections use however for own purposes

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### Special Questions Art. 10a DPA II

#### Audit Right:

- Controller is responsible for control (Oberaufsicht)
- Proviso for supervision of necessary rights:
  - Access for internal and external auditors
  - Right to inspect infrastructure
  - Right over type of data processing
- Scope of audit right: any time or only quarterly, with or without prior notification etc.
- In practice: major issue in the regulated sectors as a requirement by the authorities

### Crossborder Data Processing

- Additionally fulfilment of requirements of Art. 6 DPA
- Usually requirements of Art. 10a and 6 DPA fulfilled with standard contracts
- Adequate protection:
  - Swiss Transborder Data Flow Agreement
  - EU-Model clauses
  - Privacy Shield CH

### Common Problems when Outsourcing

- Location of Cloud?
- Mandating of Subproviders
- Outsourcing of personal data protected by law: Auxiliary personnel topic
- Handing back of Personal Data:
  - Which format?
  - Deal contractually with handing back formalities
  - Insolvency of provider / Cloud provider: no claim for handing over of personal data

# Implications of revised DPA on Outsourcing?

#### ■ Draft Swiss DPA contains some new provisions:

- Introduction of the terms controller and processor and respective duties
- Duty of information extended as regards identity and contact details of controller
- Controller has duty to obtain approval for engaging subprocessors
- Controller has duty to obtain approval for EU model clauses

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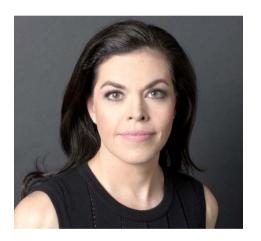
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