

**GENERAL TERMS AND CONDITIONS FOR SUBSCRIPTION AND SUPPORT AGREEMENTS  
OF MATHIAS KETTNER GMBH**

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These General Terms and Conditions (“GTC“) comprise the following sections:

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**1. SCOPE**

- 1.1 By signing a subscription and/or support agreement (the “**Agreement**“), the client (the “**Client**“) commissions Mathias Kettner GmbH (the “**Contractor**“) to provide services in the fields of maintenance and debugging of open source software for himself and, where applicable, for companies affiliated with the client. Further details are set forth in the relevant assignment which is based on these GTC.
- 1.2 Unless otherwise agreed in writing, all services provided by the Contractor shall be governed exclusively by the provisions of these GTC. The GTC shall apply even in cases where no express reference is made to them.

**2. REQUEST AND DELIVERY OF SUPPORT SERVICES**

- 2.1 Support services shall be requested by the Client by way of an e-mail to the address which the Contractor shall allocate and disclose to the Client once the support Agreement has been concluded. Any support request which has not been agreed and paid in advance shall require the Contractor’s express acceptance; without such acceptance, the Contractor shall not be obliged to process the support request by the Client or to deliver any support services.

- 2.2 Apart from the Client, companies affiliated with the Client pursuant to §§ 15 ff. AktG (“**Affiliated Companies**“) may also request support services from the Contractor. Such requests shall constitute separate contractual relationships between the Contractor and the Affiliated Companies. The Client shall have the sole responsibility to pay the Contractor the owed remuneration for the provision of support services to Affiliated Companies.
- 2.3 The Contractor shall endeavour to solve support requests within the scope of the assignment; however, a particular success shall not be owed by the Contractor. The Contractor shall respond per telephone or per e-mail to support requests by the Client within the contractual response time and subsequently process these requests (“**Service**“).

### **3. RESPONSE TIMES**

- 3.1 For an additional fee the parties can agree on a binding maximum response time of 24 hours on working days for the Services to be delivered by the Contractor.
- 3.2 In the absence of any other express agreement, the binding response time shall mean that the Contractor must have started the Service delivery within that time; a successful completion of the work within the agreed timeframe shall only be owed where expressly agreed.
- 3.3 Working days for the purpose of this provision shall be Monday to Friday excluding statutory holidays in Bavaria. The normal working hours on working days shall be from 8 a.m. to 5 p.m.

### **4. CLIENT OBLIGATIONS**

- 4.1 In addition to a detailed and comprehensible problem description for his support request, the Client shall provide, upon the Contractor’s request, the documentation of the system on which maintenance work is to be performed and – if requested by the Client – any data that are necessary to gain remote access to the system. The Client shall reply to any additional questions by the Contractor within a reasonable amount of time. Notwithstanding anything to the contrary contained herein, in no event shall Contractor have, nor shall Client be required to provide, access to Client’s or its affiliate’s systems or servers and Contractor shall not attempt to or actually fix any issues or problems on Client’s systems or servers.
- 4.2 The Client is aware that with IT systems data may be lost at any time. The Client therefore shall back up its data regularly (at least daily) as well as immediately before the Contractor commences any maintenance work. The Contractor shall not be obliged to back-up any data before commencing its work.

### **5. DOWNLOAD SERVER ACCESS (SUBSCRIPTION)**

- 5.1 Within the scope of the assignment and during the term of the Agreement, the Contractor shall provide the Client access to software on a download server which is operated by the Contractor.

- 5.2 In this context, the Contractor shall only owe the access to the download server, but shall not be liable to verify the downloadable software bundles with regard to their operability, their suitability for a particular purpose or the absence of any technical defects. The liability of the Contractor for any of the above shall be excluded, except to the extent caused by the Contractor's gross negligence or willful misconduct.
- 5.3 For files downloaded from the download server that are explicitly marked with the license notice "*Distributed under the Check\_MK Enterprise License*" the following provisions shall apply:
- a. The Client has the non-exclusive, perpetual right to use these files in accordance with their intended purpose for its own business activities. The Client's "**use for own business activities**" means that only the Client's own employees, freelance workers, or external service providers working for the Client may use the files.
  - b. The Client has the right to modify the files as long as no copyright or licenses notices are modified or removed. The provisions of this paragraph 5.3 shall also apply to the modified file version.
  - c. If the Client and the Contractor have explicitly and in writing agreed on a "**Group Use**", the Client shall also have the perpetual right to use the files in accordance with their intended purpose for the business activities of its Affiliated Companies and/or to pass the files on to its Affiliated Companies and to permit them to use these files in accordance with their intended purpose for their own business activities.
  - d. If the Client and the Contractor have explicitly and in writing agreed on a "**Managed Service Provider Use**", the Client shall also have the perpetual right to use the files in accordance with their intended purpose as an add-on service for the business activities of its customers who have an ongoing contract with the Client in place regarding the provision of other material paid services. The offer as an independent stand-alone service (i.e. not as an add-on to other material Client services) is not permitted. In this context the Client's customers are only permitted a passive use, i.e. they can have read-only access to the web interface to obtain information and/or reports and can receive alerts which the Client has set up; an active customer use, particularly in the form of own customer configuration changes, confirmation of incidents or the handling of maintenance modes, is not permitted.
  - e. Any additional usage rights of the Client (particularly to copy or distribute the files or make them publicly available) shall only exist if the Contractor has explicitly agreed to such rights in writing, or if they are based on a mandatory provision of applicable statutory law.
  - f. The content of the files is confidential information pursuant to paragraph 8 below.
- 5.4 For all other files the Client shall have the exclusive responsibility to verify the relevant licensing conditions for the downloaded software and to ensure compliance with such provisions and/ or that any required third-party licensing rights are acquired.

## **6. REMUNERATION**

- 6.1 Unless a different price has been agreed or if the Contractor provides services which are not owed within the scope of the relevant assignment, the Contractor shall invoice its support services based on the number of 15-minute work units. The Contractor's price for every started work unit shall be separately agreed in the support contract. The Client usually orders and pays in advance a defined number of work units, which shall be valid for a period of 12 months (the relevant date shall be the day on which a support request is received, so that work units can still be used for working on a support request which has been submitted on time, even though the 12 months may have lapsed); work units that are not used up within this year shall become void without compensation to the Client. The Client and the Contractor may also agree on a different model, under which the Client merely places a non-binding pre-order for a number of work units without paying them in advance, and then requests work units as the need arises; in this case the actually consumed work units will be invoiced upon their individual request (even if the number of actually consumed work units exceeds the Client's non-binding pre-order).
- 6.2 In addition to paragraph 6.1 the Client shall pay an annual flat fee for the download server access which depends on the number of services which are monitored by the monitoring systems within the scope of the Agreement. The Client shall inform the Contractor upon request about the number of services which are monitored by the monitoring systems within the scope of the Agreement. The Contractor shall invoice the relevant fee to the Client in advance at the start of each contract year; if the number of monitored services exceeds the agreed threshold during the contract year the invoice amount shall be increased accordingly and shall become due retrospectively for the contract year concerned, provided, however, that if the Contractor raises the relevant fee for any monitored service during any contractual year, the Client shall have the right to terminate this Agreement upon thirty (30) days written notice from the date the Client receives notice of the fee increase.
- 6.3 All prices are quoted net and excluding VAT, which shall be added at the statutory rate if applicable.
- 6.4 Invoices of the Contractor shall be due for payment without deductions within thirty (30) days of receipt, except in the case of a good faith dispute.

## **7. SUBCONTRACTORS**

- 7.1 The Contractor may commission subcontractors for providing its services. The Client may withdraw the permission to employ subcontractors based on its reasonable discretion.
- 7.2 Even when employing authorized subcontractors, the Contractor shall remain fully responsible for complying with its contractual obligations towards the Client and shall be responsible for any breach of this Agreement by any subcontractors it so employs.

## **8. CONFIDENTIALITY**

- 8.1 All information of one party that is obtained by the other party in connection with an assignment and/or with the fulfilment of its contractual obligations shall be considered confidential, unless it explicitly marked as not confidential or its non-confidential nature is evident, particularly if it is:
- a. Information which was verifiably known to the receiving party prior to its first disclosure by the disclosing party and without being subject to any confidentiality obligations;
  - b. information which was already in the public domain prior to its disclosure or which subsequently became public domain without any infringements of confidentiality obligations by the receiving party;
  - c. information which was received in good faith by a party from a third party which was not bound by confidentiality obligations towards the disclosing party or towards other parties with regard to such information;
  - d. information which must be disclosed pursuant to applicable laws or orders from any court, supervisory or regulatory authority.
- 8.2 The parties undertake to treat all confidential information of the other party as confidential and to protect such information to the same extent as if it were their own confidential information, but with no less than reasonable care. Passing on confidential information to third parties, except to employees, agent or representatives who need to know such information in order to comply with contractual obligations, requires prior written consent by the party concerned.
- 8.3 The parties shall also oblige their employees, subcontractors and other agents to comply with these confidentiality obligations and shall be responsible for any breach hereof.
- 8.4 These confidentiality obligations shall apply for an indefinite period.

## **9. DEFECT CLAIMS**

- 9.1 Unless where agreed otherwise, the Contractor shall remedy any performance defects during the three-year warranty period, at its discretion either by rectifying the defect (subsequent improvement) or by delivering a defect-free performance (replacement).
- 9.2 Where the defect cannot be rectified within a reasonable amount of time or if the subsequent improvement or replacement fails for other reasons, the Client may immediately terminate this Agreement and any services or schedules hereto and shall be reimbursed a prorated amount of the subscription and support fees for the remainder of the current term. Damages or compensation for Client's expenses relating to any failed remedy by Contractor may only be claimed within the scope of paragraph 10 herein.
- 9.3 Subsequent improvements or replacements may only be deemed as failed after the contractor has been granted reasonable opportunity in order to carry out such subsequent improvement or replacement without achieving the desired success, if such subsequent improvement or replacement is impossible or where it is refused or

unreasonably delayed by the contractor, where there are justified doubts with regard to the prospects of success or for any other causes which are considered unreasonable.

- 9.4 Where a defect indicated by the Client cannot be attributed to the Contractor or to one of the subcontractors commissioned by the Contractor or where there is no actual defect, the Contractor may charge the Client the working hours spent analysing or trying to rectify the defect or any maintenance work carried out in this context, at the rates agreed with the Client.

## **10. LIMITATION OF LIABILITY**

- 10.1 The parties shall only be liable for damages caused through ordinary negligence if they are based on a breach of material contractual obligations which can prevent that the contract's purpose is achieved, or in case of a breach of duties which must be complied with in order to fulfil the contract.
- 10.2 In the cases described in paragraph 10.1, the liability of the parties shall be limited to typical and reasonably foreseeable damages.
- 10.3 In the cases described in paragraph 10.1, the liability of each party shall be limited to the following amounts:
- a. For each individual claim, the amount shall be limited to a maximum of 25% of the calculation basis defined below, and
  - b. for all claims caused in any one contractual year which are related to this Agreement, the amount shall be limited to a maximum of 50% of the calculation basis defined below.

The calculation basis for the above limitations of liability shall be defined as follows:

- During the first contractual year: the annual net fee agreed between the parties at the time of concluding the Agreement;
  - during subsequent contractual years: the cumulated annual net turnover achieved by the Contractor in connection with the relevant Agreement in the preceding contractual year.
- 10.4 Any liability for loss of profits in the cases described in paragraph 10.1 shall be excluded.
- 10.5 The parties shall be liable for the loss of data or programmes only if (i) such loss was unavoidable even if the other party had applied reasonable precautions to prevent the loss of data (in particular by making at least daily back-up copies of all programmes and data) or (ii) loss is caused by the responsible party's gross negligence or wilful misconduct. Otherwise, any liability for loss of data shall be subject to the limitations described in paragraph 10 herein.
- 10.6 Except for cases of assumed warranties, fraud, wilful damage or other wilful misconduct or maliciously concealed defects or in case of corporal damages, the above liability limitations shall apply to all damage claims irrespective of their legal basis, including all claims arising from tortious actions.

10.7 The above liability limitations shall also apply in case of damage claims by one of the parties against employees or agents of the other party.

## **11. TERM AND TERMINATION**

11.1 Unless otherwise agreed, the term of the assignment shall be 12 months.

11.2 Unless where the assignment is terminated in due form by one of the parties with three months' notice to the end of the contractual term or earlier in accordance with the terms herein, the assignment shall be extended automatically by another one-year term. This shall not affect the right to termination for important reasons.

11.3 All terminations must be communicated in writing.

## **12. NON-SOLICITATION CLAUSE**

12.1 During the term of the assignment and for one year after its expiry, the Client shall not recruit or commission the recruitment of any employees deployed by the Contractor within the scope of this Agreement; provided, however that general non-targeted job offers and responding thereto shall not be deemed a breach hereof.

12.2 The Client shall be liable to pay a contractual penalty for every culpable breach of this obligation. The amount of this contractual penalty shall correspond to the cumulated gross salary of the recruited employee over the six months preceding his departure from the contractor.

## **13. APPLICABLE LAW AND JURISDICTION**

13.1. This Agreement shall be governed exclusively by the statutory provisions of the Federal Republic of Germany (excluding any references to other legal systems). The provisions of the UN Convention on Contracts for the International Sale of Goods (CISG) shall be excluded.

13.2. The courts competent for the judicial district of the town of Munich and shall have jurisdiction in cases where the parties are unable to settle any disputes by mutual agreement.

## **14. MISCELLANEOUS**

14.1 **Final provisions.** The assignment and these GTC contain the final provisions concerning the subject matter agreed between the parties. They supersede all previous agreements between the parties concerning this subject matter. No oral side agreements have been concluded. The trading conditions of the parties shall not apply, even if a party refers to their trading conditions in individual cases without the other party raising any objections.

14.2 **Written form.** In order to be effective, any amendments of the contractual relationship must be in writing. This requirement for the written form also applies to any waiver of the requirement for the written form.

- 14.3 **Severability.** In case any provision agreed between the parties is or turns out to be invalid or unenforceable, the validity of the assignment as a whole shall not be affected. The parties shall replace the provision concerned with a valid and enforceable provision which is as close as possible to the original economic objective of the parties.
- 14.4 **Reference.** The Contractor may mention the Client as a reference customer when communicating with other potential clients and/or on his website and he may use the client's logo for this purpose.