Contracting for Privacy: Handling Critical Contract Provisions Impacting Data

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Welcome

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Considerations

- Overall context: vendor vs partner vs customer?

- What data is involved and what is the lifecycle for pertinent data?

- What is the purpose of the product or service? What are the goals and priorities in respect of the data? Do terms track with privacy notice/policy, internal policies, employment contracts, etc.?

- Will the product or service involve the processing of personal data?

- How will risk be allocated between parties?

- How will rights in data be allocated between parties?

- Are there commitments to other parties (e.g., internal policies, privacy notices) that may constrain use of product or service?

Key Terms & Defining Roles

Controller: the entity that determines the purpose and means of processing personal data (i.e., the customer)

Processor: the entity that processes personal data on behalf of the controller (can have sub-processors) (i.e., the vendor or supplier)

Consider roles even if not mandated (eg under GDPR, CCPA) – having this framework helps structure obligations under contract and can point you to templates so you don't need to develop from scratch

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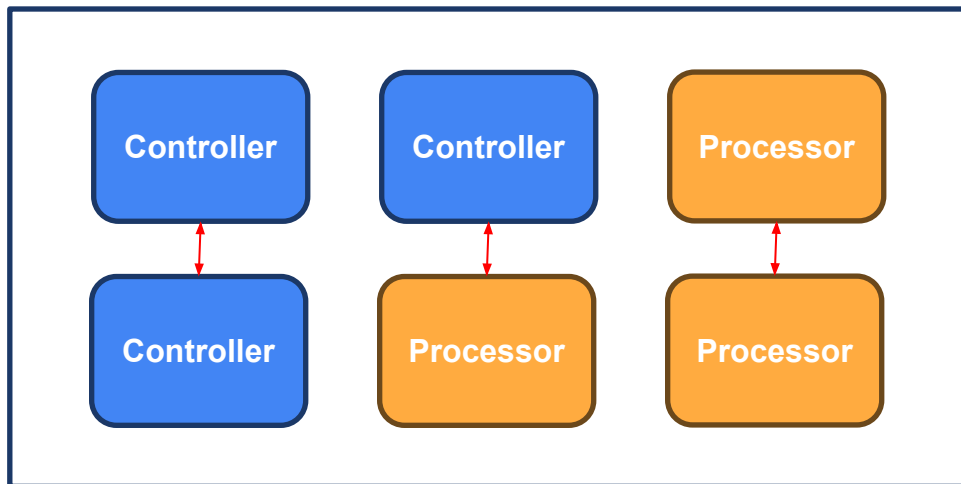
Key Provisions

Security Requirements / Notification of Incidents

Order of Precedents

Processor / Controller Roles and the Purpose of Processing

Cross Border Transfers

Subprocessing

Liability and Indemnfication

Audit Rights

Data Subject Requests

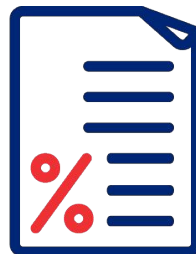UC Berkeley
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Structuring Vendor Agreements

Benefits and Drawbacks

of setting out data protection terms in a standalone DPA

- ✔ Focused review of data terms
- ✔ Flexibility
- ✔ Clarity
- ✔ Shareability
- ☐ Adds complexity
- ☐ Integration issues
- ☐ Potential for DPA to be overlooked or trivialized

Consider hybrid approaches

Vendor Agreement or MSA
Outlines the overarching commercial terms of the customer-supplier relationship

Data Processing Addendum (DPA)
Provides instructions on how personal data is to be processed and secured

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Customer Perspective: Prioritzing

Must Haves

Nice to Have

Contracting for AI Products

- Use of personal data to train AI model?

- What data will be ingested by the AI?

- Some customers will be more sensitive than others

- Position in the digital supply chain

Tips & Tricks

- Cross train your procurement and commercial legal staff – to give them context to flowdown issues (i.e., obligations passed down to sub-processors)

- Customize required employee training (e.g., under CCPA) to your business and risk profile

- Data privacy laws are constantly changing –futureproof your agreements and don't assume that past contracts are up to date

- Don't be afraid to go back to vendors to renegotiate (e.g., if laws change) – they're probably used to it by now (or at least they should be!) – or include provisions to anticipate changes in laws and provide for good faith renegotiation

- Use existing frameworks and templates – even if they aren't required

- Consider how contract will work operationally – more isn't always better

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