

DE4A – Memorandum of Understanding

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# Introduction

## Purpose of this MoU

Within the DE4A project, certain pilots will be organised. During these pilots, evidentiary documents are expected to be exchanged between public administrations and other entities, who are located in different countries. These piloting activities are partially organised within the context of the Single Digital Gateway Regulation (SDGR), but also aim to generally pilot solutions based on innovative technologies that enable new forms of organising once-only transactions in cross border e-government use cases (irrespective of whether they fall witing the scope of the SDGR).

This raises certain challenges for some piloting partners in the DE4A project, since the legal rights and obligations of the partners are not comprehensively regulated. The SDGR will not become fully applicable until December 2023, and some piloting activities will not be covered by the SDGR. While the DE4A Grant Agreement and the DE4A Consortium Agreement provides a legally binding statement of the rights and obligations of DE4A partners, these do not address constraints and obligations in relation to piloting to any level of detail.

In the absence of sufficiently comprehensive legislation or contracts, it is not unambiguously clear what the limitations to piloting activities in DE4A might be, nor how piloting partners are expected to be organised. The purpose of this MoU is to fill this gap, by providing a joint statement of mutual understanding between piloting partners in relation to the requirements, assurances and limitations in relation to piloting.

## Legal nature and goals

This document is a Memorandum of Understanding (MoU), not a legally binding contract. It is a non-binding, good faith, statement of shared understanding between the signatories.

Given its legal nature, the Memorandum does not supersede any legislation (whether at the EU, national or other level), nor does it supersede any contractual obligation (including but not limited to the DE4A Grant Agreement and the DE4A Consortium Agreement).

By signing this MoU, the signatories declare their intention to observe the agreements included herein in good faith, and affirm their good faith conviction that, to the best of their knowledge, the terms of this MoU do not contradict any legal requirements that apply to them. If a signatory becomes aware of any reason why he cannot respect the terms of this MoU during the DE4A project, he will endeavour to inform other signatories that may be affected by this inability.

Since the MoU is not a binding and enforceable contract, it contains no terms relating to liability, applicable law, or dispute resolution.

The signatories affirm that the DE4A Grant Agreement and the DE4A Consortium Agreement shall continue to apply to them, and that the terms of the DE4A Grant Agreement and the DE4A Consortium Agreement shall take precedence over any terms of the MoU that could cause a potential conflict.

## Scoping and intended applicability of this MoU

The sole objective of this MoU is to support the piloting activities between partners and/or their direct and indirect agents, as described in the Description of Work [1] referenced by the DE4A Grant Agreement and the DE4A Consortium Agreement, and as these may evolve in the course of the DE4A project.

Based on this scoping:

* This MoU does not affect non-piloting activities[[1]](#footnote-1) within the DE4A project
* This MoU does not affect non-piloting partners within the DE4A project
* This MoU does not affect piloting within the DE4A project that’s conducted purely internally by only one partner (internal piloting)
* This MoU does not affect any activities (including any piloting) organised outside the scope of the DE4A project
* This MoU terminates automatically after the termination of the DE4A project

The intended applicability implies that this MoU is intended to be signed by all DE4A partners who are involved in piloting, i.e. in any activities that involve the exchange of evidence to satisfy administrative procedures targeted by the DE4A pilots. Any DE4A partner may opt to allow this MoU to also be signed by other parties who are involved in such piloting activities on their behalf (e.g. subcontractors to the piloting partners).

Piloting parties may state their intent to adhere to the terms of the MoU by signing the Statement of endorsement in 5, and sending it to the DE4A Executive Board.

# Principles of this MoU

## In relation to legal compliance

Given its legal nature as set out in 1.2, this MoU does not affect the legal rights and obligations of the signatories. It is not intended to implement, complement or replace any part of the SDGR and/or its implementing act(s). It is also not intended as a precursor to any discussions or negotiations taking place between any signatories of the MoU in the context of the SDGR or in other related policy initiatives. All signatories remain free to take other or contrary positions in such discussions that those which may be included in this MoU.

More specifically and purely by way of example, this MoU does not affect the rights and obligations of the signatories in connection with the SDGR, the GDPR, or adherence to the DE4A Grant Agreement and the DE4A Consortium Agreement. It is not a data processing agreement, partner agreement, networking agreement, or shared policy.

## In relation to DE4A outputs

The signatories to this MoU declare their good faith intent to respect any agreed piloting requirements as set out in DE4A deliverables, including but not limited to architectural requirements and the use of reference code.

Where a signatory feels that adherence to these deliverables is not feasible or unsuitable for a piloting activity in which they are engaged, they will endeavour to share this concern with other parties involved in that piloting activity as soon as reasonably feasible, and at any rate prior to initiating the piloting activity.

Where a signatory feels that the requirements of a deliverable are inadequate or feasible or unsuitable for a piloting activity in which they are engaged, they will endeavour to share this concern with other parties involved in that piloting activity, and with the DE4A partner who is the lead responsible for that deliverable, as soon as reasonably feasible. They will seek in good faith to agree on clarifications or amendments to that deliverable, and to communicate these to other affected parties.

## In relation to piloting

The DE4A project will likely engage in a broad spectrum of piloting activities. These can include :

* activities that involve solely fictitious data and fictitious evidence, exchanged in fake procedures running in test environments; or
* activities undertaken in testing and pre-production environments requiring higher assurances that involve real-life data with real-life evidences, exchanged in actual procedures running in operational environments, with persons having prior knowledge of the DE4A project; or
* activities requiring higher assurances that involve real-life data with real-life evidences, exchanged in actual procedures running in operational environments, with persons (citizens or businesses) who have no particular fore-knowledge of the DE4A project.

The signatories agree that a nuanced approach is warranted, so that more flexibility is possible in low-risk piloting activities, and higher assurances are available in high-risk piloting activities.

Furthermore, the signatories agree that this MoU will govern the piloting activities of all signatories, irrespective of whether the piloting activities would fall within the scope of the SDGR.

# Piloting in DE4A

## Pilot types

This MoU considers three types of piloting activities:

* Low risk piloting activities include piloting activities that involve only fictitious persons, fictitious data, and test procedures. All three of these requirements must be met, or the piloting activities are qualified as medium risk.
* Medium risk piloting activities include piloting activities that involve any one or two of the following factors (but not all three cumulatively, since that would qualify as high risk):
  + Real-life persons
  + Real-life data
  + Production environments
* High risk piloting activities including piloting activities that cumulatively involve real-life persons, real-life data, and production environments.

For the purposes of this MoU:

* Fictitious persons are natural or legal entities which do not exist in real life. The persons are made up for testing purposes (although they should appear credible and some of their characteristics (e.g. their names) could theoretically correspond to real-life persons).
* Fictitious data is any data (including any evidence) that has been generated for testing purposes in relation to a fictitious person. Fictitious data should appear credible and could theoretically correspond to real-life data, but has not been copied from real-life data.
* Test procedures are any administrative procedures that are clearly distinguishable as such by all parties involved in the piloting activities, and which run exclusively on non-production environments - i.e. they cannot result in any legal effects or practical impacts on any real-life persons.
* Real-life persons are natural or legal entities which exist in real life.
* Real-life data is any data (including any evidence) relating to a real-life person.
* Production environments are any ICT systems (or components thereof) which are used by a competent authority for real-life procedures, i.e. procedures that can result in legal effects or practical impacts for real-life persons, or that can impact the accuracy or integrity of the data and databases held by competent authorities involved in the procedures.

In low-risk piloting activities, virtually no constraints (i.e. technical, legal and organisational measures limiting the impact of the activities on the fundamental rights and freedoms of real persons) must be applied, since no negative impacts can realistically occur in relation to real-life persons, procedures or systems.

In medium-risk piloting activities, some constraints should apply as will be explained below, since some negative impacts can occur in relation to real-life persons, procedures or systems.

In high-risk piloting activities, it is advisable under this MoU to apply more significant constraints as will be explained below , since significant negative impacts can occur in relation to real-life persons, procedures or systems.

Note that, purely by way of examples, as other situation may arise during the piloting:

* Any procedures involving real-life persons are automatically considered as at least medium risk (even e.g. if fake evidence is used, and even when running only on pre-production environments). This is because real-life persons may become identified due to incidents, resulting in negative consequences that may be difficult to manage (e.g. a real-life person is incorrectly revealed to receive a (fake) pension from another country in a (fake) procedure – the fakeness may not be readily apparent to external persons).
* Any procedures running on production environments are similarly considered to be at least medium risk, since an incident may impact the environment (which is by definition used for real life procedures), even if no real-life person or data is involved.

## Shared principles in relation to all piloting activities, including communication within the DE4A Consortium

Any piloting activity in the scope of this MoU involves at least two signatories.

The signatories declare their mutual understanding that, prior to initiating any piloting activity, they endeavour to agree in writing on the risk qualification (low risk, medium risk, high risk) that applies to their piloting activity.

They may choose to make this qualification as broad or as fine grained as seems suitable to them (e.g. by applying a different qualification depending on the use case or iteration), provided that it is clear to the participants in each piloting activity which risk qualification applies, and why (e.g. because it involves real life persons, real life data, production environments, etc).

The signatories agree that the qualification is determined by the most elevated risk in the piloting activity. E.g. if one party uses a test environment in a piloting activity but the other uses a production environment, the production environment determines the risk qualification.

The signatories furthermore agree that the qualification is dynamic, and that the progression of the pilot may result in risk profiles being elevated (e.g. a low risk activity becomes medium risk because real life data is now being used) or being lowered (e.g. a high risk activity becomes medium risk because the participants decide no longer to use production environments for future piloting). They endeavour to keep each other informed of such changes in good faith.

The signatories agree to communicate in good faith between each other on any incident or development that affects the risk qualification of their piloting activities, using the governance structure elaborated per pilot (as described in the three Pilot Planning deliverables D4.2, D4.6, and D4.10). They furthermore agree to communicate relevant information to other pilot participants in their piloting activities through this structure, in cased of any noncompliance with this MoU that may affect other pilot participants.

## Low risk piloting

The signatories affirm their mutual understanding that low risk piloting implies no specific constraints or obligations on any side (other than the good faith communication set out in 3.2,) given the inherent lack of potential impact on persons, data or systems.

## Medium risk piloting

The signatories affirm their mutual understanding that medium risk piloting should involve:

* An active communication to any real-life person (if applicable) informing them of the fact that they are involved in piloting activities, including the identification of any risks and countermeasures taken, and the (lack of) legal effects and consequences of participation. The communication should be done in their own language, in an accessible manner, and providing usable contact information. If the GDPR applies, such information provision should satisfy the requirements of the GDPR. Appropriate documentation should be retained to demonstrate that this information has been provided.
* If the piloting involves real-life persons, piloting should be organised under the supervision of a DPO.
* If the piloting would be done on a production environment, all pilot partners should notify any operators of such environments in their respective countries in advance, and appropriate measures should be taken that piloting activities do not result in negative legal or practical consequences for any real-life persons, real life data, or production environments[[2]](#footnote-2). The production environments should be cleaned if the piloting activity was not intended to have long term legal or practical consequences for any real-life persons, real life data, or production environments, even after project termination.
* All piloting activities should be monitored by pilot partners (each solely in relation to such components of the piloting activities which are under their responsibility) in a manner that allows any incidents to be detected and remedied (including by contacting any affected real-life persons where needed).

## High risk piloting

The signatories affirm their mutual understanding that high risk piloting should involve:

* All measures that apply to medium risk piloting as set out in 3.4
* The DE4A project DPO should be informed prior to initiating piloting activity, and of any incidents that are reasonably likely to create legal effects or practical impacts on any real-life persons.
* The implementation of a pilot monitoring and remediation strategy as a part of the governance structure elaborated per pilot (as described in the three Pilot Planning deliverables D4.2, D4.6, and D4.10), covering all participating countries, to assess whether exchanged evidences are reasonably capable of satisfying the legal, technical and operational requirements for high risk piloting, including in terms of data quality, and to ensure that any errors in the piloting activity can be detected and remediated in a manner that eliminates any negative legal or practical consequences for any real-life persons, real life data, or production environments.

# Statement of endorsement

On behalf of [*identification of the legal entity involved in a piloting activity – name, legal form, address – should be identical to the Grant Agreement/Consortium Agreement if applicable*],

[*Name*], [*Function*]

Hereby declares that the aforementioned entity intends in good faith to adhere to the terms of the Memorandum of Understanding in relation to its piloting activities in the DE4A project.

[*Date*] [*Location*] [*Signature and/or stamp*]

References

1. DE4A Description of the Action
2. Berlin Declaration on Digital Society and Value-Based Digital Government of 8 December 2020. <https://www.bmi.bund.de/SharedDocs/downloads/EN/eu-presidency/berlin-declaration-digital-society.pdf;jsessionid=16E411E2A284D84BDE5A1956E1439F1D.2_cid364?__blob=publicationFile&v=2>, retrieved on 2020-12-17

1. To be understood in the broad sense as any activities that don’t include any testing of developed components in a way that involves real or fictitious persons or procedures. Non-piloting activities therefor include software development, compilation and black box testing; focus group testing or stakeholder consultation, marketing, feedback collection, surveying and assessing infrastructure prior to piloting, or integration with non-DE4A infrastructure. [↑](#footnote-ref-1)
2. By way of non-exhaustive examples, one might consider the automatic discarding of cross-border evidence received through the DE4A technical system after the submission step, preventing it to be definitively entered into the requesting competent authority’s system; or marking such data in a way that makes it easier for the data to be identified and deleted afterwards if this is needed. Alternative measures include active and live monitoring of logs to comprehensively track any changes in affected systems, or the intervention of pilot stewards at each piloting entity who can ensure that incidents are monitored and addressed appropriately, and who communicate between each other to flag and address any issues that emerge. [↑](#footnote-ref-2)