

## DATA PROCESSING ADDENDUM TO THE INSTANA TERMS OF SERVICE

**THIS DATA PROCESSING ADDENDUM ("DPA")**, together with the Instana Terms of Service SaaS License Agreement between INSTANA, Inc. a Delaware Corporate, with its principle place of business at 222 S. Riverside Plaza, 15<sup>th</sup> Floor, Chicago, IL 60606 ("Vendor") and you ("Company"). This DPA is effective the earlier of the date of initial Order Form is executed or the date that the Vendor begins processing personal data on behalf of the Company.

Each of Vendor and Company may be referred to herein as a "**party**" and together as the "**parties**".

### RECITALS:

- (A) Vendor provides to Company certain IT Infrastructure and Application Performance Monitoring services (collectively, the "**Vendor Services**") pursuant to an agreement entitled Instana Terms of Service SaaS License Agreement between the parties ("**Main Agreement**"). In connection with the Vendor Services, the parties anticipate that Vendor may from time to time process certain Personal Data in respect of which the Company may be a controller of that data under applicable Data Protection Laws.
- (B) The parties have agreed to enter into this DPA in order to ensure that adequate safeguards are put in place with respect to the protection of such Personal Data as required by the Data Protection Laws.

### 1. Definitions

#### 1.1. The following definitions are used in this DPA:

**"Adequate Country"** means a country or territory outside the EEA recognised as providing adequate protection for Personal Data transfers under an adequacy decision made from time to time by the European Commission under the GDPR;

1. **"Affiliate"** means, with respect to a party, any corporate entity that, directly or indirectly, Controls, is Controlled by, or is under Common Control with such party (but only for so long as such Control exists);

2. **"Data Subject Request"** means a request from or on behalf of a data subject relating to access to, or rectification, erasure or data portability in respect of that person's Personal Data or an objection from or on behalf of a data subject to the processing of its Personal Data;

3. **"EEA"** means European Economic Area and Switzerland;

4. **"Data Protection Laws"** means all privacy laws applicable to any Personal Data processed under or in connection with this agreement, including, without limitation, all privacy laws and regulations of the European Union, the EEA and their member states, Switzerland and the United Kingdom applicable to any Personal Data processed under or in connection with this DPA, including, without limitation, the General Data Protection Regulation 2016/679 (the "**GDPR**"), the Privacy and Electronic Communications Directive 2002/58/EC (as the same may be superseded by the Regulation on Privacy and Electronic Communications, ("**ePrivacy Regulation**")) and all national legislation implementing or supplementing the foregoing and all associated codes of practice and other guidance issued by any applicable data protection authority, all as amended, re-enacted and/or replaced and in force from time to time;

5. **"Model Clauses"** means the model clauses for the transfer of personal data to processors established in third countries approved by the European Commission, the approved version of which is set out in the European Commission's Decision 2010/87/EU of 5 February 2010 and at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32010D0087> and which along with the Appendices to the Model Clauses included in Annex 1 to this DPA, form a part of this DPA;

6. **"Personal Data"** means all data which is defined as '*personal data*' under Data Protection Laws and which is provided by the Company to Vendor (directly or indirectly), and accessed, stored or otherwise processed by Vendor as a data processor as part of its provision of the Vendor Services to Company and to which Data Protection Laws apply from time to time;

7. **"controller", "data subject", "processor" and "supervisory authority"** shall have the meanings ascribed to them in the Data Protection Laws; and

8. **"Vendor Group"** means Vendor and any of its Affiliates.

1.2. An entity **"Controls"** another entity if it: (a) holds a majority of the voting rights in it; (b) is a member or shareholder of it and has the right to remove a majority of its board of directors or equivalent managing body; (c) is a member or shareholder of it and controls alone or pursuant to an agreement with other shareholders or members, a majority of the voting rights in it; or (d) has the right to exercise a dominant influence over it pursuant to its constitutional documents or pursuant to a contract; and two entities are treated as being in **"Common Control"** if either controls the other (directly or indirectly) or both are controlled (directly or indirectly) by the same entity.

## 2. Status of the parties

2.1. The type of Personal Data processed pursuant to this DPA and the subject matter, duration, nature and purpose of the processing, and the categories of data subjects, are as described below:

- (a) **Subject Matter of the Processing:** Vendor's provision of the Vendor Services to Company.
- (b) **Nature and Purpose of the Processing:** the collection, analysis, storage, duplication, deletion and disclosure as necessary to provide the Vendor Services and as may be further instructed by Company in writing.
- (c) **Duration of Processing:** the Vendor will process the Personal Data for the duration of the Main Agreement, or until the data upon which processing is no longer necessary for the purposes of either party performing its obligations under the Main Agreement (to the extent applicable) unless otherwise agreed between the parties in writing.
- (d) **Types of Data:** data relating to individuals, including names, emails, photographs and other graphics, job title, employer, ip addresses, provided to Vendor via the Vendor Services, by (or at the direction of) Company.
- (e) **Categories of Data Subjects:** data subjects may include employees, clients and/or business partners of the Company and other representatives of the Company who are authorised by the Company to use the Vendor Services on behalf of the Company and who provide data to Vendor via the Vendor Services.

- 2.2. Each party warrants in relation to Personal Data that it will comply (and will procure that any of its personnel comply and will procure that its sub-processors comply), with the Data Protection Laws.
- 2.3. In respect of the parties' rights and obligations under this DPA regarding the Personal Data, the parties hereby acknowledge and agree that Company or its relevant Group Company is the data controller and Vendor is the data processor, and accordingly Vendor agrees that it shall process all Personal Data in accordance with its obligations pursuant to this DPA.
- 2.4. Each party shall appoint an individual within its organisation authorised to respond from time to time to enquiries regarding the Personal Data and each party shall deal with such enquiries promptly.

### 3. Vendor obligations

#### 3.1. With respect to all Personal Data, Vendor shall:

- (a) only process Personal Data in order to provide the Vendor Services and shall act only in accordance with: (i) this DPA, and (ii) Company's written instructions, which shall include the Main Agreement;
- (b) in the unlikely event that applicable European Union or United Kingdom law requires Vendor to process Personal Data other than pursuant to the Company's instruction, Vendor will notify the Company (unless prohibited from so doing by applicable law);
- (c) as soon as reasonably practicable upon becoming aware, inform Company if, in Vendor's opinion, any instructions provided by Company under clause 3.1(a) infringe the Data Protection Laws;
- (d) implement appropriate technical and organizational measures to ensure a level of security appropriate to the risks that are presented by the processing of Personal Data, in particular protection against accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to Personal Data. Such measures include, without limitation, the security measures set out in <https://instana.com/security>;
- (e) take reasonable steps to ensure that only authorised personnel have access to such Personal Data and that any persons whom it authorizes to have access to the Personal Data are under obligations of confidentiality;
- (f) as soon as reasonably practicable upon becoming aware, notify Company of any actual, alleged or suspected incident of unauthorised or accidental disclosure of or access to any Personal Data by any of its staff, sub-processors, or any other identified or unidentified third party (a "**Security Breach**");
- (g) promptly provide Company with cooperation and assistance in respect of a Security Breach and all information in Vendor's possession concerning the Security Breach insofar as it affects Company, including the following:
  - (i) the possible cause and consequences for the Data Subjects of the Security Breach;
  - (ii) the categories of Personal Data involved;

- (iii) a summary of the possible consequences for the relevant data subjects;
  - (iv) a summary of the unauthorised recipients of the Personal Data; and
  - (v) the measures taken by Vendor to mitigate any damage;
- (h) not make any public announcement about a Security Breach (a "**Breach Notice**") without:
- (i) the prior written consent of Company; and
  - (ii) prior written approval by the Company of the content, media and timing of the Breach Notice;

unless required to make a disclosure or announcement by applicable law.

- (i) promptly notify Company if it receives a Data Subject Request. Vendor shall not respond to a Data Subject Request received by the Vendor without Company's prior written consent except to confirm that such request relates to Company, to which Company hereby agrees. Vendor shall provide reasonable assistance to Company) to facilitate Company responding to a Data Subject Request within the deadlines set out under Data Protection Laws and fulfilling the Company's obligations with regards to Data Subject Requests under Data Protection Laws provided that the Company shall cover the Vendor's cost for doing so;
- (j) other than to the extent required to comply with applicable law, as soon as reasonably practicable following, and in any event within thirty (30) days of, termination or expiry of the Main Agreement or completion of the Vendor Services, Vendor will delete or return all Personal Data (including copies thereof) processed pursuant to this DPA;
- (k) provide such assistance to Company as Company reasonable requests requests (taking into account the nature of processing and the information available to Vendor) in relation to Company's obligations under Data Protection Laws with respect to:
  - (i) data protection impact assessments (as such term is defined in the GDPR);
  - (ii) notifications to the supervisory authority under Data Protection Laws and/or communications to data subjects by Company in response to any Security Breach; and
  - (iii) Company's compliance with their respective obligations under the GDPR with respect to the security of processing,

provided that the Company shall pay Vendor's charges for providing the assistance in this clause 3.1(k).

#### **4. Sub-processing**

- 4.1.** Company grants a general authorization: (a) to Vendor to appoint other members of the Vendor Group as sub-processors, and (b) to Vendor and other members of the

Vendor Group to appoint third parties as sub-processors to support the performance of the Vendor Services.

- 4.2. Vendor will maintain a list of sub-processors at the following URL: <https://www.instana.com/gdpr-subprocessors/> and will add the names of new and replacement sub-processors to the list prior to them starting sub-processing of Personal Data and send a communication to the Company informing the Company of such intended change. If Company has a reasonable objection to any new or replacement sub-processor, it shall notify Vendor of such objections in writing within thirty (30) days of the notification and the parties will seek to resolve the matter in good faith. If Vendor is able to provide the Vendor Services to Company in accordance with the Main Agreement without using the sub-processor and decides in its discretion to do so, then Company will have no further rights under this clause 4.2 in respect of the proposed use of the sub-processor. If Vendor requires use of the sub-processor and is unable to satisfy Company as to the suitability of the sub-processor or the documentation and protections in place between Vendor and the sub-processor within forty five (45) days from Company's notification of objections, Company may within ten (10) days following the end of the forty five (45) day period referred to above, terminate the Main Agreement with at least thirty (30) days written notice. If Company does not provide a timely objection to any new or replacement sub-processor in accordance with this clause 4.2, Company will be deemed to have consented to the sub-processor and waived its right to object.
- 4.3. Vendor will ensure that any sub-processor it engages to provide an aspect of the Vendor Services on its behalf in connection with this DPA does so only on the basis of a written contract which imposes on such sub-processor substantially no less protection of personal data as those imposed on Vendor in this DPA (the "**Relevant Terms**"). Vendor shall procure the performance by such sub-processor of the Relevant Terms and shall be liable to Company for any breach by such person of any of the Relevant Terms.

## 5. **Audit and records**

Vendor shall, in accordance with Data Protection Laws, make available to Company such information in Vendor's possession or control, and provide all assistance in connection with audits of Vendor's premises up to once a calendar year, systems and documentation as the Company may reasonably request with a view to demonstrating Vendor's compliance with the obligations of processors under Data Protection Law in relation to its processing of Personal Data.

## 6. **Data transfers**

### *Model clauses*

- 6.1. As the Vendor is located outside the EEA, the parties agree that the Model Clauses set forth at Annex 1 to this DPA will apply in respect of that processing, and Vendor is the 'data importer' and will comply with the obligations of the 'data importer' in the Model Clauses accordingly and Company is the data exporter and will comply with the obligations of the 'data exporter' accordingly.
- 6.2. The parties agree that the Model Clauses set forth at Annex 1 to this DPA will apply in respect of that processing, and Vendor is the 'data importer' and will comply with the obligations in the Model Clauses accordingly and the Company is the data exporter and will comply with the obligations of the 'data exporter' accordingly.

### *Sub-processors – transfer mechanisms*

- 6.3. Company acknowledges and accepts that the provision of the Vendor Services under the Main Agreement may require the further processing of Personal Data in addition to the transfer referred to above by sub-processors in countries outside the EEA from time to time.
- 6.4. If, in the performance of this DPA and/or the Main Agreement, Vendor transfers any Personal Data to a sub-processor (which shall include without limitation any Affiliates of Vendor), or permits processing of any Personal Data by a sub-processor (which shall include without limitation any Affiliates of Vendor) located outside of the EEA except if in an Adequate Country (without prejudice to clause 4), Vendor shall in advance of any such transfer ensure that a legal mechanism to achieve adequacy in respect of that processing and which is approved in writing by Company before the non-EEA processing is in place, such as:
- (a) the requirement for Vendor to execute or procure that the sub-processor execute on behalf of Company Model Clauses;
  - (b) the existence of any other specifically approved safeguard for data transfers (as recognized under Data Protection Laws) and/or a European Commission finding of adequacy.
- 6.5. The following terms shall apply to the Model Clauses:
- (a) The Company may exercise its right of audit under clause 5.1(f) of the Model Clauses as set out in, and subject to the requirements of, clause 5 of this DPA; and
  - (b) Vendor and the relevant affiliate of Vendor may appoint sub-processors as set out, and subject to the requirements of, clauses 4 and 6.3 of this DPA.
- 6.6. Vendor will procure the compliance with the Model Clauses by the relevant Affiliate of Vendor which is named as the data importer in the Model Clauses.

## **7. General**

- 7.1. This DPA is without prejudice to the rights and obligations of the parties under the Main Agreement which shall continue to have full force and effect. In the event of any conflict between the terms of this DPA and the terms of the Main Agreement, the terms of this DPA shall prevail so far as the subject matter concerns the processing of Personal Data
- 7.2. Vendor's maximum aggregate liability to the Company under or in connection with this DPA (including under the standard contractual clauses set out in Annex 2) shall not under any circumstances exceed the maximum aggregate liability of Vendor to the Company as set out in the Main Agreement.
- 7.3. Without prejudice to clause 7 (Mediation and Jurisdiction) and clause 9 (Governing Law) of the Model Clauses, this DPA shall be governed by and construed in accordance with the laws of the country of territory stipulated for this purpose in the Main Agreement and each of the parties agrees to submit to the choice of jurisdiction as stipulated in the Main Agreement in respect of any claim or matter arising under this DPA.

- 7.4. This DPA is the final, complete and exclusive agreement of the parties with respect to the subject matter hereof and supersedes and merges all prior discussions and agreements between the parties with respect to such subject matter. Other than in respect of statements made fraudulently, no other representations or terms shall apply or form part of this DPA. No modification of, amendment to, or waiver of any rights under the DPA will be effective unless in writing and signed by an authorised signatory of each party. This DPA may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement. Each person signing below represents and warrants that he or she is duly authorised and has legal capacity to execute and deliver this DPA. Each party represents and warrants to the other that the execution and delivery of this DPA, and the performance of such party's obligations hereunder, have been duly authorised and that this DPA is a valid and legally binding agreement on each such party, enforceable in accordance with its terms.

## ANNEX 1

### 2010 EU Model clauses extracted from 2010/87/EU Annex EU Standard Contractual Clauses for the transfer of personal data to data processors established in third countries which do not ensure an adequate level of data protection

---

#### STANDARD CONTRACTUAL CLAUSES (PROCESSORS)

For the purposes of Article 26(2) of Directive 95/46/EC for the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection

(1) Name of the data exporting organisation: **[Company]**

Address:	
Telephone:	
Fax:	
E-mail:	

(1)

Other information needed to identify the organisation:

--

(the **data exporter**);

**and**

(2) Name of the data importing organisation: Instana, Inc.

Address:	222 S. Riverside Plaza, 15 <sup>th</sup> Floor, Chicago, IL 60606
Telephone:	
Fax:	
E-mail:	

(2)

Other information needed to identify the organisation:

--

(the **data importer**);

each a '**party**'; together '**the parties**',



**HAVE AGREED** on the following Contractual Clauses (the '**Clauses**') in order to adduce adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals for the transfer by the data exporter to the data importer of the personal data specified in Appendix 1.

## **Clause 1**

### **Definitions**

For the purposes of the Clauses:

- (a) '**personal data**', '**special categories of data**', '**process/processing**', '**controller**', '**processor**', '**data subject**' and '**supervisory authority**' shall have the same meaning as in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- (a) the '**data exporter**' means the controller who transfers the personal data;
- (b) the '**data importer**' means the processor who agrees to receive from the data exporter personal data intended for processing on his behalf after the transfer in accordance with his instructions and the terms of the Clauses and who is not subject to a third country's system ensuring adequate protection within the meaning of Article 25(1) of Directive 95/46/EC;
- (c) the '**sub-processor**' means any processor engaged by the data importer or by any other sub-processor of the data importer who agrees to receive from the data importer or from any other sub-processor of the data importer personal data exclusively intended for processing activities to be carried out on behalf of the data exporter after the transfer in accordance with his instructions, the terms of the Clauses and the terms of the written subcontract;
- (d) the '**applicable data protection law**' means the legislation protecting the fundamental rights and freedoms of individuals and, in particular, their right to privacy with respect to the processing of personal data applicable to a data controller in the Member State in which the data exporter is established; and
- (e) '**technical and organisational security measures**' means those measures aimed at protecting personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

## **Clause 2**

### **Details of the transfer**

The details of the transfer and in particular the special categories of personal data where applicable are specified in Appendix 1 which forms an integral part of the Clauses.

## **Clause 3**

### **Third-party beneficiary clause**

1. The data subject can enforce against the data exporter this Clause, Clause 4(b) to (i), Clause 5(a) to (e), and (g) to (j), Clause 6(1) and (2), Clause 7, Clause 8(2), and Clauses 9 to 12 as third-party beneficiary.

2. The data subject can enforce against the data importer this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where the data exporter has factually disappeared or has ceased to exist in law unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity.
3. The data subject can enforce against the sub-processor this Clause, Clause 5(a) to (e) and (g), Clause 6, Clause 7, Clause 8(2), and Clauses 9 to 12, in cases where both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law as a result of which it takes on the rights and obligations of the data exporter, in which case the data subject can enforce them against such entity. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
4. The parties do not object to a data subject being represented by an association or other body if the data subject so expressly wishes and if permitted by national law.

#### **Clause 4**

##### **Obligations of the data exporter**

The data exporter agrees and warrants:

- (a) that the processing, including the transfer itself, of the personal data has been and will continue to be carried out in accordance with the relevant provisions of the applicable data protection law (and, where applicable, has been notified to the relevant authorities of the Member State where the data exporter is established) and does not violate the relevant provisions of that State;
- (b) that it has instructed and throughout the duration of the personal data-processing services will instruct the data importer to process the personal data transferred only on the data exporter's behalf and in accordance with the applicable data protection law and the Clauses;
- (c) that the data importer will provide sufficient guarantees in respect of the technical and organisational security measures specified in Appendix 2 to this contract;
- (d) that after assessment of the requirements of the applicable data protection law, the security measures are appropriate to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing, and that these measures ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected having regard to the state of the art and the cost of their implementation;
- (e) that it will ensure compliance with the security measures;
- (f) that, if the transfer involves special categories of data, the data subject has been informed or will be informed before, or as soon as possible after, the transfer that its data could be transmitted to a third country not providing adequate protection within the meaning of Directive 95/46/EC;
- (g) to forward any notification received from the data importer or any sub-processor pursuant to Clause 5(b) and Clause 8(3) to the data protection supervisory authority if the data exporter decides to continue the transfer or to lift the suspension;
- (h) to make available to the data subjects upon request a copy of the Clauses, with the exception of Appendix 2, and a summary description of the security measures, as well as a copy of any contract for sub-processing services which has to be made in

accordance with the Clauses, unless the Clauses or the contract contain commercial information, in which case it may remove such commercial information;

- (i) that, in the event of sub-processing, the processing activity is carried out in accordance with Clause 11 by a sub-processor providing at least the same level of protection for the personal data and the rights of data subject as the data importer under the Clauses; and
- (j) that it will ensure compliance with Clause 4(a) to (i).

## **Clause 5**

### **Obligations of the data importer**

The data importer agrees and warrants:

- (a) to process the personal data only on behalf of the data exporter and in compliance with its instructions and the Clauses; if it cannot provide such compliance for whatever reasons, it agrees to inform promptly the data exporter of its inability to comply, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (b) that it has no reason to believe that the legislation applicable to it prevents it from fulfilling the instructions received from the data exporter and its obligations under the contract and that in the event of a change in this legislation which is likely to have a substantial adverse effect on the warranties and obligations provided by the Clauses, it will promptly notify the change to the data exporter as soon as it is aware, in which case the data exporter is entitled to suspend the transfer of data and/or terminate the contract;
- (c) that it has implemented the technical and organisational security measures specified in Appendix 2 before processing the personal data transferred;
- (d) that it will promptly notify the data exporter about:
  - (i) any legally binding request for disclosure of the personal data by a law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation;
  - (ii) any accidental or unauthorised access; and
  - (iii) any request received directly from the data subjects without responding to that request, unless it has been otherwise authorised to do so;
- (e) to deal promptly and properly with all inquiries from the data exporter relating to its processing of the personal data subject to the transfer and to abide by the advice of the supervisory authority with regard to the processing of the data transferred;
- (f) at the request of the data exporter to submit its data-processing facilities for audit of the processing activities covered by the Clauses which shall be carried out by the data exporter or an inspection body composed of independent members and in possession of the required professional qualifications bound by a duty of confidentiality, selected by the data exporter, where applicable, in agreement with the supervisory authority;
- (g) to make available to the data subject upon request a copy of the Clauses, or any existing contract for sub-processing, unless the Clauses or contract contain commercial information, in which case it may remove such commercial information, with the exception of Appendix 2 which shall be replaced by a summary description of the security measures in those cases where the data subject is unable to obtain a copy from the data exporter;
- (h) that, in the event of sub-processing, it has previously informed the data exporter and obtained its prior written consent;

- (i) that the processing services by the sub-processor will be carried out in accordance with Clause 11;
- (j) to send promptly a copy of any sub-processor agreement it concludes under the Clauses to the data exporter.

## **Clause 6**

### **Liability**

1. The parties agree that any data subject, who has suffered damage as a result of any breach of the obligations referred to in Clause 3 or in Clause 11 by any party or sub-processor is entitled to receive compensation from the data exporter for the damage suffered.
2. If a data subject is not able to bring a claim for compensation in accordance with paragraph 1 against the data exporter, arising out of a breach by the data importer or his sub-processor of any of their obligations referred to in Clause 3 or in Clause 11, because the data exporter has factually disappeared or ceased to exist in law or has become insolvent, the data importer agrees that the data subject may issue a claim against the data importer as if it were the data exporter, unless any successor entity has assumed the entire legal obligations of the data exporter by contract or by operation of law, in which case the data subject can enforce its rights against such entity.

The data importer may not rely on a breach by a sub-processor of its obligations in order to avoid its own liabilities.

3. If a data subject is not able to bring a claim against the data exporter or the data importer referred to in paragraphs 1 and 2, arising out of a breach by the sub-processor of any of their obligations referred to in Clause 3 or in Clause 11 because both the data exporter and the data importer have factually disappeared or ceased to exist in law or have become insolvent, the sub-processor agrees that the data subject may issue a claim against the data sub-processor with regard to its own processing operations under the Clauses as if it were the data exporter or the data importer, unless any successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law, in which case the data subject can enforce its rights against such entity. The liability of the sub-processor shall be limited to its own processing operations under the Clauses.

## **Clause 7**

### **Mediation and jurisdiction**

1. The data importer agrees that if the data subject invokes against it third-party beneficiary rights and/or claims compensation for damages under the Clauses, the data importer will accept the decision of the data subject:
  - (a) to refer the dispute to mediation, by an independent person or, where applicable, by the supervisory authority;
  - (b) to refer the dispute to the courts in the Member State in which the data exporter is established.
2. The parties agree that the choice made by the data subject will not prejudice its substantive or procedural rights to seek remedies in accordance with other provisions of national or international law.

## **Clause 8**

### **Cooperation with supervisory authorities**

1. The data exporter agrees to deposit a copy of this contract with the supervisory authority if it so requests or if such deposit is required under the applicable data protection law.
2. The parties agree that the supervisory authority has the right to conduct an audit of the data importer, and of any sub-processor, which has the same scope and is subject to the same conditions as would apply to an audit of the data exporter under the applicable data protection law.
3. The data importer shall promptly inform the data exporter about the existence of legislation applicable to it or any sub-processor preventing the conduct of an audit of the data importer, or any sub-processor, pursuant to paragraph 2. In such a case the data exporter shall be entitled to take the measures foreseen in Clause 5(b).

## **Clause 9**

### **Governing law**

The Clauses shall be governed by the law of the Member State in which the data exporter is established..

## **Clause 10**

### **Variation of the contract**

The parties undertake not to vary or modify the Clauses. This does not preclude the parties from adding clauses on business related issues where required as long as they do not contradict the Clause.

## **Clause 11**

### **Sub-processing**

1. The data importer shall not subcontract any of its processing operations performed on behalf of the data exporter under the Clauses without the prior written consent of the data exporter. Where the data importer subcontracts its obligations under the Clauses, with the consent of the data exporter, it shall do so only by way of a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Clauses. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the data importer shall remain fully liable to the data exporter for the performance of the sub-processor's obligations under such agreement.
2. The prior written contract between the data importer and the sub-processor shall also provide for a third-party beneficiary clause as laid down in Clause 3 for cases where the data subject is not able to bring the claim for compensation referred to in paragraph 1 of Clause 6 against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and no successor entity has assumed the entire legal obligations of the data exporter or data importer by contract or by operation of law. Such third-party liability of the sub-processor shall be limited to its own processing operations under the Clauses.
3. The provisions relating to data protection aspects for sub-processing of the contract referred to in paragraph 1 shall be governed by the law of the Member State in which the data exporter is established.

4. The data exporter shall keep a list of sub-processing agreements concluded under the Clauses and notified by the data importer pursuant to Clause 5(j), which shall be updated at least once a year. The list shall be available to the data exporter's data protection supervisory authority.

## **Clause 12**

### **Obligation after the termination of personal data-processing services**

1. The parties agree that on the termination of the provision of data-processing services, the data importer and the sub-processor shall, at the choice of the data exporter, return all the personal data transferred and the copies thereof to the data exporter or shall destroy all the personal data and certify to the data exporter that it has done so, unless legislation imposed upon the data importer prevents it from returning or destroying all or part of the personal data transferred. In that case, the data importer warrants that it will guarantee the confidentiality of the personal data transferred and will not actively process the personal data transferred anymore.
2. The data importer and the sub-processor warrant that upon request of the data exporter and/or of the supervisory authority, it will submit its data-processing facilities for an audit of the measures referred to in paragraph 1.

## **Appendix 1**

### **to the Standard Contractual Clauses**

This Appendix forms part of the Clauses and must be completed and signed by the parties. The Member States may complete or specify, according to their national procedures, any additional necessary information to be contained in this appendix.

#### **Data exporter**

The data exporter is (please specify briefly your activities relevant to the transfer):

User of the SaaS solution, Instana Application Performance Management (APM), which allows statistical evaluations about the performance and reliability of applications and IT infrastructure.

#### **Data importer**

The data importer is (please specify briefly activities relevant to the transfer):

Provider of the SaaS solution, Instana Application Performance Management (APM), which allows statistical evaluations about the performance and reliability of applications and IT infrastructure.

#### **Data subjects**

The personal data transferred concern the following categories of data subjects (please specify):

Employees and other representatives of the data exporter, Clients and/or Business Partners of the data exporter.

#### **Categories of data**

The personal data transferred concern the following categories of data (please specify):

- First and last name
- Email
- Photographs and other graphics
- Job title
- Employer
- IP addresses

#### **Special categories of data (if appropriate)**

The personal data transferred concern the following special categories of data (please specify):

Data Exporter will not provide any Special Categories of Data, including financial account numbers, social security numbers, tax ID numbers, passport numbers, any government identification numbers of any kind, specifically highly regulated data (e.g. financial or healthcare data).

## **Processing operations**

The personal data transferred will be subject to the following basic processing activities (please specify):

The personal data will be subject to basic processing, including but not limited to collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction for the purpose of providing services to data exporter in accordance with the terms of the Agreement.



## Appendix 2

### to the Standard Contractual Clauses

This Appendix forms part of the Clauses and must be completed and signed by the parties.

**Description of the technical and organisational security measures implemented by the data importer in accordance with Clauses 4(d) and 5(c) (or document/legislation attached):**

Data Importer will maintain administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Personal Data as set out herein. Data Importer will not materially decrease the overall security of the Services during the provision of such Services by Data Importer to Data Exporter. Further information about security measures employed by the Data Importer can be found here: <https://instana.com/security>.