agreement for the exchange of technical data (MUTUAL)

Cover sheet

|  |  |
| --- | --- |
| **Date** | [*date*] |
| **Party 1** | [*name / company name / address*]Contact: [*name*][*email address*] |
| **Party 2** | [*name / company name / address*]Contact: [*name*][*email address*] |
| **Party 1 Covered Data** | [*describe the Data to which Party 1 will grant access under this Agreement, including documentation relating to such data, their format, etc.*] |
| **Party 2 Covered Data** | [*describe the Data to which Party 2 will grant access under this Agreement, including documentation relating to such Data, their format, etc.*] |
| **Access** | [*specify the platform on which the parties grant each other access to and exchange the Covered Data or the API made available by either party to allow access to and exchange of the Covered Data, or any of the technical means used by the parties to grant such access to and exchange the Covered Data*] |
| **Term and Notice** | [*specify the initial term of this Agreement, e.g. 6 months, 1 year, etc.*]Termination Notice: [*please specify the duration of the advance notice that must be given to terminate the agreement, e.g. 1 week, 1 month, etc*. – *it must be shorter than the Term*] |
| **Use Restrictions** | [*specify the restrictions that will apply to the use of the Covered Data; multiple boxes may be checked*] |
| Party 1* No Commercial Use of the Covered Data
* No Commercial Use of the Results
* No Distribution of the Covered Data
* No Distribution of the Results
 | Party 2* No Commercial Use of the Covered Data
* No Commercial Use of the Results
* No Distribution of the Covered Data
* No Distribution of the Results
 |

1. definitions

The capitalized terms in this Agreement have the following meanings:

|  |  |
| --- | --- |
| **Commercial Use** | any use of the Covered Data and/or of the Results by the Receiving Party or a Downward Recipient that is primarily intended towards a monetary compensation or commercial advantage. |
| **Confidential Information** | any proprietary and/or non-public information provided by either party, in particular but not limited to trade secrets or know-how or other related proprietary business information and data, whether such information is provided in tangible or intangible form, written, oral, graphic, pictorial or recorded form or stored on computer discs, hard drives, magnetic tape or digital or any other electronic medium. |
| **Covered Data** | any Data made available under this Agreement as defined on the cover sheet, to the exclusion of any communication Data automatically generated by the parties for the purpose of allowing the Receiving Party to access the Covered Data. |
| **Data** | any digital representation of acts, facts or information and anycompilation of such acts, facts or information, to the exclusion of Personal Data, of any type and in any format. |
| **Distribute**  | make all or part of the Covered Data available to third parties in unmodified form or in such modified form that would still allow such third party to retrieve the original Covered Data. |
| **Downward Recipient** | any person or entity to whom the Covered Data is made available by the Receiving Party, directly or indirectly. |
| **Intellectual Property Rights** | all intellectual property rights, whether registered or not, and anchored in either national or international law, in and to the Covered Data, including without limitation copyright, trademark right, patent right and database right.  |
| **Interoperability** | the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use Data in order to perform their functions. |
| **Personal Data** | any data or information relating to an identified or identifiable person within the meaning of article 3 let. a of the Swiss Data Protection Act (DPA – RS 235.1). |
| **Receiving Party** | either party to this Agreement when it is in the position of receiving or being granted access to the Covered Data of the other party.  |
| **Restrictions** | the restrictions on use specified on the cover sheet. |
| **Results** | any results developed, created or improved by the Receiving Party based on its use of the Covered Data. |

1. General Provisions
	1. **Access.** Subject to the terms of this Agreement, each party grants the other party access to its respective Covered Data in accordance with the access modalities set forth on the cover sheet for the Term, in the format set forth on the cover sheet. Access to the Covered Data includes access to any updates of such Covered Data or newly collected Covered Data, if any.
	2. **Results.**[Alt.1] In addition to the Covered Data, each party grants the other party access to the Results, which may be used by the Receiving Party subject to the restrictions set forth on the cover sheet. [Alt.2] Access to the Covered Data does not grant access to the Results and neither party has the obligation to share its Results with the other party.

**[Comment**: *select Alt.1 if the parties wish to also exchange the results that will arise from their use of the exchanged data; otherwise, select Alt.2.****]***

* 1. **No Fee.** No fee shall be charged by either party to provide access to its Covered Data and each party shall bear its own costs relating to the implementation and maintenance of the relevant tools allowing for the exchange of the Covered Data.
	2. **No-Exclusivity.** The Covered Data is provided on a non-exclusive basis and each Receiving Party acknowledges that the other party may grant access to the Covered Data to third parties or may continue to use the Covered Date itself.
	3. **Restrictions on Use.** The use of the Covered Data by the Receiving Party and the Downward Recipient, if any, shall be limited by the restrictions on use set forth on the cover sheet.
	4. **Prohibited Use.** In addition to the Restrictions, if any, the Receiving Party and the Downward Recipient, if any, shall not:
		1. deploy any coercive means or abuse any evident gaps in the technical infrastructure of the party holding the Covered Data, to obtain access to Data;
		2. use any Covered Data or Result to derive insights about the economic situation, assets and production methods of, or use by the other party, that could undermine the commercial position of the party holding the Data on the markets in which such party is active unless such party has consented to such use and has the technical possibility to withdraw that consent at any time;
		3. use any Covered Data or Result to develop a product or service that competes with the product or service from which the Covered Data originate or share such Data with a third party for that purpose.

[***Drafting******comment****: this section addresses potential risks related to the use of Covered Data by the data recipient. It is based on obligations applicable under the Data Act to the data recipient or data holder, as the case may be (e. g. art. 5 and 6 of the Data Act)*. *Since this agreement is bilateral, does not involve any individual and is not based on any legal requirement to share data or any access right, the obligations fall upon the data recipient only.*]

* 1. **Limited License.** This Agreement does not aim at addressing or governing possible ownership or property rights in or to the Covered Data. To the extent that the Covered Data shall however be subject to Intellectual Property Rights, each respective party hereby grants a non-exclusive license to the Receiving Party to use the Covered Data in accordance with this Agreement, for the Term.
	2. **Confidentiality.** The parties acknowledge that the Covered Data may contain Confidential Information of either Party or third parties and the respective Receiving Party agrees that the present Agreement does not constitute permission to obtain or reveal Confidential Information, whether by way of reverse-engineering or decompiling, or any other technical or non-technical mean allowing access to such Confidential Information. Each Receiving Party shall treat as confidential any Confidential Information it may receive or be granted access to unwillingly or fortuitously under this Agreement.
	3. **Compliance.** Nothing in this Agreement shall restrict, limit or otherwise affect any rights or obligations that the party holding the Covered Data may have under any applicable laws or regulations, such as (without limitation) competition and antitrust laws, or in relation to data sharing or data access requests of users.

[**Drafting** **comment**: *this section reserves any obligations a party may have under the Data Act or other laws or regulations, since the Data Act imposes specific data sharing obligations on data holders. Even if the Data Act is not directly applicable to the relationship between the parties under this agreement, it may nevertheless apply to a party depending on the circumstances (e.g. if such party provides connected products or services in the EU)*.]

* 1. **[Audit.** Each party agrees that the other party may, at any time for the duration of this Agreement, but no more than once a year, access the Receiving Party’s books, records, infrastructures, databases and Results in order to ensure compliance with the present Agreement.**]**

**[*Comment:*** *this section 2.10 is mainly relevant in case strict restrictions on use are selected, in order to allow the parties to verify compliance with such restrictions. It can typically be removed in case no restrictions on use are selected by the parties.]*

1. additional terms
	1. **Additional Terms.** The use of technical tools used by the parties to exchange the Covered Data may be governed by additional terms, whether in the form of an API license agreement, terms of use, or any services agreement that may be entered into by the parties. Such additional terms may also govern the provision of other services by either party, as the case may be.
	2. **Interoperability.** The Parties shall use their best efforts to facilitate the Interoperability of Covered Data, data sharing mechanisms and data services, if any, as follows:
		1. the dataset content, use restrictions, licences, data collection methodology, data quality and uncertainty shall be sufficiently described to allow the Receiving Party to find, access and use the Covered Data;
		2. the data structures, formats, vocabularies, classification schemes, taxonomies and code lists shall be sufficiently described in a consistent manner;
		3. the technical means to access the Covered Data, such as any API, and their terms of use and quality of service, shall be sufficiently described to enable automatic access and transmission of data between parties, including continuously or in real-time in a machine-readable format;
		4. the means to enable the interoperability of smart contracts, if any, within their services and activities shall be provided.

[**Drafting** **comment**: *this section 3.2 reflects the interoperability essential requirements under art. 28 of the Data Act, but on a best-efforts basis*.]

1. attribution

[Alt.1] The origin of the Covered Data and identity of the party providing the Covered Data shall be made available to third parties to whom the Covered Data and/or the Results have been Distributed. [Alt.2] The Receiving Party shall always seek prior authorization from the other party to mention the origin of the Covered Data and the identity of said party in case of authorized Distribution of the Covered Data and/or Results.

**[*Comment****: select Alt.1 if the parties wish that their respective identity and the origin of the data be automatically communicated when such data is being distributed to third parties; select Alt.2 if the parties wish to check and confirm prior to the distribution whether its identity should be mentioned or not*.**]**

1. Security
	1. **IT Security.** The Receiving Party shall comply with all laws and regulations applicable to the privacy or security of the Covered Data.
	2. **Breach Monitoring.** In the event of an actual or suspected security incident involving its information systems, the Receiving Party shall immediately notify the other party and comply with any applicable notification obligations.
2. Representations and warranties
	1. Each party represents that it will perform its obligations under this Agreement in compliance with applicable laws.
	2. The parties offer no warranty that the other party shall not be granted access to Personal Data in the framework of this Agreement, and should the Receiving Party be granted access to Personal Data in the framework of this Agreement, it acknowledges that it may be subject to additional obligations to comply with privacy and data protection laws and hereby commits to take the relevant measures to comply with such obligations, if any.
	3. The Covered Data is provided on an “as is” and “as available” basis, without warranties or conditions of any kind, either express or implied including, without limitation, any warranties or conditions of title, non-infringement, merchantability or fitness for a particular purpose.
	4. Within the limits of applicable law, neither party shall have any liability for any direct or indirect damages (including without limitation lost profits), however caused and on any theory of liability, whether in contract, strict liability, or civil liability (including negligence or otherwise) arising in any way out of the Covered Data, even if advised of the possibility of such damages.
3. Duration and termination
	1. **Duration.** This Agreement enters into force on the date first written above and for the duration of the initial term mentioned on the cover sheet. It shall be automatically renewed, at the same conditions, for additional terms of the same duration unless terminated in accordance with this Agreement. The initial term and all renewal terms shall together constitute the Term.
	2. **Voluntary Termination.** Any party to this Agreement may terminate this Agreement without cause with a written Termination Notice as set forth on the cover sheet.
	3. **Automatic Termination.** This Agreement shall automatically terminate in case of breach of any of the terms and conditions of this Agreement by either party or a Downward Recipient.
	4. **Effect of Termination.** Upon termination of this Agreement, neither party shall have access to the other party’s Covered Data, and the necessary technical measures shall be taken to prevent such access. The Receiving Party shall however remain entitled to use the Results and sections 2.8, 4, 6.4 and 8 shall survive in case of termination.
4. Miscellaneous
	1. **Entire Agreement.** This Agreement contains all of the terms and conditions agreed upon by the parties relating to its subject matter and supersedes all prior agreements, negotiations, correspondence, undertakings and communications of the parties, whether oral or written, with respect to such subject matter.
	2. **Form**. Any reference to the written form in this Agreement, and any reference to any notice or document to be delivered in writing, shall be deemed to be satisfied by email or any form of electronic signature service such as PDF or DocuSign.
	3. **Severability.** If any provision of this Agreement is held to be unenforceable for any reason, it shall be adjusted rather than voided, if possible, in order to achieve the intent of the parties to the fullest extent possible. In any event, all other provisions of this Agreement shall remain valid and enforceable to the fullest extent possible.
	4. **No Waiver.** The failure of any of the parties to enforce any of the provisions of this Agreement or any rights with respect thereto shall in no way be considered as a waiver of such provisions or rights or in any way affect the validity of this Agreement. The waiver of any breach of this Agreement by any party shall not be construed as a waiver of any other prior or subsequent breach.
	5. **Governing Law.** This Agreement shall be governed by and construed in accordance with Swiss substantive law, without reference to its conflict of laws provisions.
	6. **Jurisdiction.** [Alt.1] Any dispute, controversy or claim arising out of or in relation with this Agreement shall be submitted to the ordinary courts at the domicile or the registered seat of the defending party, subject to appeal to the competent superior authority. [Alt.2] Any dispute, controversy or claim arising out of or in relation with this Agreement shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Arbitration Centre and the ITDR - Institution for IT and Data Dispute Resolution Recommendations for Arbitration, both in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules and Recommendations. The number of arbitrators shall be one or three. The seat of the arbitration shall be Bern. The arbitral proceedings shall be conducted in English. Notwithstanding the above, the parties may agree at any time to submit the dispute to mediation in accordance with the Swiss Rules of Mediation of the Swiss Arbitration Centre and the ITDR – Institution for IT and Data Dispute Resolution Recommendations for Mediation, both in force on the date on which the request for mediation is submitted in accordance with these Rules and Recommendations. Notwithstanding the above, the parties may agree at any time prior to submitting the dispute to arbitration or mediation to submit the dispute to assessment by an expert opinion in accordance with the ITDR – Institution for IT and Data Dispute Resolution Rules of Procedure for Expert Opinions in force on the date on which the request for assessment by an expert opinion is submitted in accordance with these Rules.

**[*Comment****: select Alt.1 if the parties wish to subject potential disputes relating to the agreement to ordinary Swiss courts, without a specific expertise in the field; this corresponds to the ordinary route in case of disputes; select Alt. 2 if the parties wish to subject potential disputes to arbitration by experts in the field, as well as benefit from the ability to ask an expert to intervene before initiating an arbitration or mediation*.**]**

**Party 1** **Party 2**