

**Xain AG**, Schmiedestr. 2A, 15745 Wildau (Berlin), Germany

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## **Contractual Provisions for the Use and Subscription of Standard Software and the Performance of Support Services and Professional Services**

### **Part A. General provisions**

#### **1. SCOPE AND APPLICABILITY**

1.1 The following provisions (hereinafter referred to as "CONTRACTUAL TERMS") set forth the general and special conditions pursuant to which Xain AG (hereinafter referred to as "Xain") provides goods and services to its contractual partner, which is not a consumer, (hereinafter referred to as "Customer") named in the individual order, order confirmation and/or statement of work ("SOW", each an "Order") which refer to these CONTRACTUAL TERMS.

1.2 Specifically:

- Part A governs the general conditions that apply to all services covered by Part B (collectively referred to as "SERVICES");
- Part B governs the special conditions for the use of software ("SOFTWARE LICENSING");
- Part C governs the special conditions for providing software support services (hereinafter referred to as "SOFTWARE SUPPORT SERVICES");
- Part D governs the special conditions for providing additional services, for example software development services (hereinafter referred to as "PROFESSIONAL SERVICES");
- Part E governs the special conditions for providing additional software maintenance services (hereinafter referred to as "SOFTWARE MAINTENANCE SERVICES");

1.3 The rules in Parts B, C, D and E supplement the rules in Part A and take precedence and priority over them. Any Order takes precedence and priority over the CONTRACTUAL TERMS.

1.4 The CONTRACTUAL TERMS also apply, unless otherwise expressly agreed:

- As a supplement to all other agreements with comparable subject matter made by and between Xain and the Customer (also collectively hereinafter referred to as "Parties" or "Contracting Parties");
- As a master agreement also for future agreements with the Customer for SERVICES, with no requirement to refer to the present provisions again in each individual case.

1.5 The CONTRACTUAL TERMS shall apply exclusively. Any terms and conditions of the Customer that conflict with, differ from or supplement these terms and conditions will not become an integral part of the contract unless Xain has expressly consented in writing to their application. For example, consent shall not be deemed to be given even if, in the knowledge of the Customer's terms and conditions, Xain accepts – without any reservations – orders, performs services or directly or indirectly refers to letters, etc., which contain the Customer's or third-party terms and conditions.

1.6 If a LICENSED PRODUCT and/or the right to purchase SERVICES was acquired through a reseller, the Customer acknowledges that the present provisions represent the entire agreement between the Customer and Xain with respect to the individual LICENSED PRODUCT. In particular, the Customer acknowledges that:

- terms and conditions of any purchase agreement or other agreement between the Customer and the reseller have no effect for or against Xain;
- the reseller is not authorized to represent Xain;
- the reseller is not authorized to modify or amend this agreement;
- Xain makes no statements or commitments regarding services performed by a reseller.

#### **2. ORDERS**

2.1 Offers by Xain as well as delivery and service dates are only approximate unless the binding character is explicitly agreed in writing.

2.2 Orders from Xain are binding only if made in writing.

#### **3. COMPENSATION**

3.1 Xain shall invoice the Customer for compensation for the respective SERVICES in accordance with the Order. Unless otherwise agreed, Xain will invoice the SERVICES at the end of every month.

3.2 All prices are net without applicable value-added tax. The value-added tax rate and amount will be stated separately on invoices.

3.3 The compensation is due and payable within 30 (thirty) days after the invoice date shown on the Order unless the Parties explicitly specify the due date in writing. If the Order does not indicate an invoice date, the compensation is due and payable within 30 (thirty) days after the agreement is made.

3.4 In the case of delay in payment by the Customer, Xain may charge interest at a rate of 6 percent per annum above the applicable base interest rate, unless Xain shows greater damage or the Customer shows lesser damage in the specific case. Xain's further rights shall remain unaffected thereby.

3.5 While the Customer is late with payment, Xain's obligation to provide Services is suspended unless the Services are withheld in bad faith, for instance if the outstanding amount is relatively small. Periods and deadlines are suspended for Xain for the duration of the delay in payment.

3.6 In the case of delay in payment and expiration of a reasonable additional grace period without result and in the event of other justified doubts as to the Customer's solvency or creditworthiness, Xain is further authorized to immediately call in all claims arising from the business relationship, without prejudice to other further rights.

3.7 The Customer can only set off a claim for damages or price reduction based on a defect against the compensation or assert a right of retention if Customer notified Xain of his intention at least one month before the due date of the compensation. Otherwise any set-off against the compensation or right of retention is precluded unless it involves claims that are uncontested or ready for adjudication or have been adjudicated finally and unappealably or if such claim is based on the same contractual relationship as the compensation claim.

3.8 Customer will reimburse Xain for travel and accommodation costs up to the amount of the costs for an economy class flight, a 2nd class train journey, the journey by own car (in the form of a kilometer flat rate) and/or for a middle-class hotel, which are incurred for Xain in connection with the provision of the SERVICES, if indicated to the Customer in advance in text form.

3.9 To the extent the Parties did not agree on separate compensation for providing SERVICES in the Order, the amount of compensation is determined according to the Xain prices applicable at the time the respective Services are provided.

3.10 A working day consists of up to eight working hours. Four and less working hours are charged as half days.

#### **4. USE OF SUBCONTRACTORS**

Xain has the right to use subcontractors to fulfill its obligations when providing SERVICES.

#### **5. CUSTOMER COOPERATION AND NOTIFICATION REQUIREMENTS**

5.1 The Customer has the obligation to provide reasonable support to Xain in the scope necessary in each case when Xain provides SERVICES, and in particular will:

- promptly send a reminder regarding SERVICES not performed in conformance with the agreement;
- make available to Xain all data, files, and other information relevant for the SERVICES to be provided;
- give Xain all other information needed by Xain in order to properly perform the SERVICES;
- make available test plans and test data as well as prepare and make available the test environment, if necessary;
- make available at its own cost all facilities, equipment and suitably qualified personnel to the extent necessary for the provision of the SERVICES;
- fulfil the (cooperation) obligations on time, to carry out the (cooperation) activities on time and to give declarations in accordance with the time limits.

5.2 The Customer must take all necessary and reasonable steps to prevent or limit damage caused through use of the LICENSED PRODUCT. In particular, this includes regularly backing up data and programs that are at risk from complete or partial improper functioning of the software.

5.3 The Customer will give Xain access to the LICENSED PRODUCTS to search for and eliminate defects.

5.4 Xain is entitled to verify whether the LICENSED PRODUCT is used in accordance with the present provisions by presenting a request for information.

5.5 The Customer shall bear the disadvantages and added cost resulting from a violation of Customer's obligations. If Customer fails to perform the obligations for which Customer is responsible, then the obligations of Xain which cannot be rendered without such obligation or only by incurring disproportionate additional expenses, shall be suspended for the duration of such default. Additional expenses caused thereby shall be reimbursed by Customer to Xain in addition to the agreed compensation on the basis of the then current rates per man working day/hourly rates. This shall not affect any legal rights of Xain to terminate this agreement.

#### **6. LIABILITY**

6.1 Notwithstanding other provisions set forth in this agreement and regardless of the grounds, Xain is only liable:

- (a) without limitation in cases of intentional misconduct and gross negligence by a legal representative, executive or other agent;
- (b) without limitation in case of injury to life, limb or health caused through slight or ordinary negligence by Xain, its legal representatives or agents;
- (c) for product liability damage under the German Product Liability Act and in the event of malicious failure to disclose a defect or assumption of a warranty for the quality of the goods (*Beschaffheitsgarantie*) or a procurement risk (*Beschaffungsrisiko*);
- (d) in terms of the legal merits in the case of any culpable violation of a major contractual duty (the concept of major contractual duty abstractly designating any duty of which the fulfillment is essential for proper implementation of the agreement and on the performance of which the other Party may regularly rely), in the case of delay and impossibility, with liability being limited to the amount of typically foreseeable damage in the case of financial loss and property damage;
- (e) for the loss of data and/or programs, in an amount no greater than the expense incurred for restoration of the data if the Customer performed regular data backups adequate for the application and thereby ensured that lost data can be restored at reasonable expense.

6.2 There is no further liability. In particular, Xain has no liability for lost profit, lost production, interruption of operations, contractual claims by third parties, loss of use, financing expenses or other financial loss and consequential damages.

6.3 The above provisions also apply for the benefit of Xain's employees, agents and subcontractors to whom duties were transferred.

6.4 Damage compensation claims against Xain, its employees or agents fundamentally become time-barred one year after they arise. This shall not apply to damage compensation claims (i) that were established through intentional or grossly negligent violations of duties or (ii) that are based on any liability for damage from injury to life, limb, or health, or (iii) in the event of malicious failure to disclose a defect or assumption of a warranty for the quality of the goods (*Beschaffheitsgarantie*) or a procurement risk (*Beschaffungsrisiko*), or (iv) under the German Product Liability Act.

6.5 In case the Parties agreed upon a SUBSCRIPTION in terms of Section B, Xain cannot be held strictly liable for a defect which exists when the agreement is entered into.

#### **7. RESCISSION AND TERMINATION**

7.1 If Xain has a right of rescission or termination according to these CONTRACTUAL TERMS, Xain's other legal rescission rights, particularly due to delay in payment, shall remain unaffected thereby.

7.2 Neither Party may rescind from or terminate individual parts of the agreement/Order, rather, any agreement/Order may only be rescinded from or terminated in whole.

## **8. NON-DISCLOSURE**

8.1 The Contracting Parties are required to treat as confidential the information made available to them by the other Party under these CONTRACTUAL TERMS.

8.2 Specifically, the Contracting Parties are prohibited from utilizing confidential information or communicating it or making it available to third parties, unless this is for the purpose of required implementation of the respective contractual relationship.

8.3 The aforementioned duties under Sections A.8.1 and A.8.2:

- (a) relate in particular to knowledge regarding technical, commercial, or organizational matters which one Contracting Party received from the other Contracting Party during the cooperation;
- (b) and relate to all other information that was clearly designated as confidential or of which the confidentiality results from the circumstances in which it was provided.

8.4 The duties under Sections A.8.1 and A.8.2 shall not apply to information for which the receiving Party shows:

- (a) that it was already lawfully known to the Party prior to the date it was received;
- (b) that it was publicly known or publicly available prior to the date it was received;
- (c) that it became publicly known or publicly available after the date it was received and the Party receiving the information is not responsible therefor;
- (d) that it has been independently developed by the receiving party without use or reference to the information;
- (e) that it has been made available to the receiving party by a third party who has legally obtained such information and as entitled to disclose it;
- (f) is revealed in response to the applicable laws, a valid order of a competent court or governmental body, provided however, that if such disclosure has to be made, the Party so ordered will notify the other Party as soon as possible so that the other Party may, at its own expense, take or ask the ordered Party to take reasonable steps to prevent or restrict that disclosure.

8.5 In case of doubt as to whether a non-disclosure duty applies according to Sections A.8.1 and A.8.2, the Contracting Parties are required to send a written request for permission from the other Party prior to any action within the meaning of Section A.8.2. In particular, neither Contracting Party will disclose the conditions of this agreement to third parties without written permission from the other Party, though the existence of this contractual relationship may be disclosed by both Parties.

8.6 The Contracting Parties will impose non-disclosure duties on their respective employees and agents according to the scope indicated in Sections A.8.1 to A.8.5. The same

applies for third parties which a Contracting Party may utilize when fulfilling its obligations to the other Contracting Party.

8.7 Unless there are circumstances as described in Section A.8.4, the aforementioned non-disclosure duties will remain in force for both Contracting Parties for an indefinite period of time after the end of the CONTRACTUAL TERMS.

## **9. DATA PROTECTION**

9.1 The Customer hereby acknowledges that Xain may collect, store, process and use personal data of the Customer and its personnel needed in order to establish, conduct and terminate business relationships (particularly names, telephone numbers, and e-mail addresses). Xain may also transfer such data to Xain affiliates, subcontractors, sales partners and other persons engaged by Xain for those business relationships (including communication with the Customer). Such data will be deleted if not required any more, unless a storage for a longer period of time is required by law, and shared with service providers. Customer's concerned personnel has the right to information, rectification, deletion, transferability of data, restriction of processing and complaint to the supervisory authority. For any further information on what personal data Xain processes and for what purpose Xain processes such data, please contact Xain or Xain's data protection officer or refer to Xain's privacy policy available under [www.xain.io/services/privacy](http://www.xain.io/services/privacy). Customer shall inform its personnel concerned about such processing of their personal data.

9.2 The Customer hereby states that Customer is responsible for complying with data protection regulations. In particular, the Customer hereby confirms that all legal requirements for making personal data available or forwarding it to Xain have been met, and in particular in this regard that all persons whose personal data was made available or forwarded to Xain agreed to the collection, processing and use of the data, to the extent required by law.

9.3 On request by the Customer and if required by laws, the Parties will conclude a data processing agreement according to Art. 28 of the General Data Protection Regulation. The basis for this is a sample contract provided by Xain.

## **10. OTHER PROVISIONS**

10.1 Deletions, changes or amendments to these CONTRACTUAL TERMS must be executed in writing in order to be valid; this also applies to any amendment to this written form clause.

10.2 All notices and other communications in connection with this agreement shall be made in text form, unless otherwise stipulated. Termination and rescission notices must be signed and delivered via registered mail.

10.3 Only the management of Xain is authorized to make changes or amendments to agreements, including these CONTRACTUAL TERMS, or to agree ancillary provisions. Any other representatives of Xain within the meaning of § 54 (1) of the German Commercial Code (HGB) are thus limited in their authority. Deviations from this rule are valid only if they are agreed in writing.

10.4 Customer may not assign any rights or claims under these CONTRACTUAL TERMS without the prior consent of Xain.

10.5 Xain reserves the right to amend or supplement the CONTRACTUAL TERMS at any time, provided that the Customer is not disadvantaged in good faith by such amendment or supplement. Amendments or supplements to the CONTRACTUAL TERMS will be announced by notification in text form. They are deemed approved if the Customer does not object in writing within two months upon such notification being submitted by Xain. Xain shall specifically point out this consequence in the notification.

10.6 To comply with the written-form requirements in terms of these CONTRACTUAL TERMS, it is sufficient for communications to be sent by either fax or email only, the latter with a scanned and signed document having to be attached.

10.7 Should individual provisions of these CONTRACTUAL TERMS be or become invalid or unfeasible in whole or in part, the validity of the remaining provisions of this agreement shall not be affected thereby. The Contracting Parties will promptly replace the invalid or unfeasible provision with one that most closely approximates the legal and economic purpose of the invalid or unfeasible provision. Until that time such a provision shall be considered to be agreed. The preceding applies accordingly for closing any lacunae in the agreement.

10.8 This agreement and its interpretation and any non-contractual obligations in connection with it are subject to German substantive law. The UN Convention on Contracts for the International Sale of Goods (CISG) shall not apply.

10.9 Place of performance is the location of Xain's registered office. In case of any disputes arising from or in connection with contractual relationships between the Contracting Parties, the courts at the location of Xain's registered office shall have exclusive jurisdiction. The foregoing shall not limit the right of Xain to initiate proceedings against the Customer at its place of jurisdiction

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## **PART B. SPECIAL PROVISIONS FOR THE USE AND SUBSCRIPTION OF STANDARD SOFTWARE**

### **1. USAGE RIGHTS FOR PERMANENT USE OF SOFTWARE**

1.1 Xain grants the Customer a simple, non-exclusive, non-transferrable, non-sublicensable right to use the contractually individualized LICENSED PRODUCT (excluding THIRD-PARTY SOFTWARE mentioned as such in an Order, in which case section B.5 applies), limited in time subject to section B.3, limited in place and manner subject to section B.1.3.

1.2 LICENSED PRODUCT shall mean (i) Software that is licensed to the Customer (referred to hereinafter as "SOFTWARE PRODUCT") and (ii) the associated documentation in English or German (referred to hereinafter as "DOCUMENTATION") as technical and other user guides and "readme" files.

1.3 The right to use the LICENSED PRODUCT:

- (a) is limited to the internal business purposes of the Customer excluding the enterprises affiliated with it according to Section 15 of the German Stock Corporation Act (AktG), and is determined in detail by the following provisions and the circumstances of the agreement as expressed in the respective Orders;
- (b) exclusively covers the country in which the Customer has its registered office, unless otherwise agreed in writing between the Parties;
- (c) is granted to the Customer subject to condition precedent of full payment of the corresponding remuneration; until that time, Xain consents to temporary use of the LICENSED PRODUCT according to the provisions set forth in the present Part B.

1.4 The Parties will specify in the various Orders for what number of computers, servers, users, modules, databases or other objects the SOFTWARE PRODUCT may be used; the same applies for use of the SOFTWARE PRODUCT in networks even if this does not entail copying of the SOFTWARE PRODUCT.

1.5 In particular, the Customer is prohibited from distributing the LICENSED PRODUCT in whole or in part, making it publicly available, lending, renting or offering it to third parties in the context of commercial hosting, application service providing or in a software-on-demand environment.

1.6 The granting of additional rights of use cannot occur implicitly but rather requires a separate written agreement.

### **2. OTHER AUTHORIZED USES**

2.1 Beyond the scope of the grant of a right of use within the meaning of section B.1, the Customer is authorized to copy, revise or otherwise modify the SOFTWARE PRODUCT to the extent necessary for error correction. In the case of a defect this applies only if Xain is in delay in correction of the defect, unjustifiably refuses to correct the defect or Xain's elimination of the defect has conclusively failed. Xain may demand that, in exchange for reasonable compensation, it be granted a perpetual right of use to any Customer rights arising from the modification, without territorial restriction and with the right to sublicense.

2.2 The Customer is authorized to decompile the SOFTWARE PRODUCT within the meaning of § 69e of the German Copyright Act (UrhG) in order to make it interoperable with other hardware and software. However, this only applies to the extent the information required to create interoperability was not made available to the Customer by Xain in response to the Customer's prior written request with the setting of a reasonable time period.

2.3 The information gained in the course of exercising the rights of use as provided in Sections B.2.1 and B.2.2 may be used exclusively for the purpose of error elimination and to create interoperability of the SOFTWARE PRODUCT. Disclosing the information to third parties is specifically prohibited.

2.4 The Customer may create the absolutely necessary quantity of backup copies of the LICENSED PRODUCT according to accepted technical standards. The backup copies may be used only for archival purposes and to restore the LICENSED PRODUCT. Backup copies on removable data storage devices must be marked as such and must contain a clear reference to Xain's authorship.

### **3. SUBSCRIPTION RIGHTS OF USE**

If the LICENSED PRODUCT is to be provided to the Customer for only a limited period of time ("SUBSCRIPTION"), the right of use is limited to the period agreed in each case ("SUBSCRIPTION PERIOD") and requires payment of the corresponding usage fees, if applicable. If not otherwise agreed, the SUBSCRIPTION PERIOD shall be one year and shall be renewed subject to section B.17.

### **4. RIGHTS OF USE WHEN PROVIDED FOR EVALUATION PURPOSES**

In the event the LICENSED PRODUCT is provided to the Customer for trial, test or similar purposes ("TESTING LICENSE"):

- (a) The Customer may not use the LICENSED PRODUCT in a production or live environment;
- (b) The LICENSED PRODUCT may be used for no more than 30 (thirty) days, subject to a separate agreement in derogation therefrom;
- (c) The Customer is required to return the LICENSED PRODUCT after the end of the respective use and destroy all copies.

### **5. RIGHTS OF USE TO THIRD-PARTY SOFTWARE**

5.1 If the LICENSED PRODUCT by agreement contains software belonging to third parties, including any open source software, ("THIRD-PARTY SOFTWARE"), the Customer may use the THIRD-PARTY SOFTWARE only with the LICENSED PRODUCT in accordance with the present CONTRACTUAL TERMS. Notwithstanding the foregoing, use of the THIRD-PARTY SOFTWARE is governed by a separate license agreement if the DOCUMENTATION or Order includes such an agreement or refers thereto or expressly states that a THIRD-PARTY SOFTWARE shall be provided.

5.2 To the extent the third party asserts claims against Xain due to violation of the terms of use by the Customer, the Customer will indemnify Xain and hold it harmless from any and all damages, expenses and costs, including reasonable legal defense costs.

## **6. RIGHTS OF USE FOR UPDATES AND UPGRADES**

As soon as Xain makes an updated or upgraded version of the LICENSED PRODUCT available to the Customer and the Customer actively uses it, all Customer rights with respect to the old version of the LICENSED PRODUCT shall expire. No explicit demand from Xain to return the product is necessary in this regard. The Customer is authorized to continue using the respective old version for the sole purpose of supporting the transition to the updated version, but for no more than three months.

## **7. PROTECTION OF INTELLECTUAL PROPERTY**

7.1 Unless rights are explicitly granted to the Customer in writing, all rights to the subject matter of the CONTRACTUAL TERMS, including any and all copies made by the Customer, belong exclusively to Xain, particularly the copyright, rights to inventions and technical property rights. The Customer's ownership of the respective data storage devices of such copies shall remain unaffected thereby.

7.2 The Customer will keep records of the copies of the LICENSED PRODUCT or individual components made by him on data storage devices in conformance with the agreement and the location thereof, and will provide information in relation thereto and grant inspection access to the seller on request.

7.3 The Customer will carefully store the LICENSED PRODUCTS and any other items falling under the agreement in order to prevent misuse.

7.4 Prior written permission from Xain is required in order to make the LICENSED PRODUCT or individual components of the LICENSED PRODUCT (regardless of whether unchanged or modified) available to third parties. This does not include making it available to employees of the Customer. The provisions concerning further transfer of the LICENSED PRODUCT as set forth in Section B.8 shall remain unaffected thereby.

7.5 The Customer may not modify or remove any authorship marks, logos, other marks for industrial property rights, serial numbers or other marks present on the LICENSED PRODUCT serving to identify the program. If the licensed products are modified or revised by Xain in the preceding sense, the Customer must include this in the modified version of the respective LICENSED PRODUCT.

7.6 If the LICENSED PRODUCT or individual components thereof are provided on a data storage device, the Customer may not remove alphanumeric or other codes on the data storage devices and must transfer them unchanged to the respective backup copy.

## **8. FURTHER TRANSFER OF THE LICENSED PRODUCT**

8.1 Regardless of section 1.1 and in case the LICENSED PRODUCT is not provided as part of a SUBSCRIPTION, Customer is permitted to transfer his rights to the LICENSED PRODUCT to third parties only in their entirety with full and final relinquishment of his own use thereof.

8.2 A transfer in terms of section 8.1 causes all the Customer's rights of use to the LICENSED PRODUCT to expire. The permissibility of the transfer requires complete and permanent deletion of the LICENSED PRODUCT in possession of the Customer and Xain's written consent to transfer. Xain will give its consent if

- (a) The Customer gives Xain his written assurance that he has given all copies of the LICENSED PRODUCT already in his possession to the third party, and as a result of deletion no longer possesses any copies himself, and
- (b) The third party has given the Customer his written agreement that he acknowledges the present CONTRACTUAL TERMS and also accepts them as being valid with respect to him.

In case of further transfer of the LICENSED PRODUCT, the Customer must provide XAIN in writing with the name and complete address of the recipient to whom the corresponding rights to the LICENSED PRODUCT are to be transferred.

## **9. DELIVERY**

9.1 The LICENSED PRODUCT is provided exclusively in machine-readable form (object code). The source code is not part of the subject matter of these CONTRACTUAL TERMS and shall not be made available to the Customer unless explicitly so agreed in writing.

9.2 The LICENSED PRODUCT will be provided either on a data storage device (physical transmission) or by way of electronic communication media, particularly by making the SOFTWARE PRODUCT available for download on the internet (nonphysical transmission). If the DOCUMENTATION is available online or offline in an electronic version, it is not necessary to deliver a printed version.

9.3 The Customer shall pay all costs and shall bear all risks associated with the delivery. Place of performance for all deliveries is the location of Xain's registered office. If the LICENSED PRODUCT is provided by way of nonphysical transmission, the risk passes to the Customer once the LICENSED PRODUCT leaves Xain's sphere of influence. If the LICENSED PRODUCT is provided by way of physical transmission, the risk passes to the Customer as soon as Xain has delivered the data storage devices to the shipping agent, carrier or other person or entity designated to perform the shipping.

## **10. INSTALLATION AND TRAINING**

10.1 At the Customer's request, Xain will perform installation of the SOFTWARE PRODUCT, instructions or training on the basis of a separate agreement and the applicable prices according to Xain's price lists, or as agreed upon in the Orders.

10.2 The Customer is responsible for providing the hardware and software environment required according to the DOCUMENTATION.

## **11. EXAMINATION AND REPORTING DUTY**

11.1 The Customer is required to promptly examine the LICENSED PRODUCT for defects after it is delivered by Xain.

11.2 Obvious defects must be reported to Xain in writing promptly after delivery of the LICENSED PRODUCT. In particular, obvious defects shall be considered to include missing DOCUMENTATION, significant functional defects of the SOFTWARE PRODUCT that are easily detectable, and missing elemental features or delivery of a product other than the contractually agreed LICENSED PRODUCT. The report is considered properly made only if it identifies the

type, scope and symptoms of the defect and the corresponding data processing environment and includes the time the defect first appeared. The notification of the defect should enable the reproduction of the error. The notice shall be deemed to have been made promptly if it is sent within seven (7) days after delivery of the LICENSED PRODUCT.

11.3 All other defects must be reported in writing to Xain in the same manner promptly after they are discovered. Statutory examination and reporting duties of the Customer shall remain unaffected thereby. In this case, the notice shall be deemed to have been made promptly if it is sent within seven (7) days after the defect has been detected.

11.4 In all cases of the present Section B.11, the Customer will secure the corresponding evidence and assign any recourse claims to Xain, with provision of the documents.

## **12. QUALITY AND WARRANTY**

12.1 Xain warrants (*gewährleistet*) that the SOFTWARE PRODUCT substantially has the agreed quality, and that use of the SOFTWARE PRODUCT by the Customer in the contractually agreed scope does not infringe any third-party rights.

12.2 The quality of the SOFTWARE PRODUCT is determined by the quality agreed between the Parties. The agreed quality is indicated in the agreed performance description; if none was separately agreed, it is indicated in the DOCUMENTATION valid at the time the agreement was concluded. In case of doubt the DOCUMENTATION contains a final and conclusive performance description in this regard, insofar as the Order and any annexes that may explicitly be incorporated into it do not explicitly contain a more extensive agreement to quality.

12.3 Representations of the SOFTWARE PRODUCT in public statements (particularly advertising) or statements by Xain employees do not involve indications as to quality, unless explicitly confirmed in writing by the management of Xain. The same applies for any guarantees given by employees of Xain before conclusion of the agreement.

12.4 Minor discrepancies between the SOFTWARE PRODUCT and the agreed quality or any minor impairment of its usefulness do not represent defects.

12.5 Customer must report an error properly in accordance with sentences 3-5 of section 11.2, which shall apply respectively. Otherwise, warranty rights shall be considered waived.

12.6 If a defect is caused by or is included in the defective THIRD-PARTY SOFTWARE and that third party does not act as a subcontractor of Xain, rather Xain is merely passing on a third-party product to Customer as Xain's contractual obligation, then Customer's rights in case of defects shall be limited to the assignment of its rights in case of defects against that third party. This shall not apply in case the defect is caused by improper handling of the third party's product for which Xain is responsible. If Customer is unable to assert his rights in case of defects against the third party out of court, Xain's subsidiary liability for Customer's rights in case of defects shall remain unaffected.

For the avoidance of doubt: Customer shall not have any rights in case of defects of a THIRD-PARTY SOFTWARE if Xain does not have a contractual obligation to provide such THIRD-PARTY SOFTWARE.

12.7 The warranty does not apply:

- (a) if the SOFTWARE PRODUCT is provided for testing or nonproductive purposes,
- (b) to copies of the SOFTWARE PRODUCT that do not come from Xain,
- (c) to SOFTWARE PRODUCTS used or installed on equipment not intended for them,
- (d) in case the parties agreed upon a maintenance agreement, unless otherwise agreed.

12.8 In case the LICENSED PRODUCT is provided free of charge, statutory warranty and liability provisions shall apply to the LICENSED PRODUCT and shall take precedence (§§ 599, 600 BGB in case of a SUBSCRIPTION and § 521 ff. BGB otherwise). Nothing in the CONTRACTUAL TERMS shall extend XAIN's statutory liability and warranty provisions in that case. This section 12.8 shall apply despite of Customer being obligated to pay a compensation for any other SERVICES agreed in the Order.

## **13. RIGHTS AND RESPONSIBILITIES IN CASE OF PHYSICAL DEFECTS (MÄNGELRECHTE)**

13.1 To the extent the SOFTWARE PRODUCT provided to the Customer contains a defect in quality, Xain will, at its option, either supply a new data storage device to the Customer or, if the defect in quality is caused by the SOFTWARE PRODUCT'S programming, take steps to correct the defect with the goal of providing a solution to the Customer to circumvent or correct the defect within the applicable defect correction period specified below (hereinafter referred to as "RECTIFICATION"). At its choice, Xain may also perform RECTIFICATION by providing a new release of the SOFTWARE PRODUCT in the Customer's possession in which the defect has been corrected.

13.2 To the extent Xain has not successfully completed RECTIFICATION within a reasonable defect correction period, Xain will notify the Customer of the conclusion of rectification efforts. Xain and the Customer will then prepare a mutually agreeable plan to solve the problems caused by the defect in quality. To the extent no such mutually agreeable plan is created within a reasonable period of time, Customer may demand a reduction in the compensation (price abatement) or set a reasonable grace period for defect correction, after the end of which Customer may rescind from the agreement; when setting the grace period Customer must explicitly indicate Customer's intent to rescind.

13.3 Xain will process incoming defect reports in order of urgency, assigning each defect report one of the following priorities:

- Class 1: An urgent problem resulting in severe disruptions; this defect can result in the SOFTWARE PRODUCT or a central portion thereof being unusable for the Customer.
- Class 2: A problem causing significant usage restrictions in important functions of the SOFTWARE PRODUCT that cannot be circumvented for a reasonable period of time which the Customer can be expected to tolerate.

- Class 3: A problem that impairs operation and usage but does not affect the primary functions of the SOFTWARE PRODUCT.
- Class 4: All other problems.

13.4 Xain will pay damages or compensation for expenses incurred in vain only within the limits defined in Section A.6. After the end of a deadline set for the claims under sentence 1, Xain may demand that the Customer exercises Customer's rights arising from expiration of the period within two weeks after receiving the demand. If the Customer does not comply with this demand in a timely manner, the right of election is transferred to Xain.

13.5 Warranty claims become time-barred after one year, starting from when the SOFTWARE PRODUCT is delivered or made available. To the extent Xain improves or replaces the SOFTWARE PRODUCT or portions thereof, the limitation period for any such improvement or replacement ends upon expiration of the limitation period for the originally supplied SOFTWARE PRODUCT.

13.6 Claims due to defects are further precluded if the Customer:

- (a) violates his examination and reporting obligations under Section B.11;
- (b) makes changes to the SOFTWARE PRODUCT himself or causes or permits changes to be made by third parties that are not permitted according to current standards, unless it can be proven that they are not the cause of the defect;
- (c) uses the SOFTWARE PRODUCT in a data processing environment that is not appropriate for the system requirements of the software product and such use was not arranged by Xain or a subcontractor engaged by Xain;
- (d) otherwise uses or operates the SOFTWARE PRODUCT in an improper or inappropriate manner;
- (e) failed to apply an update that would have prevented the defect.

#### **14. WARRANTY OF TITLE**

14.1 If a third party asserts claims against the Customer due to infringement of existing patents, utility models, design patents or copyrights (hereinafter referred to as "Proprietary Rights") by the SOFTWARE PRODUCT supplied by Xain as provided for in this agreement, and if the Customer is therefore prohibited from using the SOFTWARE PRODUCT on the basis of an intentional or negligent infringement of Proprietary Rights by Xain or Xain considers it likely that the usage will be prohibited, Xain will be liable to the Customer as follows within the time period as provided for in B.13.5:

14.2 Xain, at its own election and expense, will:

- (a) obtain a right of use for the Customer for the SOFTWARE PRODUCT concerned, or
- (b) replace the SOFTWARE PRODUCT concerned or portions thereof or modify it in such a way that the Proprietary Right is not infringed but the SOFTWARE PRODUCT still essentially conforms to the functional specifications of Order, or

- (c) refund the compensation paid if neither of the above alternatives is possible on technically or economically reasonable terms, deducting the decrease in value of the SOFTWARE PRODUCT concerned on the basis of linear depreciation over the entire period of use and in exchange for return of the SOFTWARE PRODUCT.

14.3 The Customer will reasonably support Xain in all damage mitigation measures.

14.4 Xain's obligations under Section B.14.2 apply only insofar as (i) the Customer promptly gives Xain comprehensive written notice that such claims have been asserted or threatened, (ii) all defensive measures and settlement negotiations in and out of court are reserved for Xain or conducted with written consent of Xain, (iii) the Customer promptly makes any and all information available that is requested by Xain to assess the situation or defend against the claims, and provides reasonable support.

14.5 To the extent the SOFTWARE PRODUCT is to be provided free of third-party rights, Xain is liable only for legal defects that arise when using the SOFTWARE PRODUCT in the agreed destination country. If there is no explicit agreement on this point, the destination country shall be deemed to be the country of the Customer's registered office.

14.6 If the Customer continues to use the SOFTWARE PRODUCT even though a claim has already been asserted against him for violation of third-party rights, Xain's responsibility is limited to the circumstances before the rights were asserted, insofar as there are no other grounds for preclusion.

14.7 Claims by the Customer are precluded insofar as the violation of Proprietary Rights is caused by Customer specifications, an application that was not foreseeable by Xain or by the fact that the SOFTWARE PRODUCT is altered by the Customer or third parties engaged by him or is used together with products not supplied by Xain, unless such a Proprietary Rights violation would have been caused even absent such application, alteration or usage. In these cases the Customer will indemnify Xain and hold it harmless from any and all third-party claims due to such violations of Proprietary Rights.

#### **15. WARRANTY IN CASE OF SUBSCRIPTION**

If the LICENSED PRODUCT is provided for a limited period of time (SUBSCRIPTION), the provisions of Sections B.12 to B.14 shall apply accordingly, with the proviso that:

- (a) Xain substantially warrants the agreed quality of the SOFTWARE PRODUCT according to the mandatory provisions under the law relating to leases contained in German Civil Code Sections 536 et seq.;
- (b) Xain is liable for defects in the SOFTWARE PRODUCT that were already present when the agreement was made only if Xain is at fault;
- (c) the Customer's rights under the warranty extend to the term of use of the LICENSED PRODUCT agreed between the Parties, in deviation from sections B.13.5 and B.14.1;

- (d) the Customer's statutory right to effect a cure himself according to German Civil Code Section 536a (2) remains unaffected;
- (e) the right to terminate the agreement without notice takes the place of the Customer's right of rescission under Section B.13.2.

**16. COMPENSATION**

In the event the agreed scope of use is exceeded – particularly if the LICENSED PRODUCT is used by more users than is contractually stipulated – the Customer is required to make an adjustment payment to Xain. The amount of the adjustment payment is determined according to the applicable Xain price list and is subject to the provision that the Customer does not demonstrate significantly lesser damage to Xain. Additional extra-contractual damage compensation claims shall remain unaffected thereby.

**17. TERM AND END OF THE RIGHT OF USE**

17.1 In case of a SUBSCRIPTION and unless otherwise agreed, the agreement shall have an initial term of one year and then automatically be renewed for one additional year at a time unless a Party gives written notice of termination no later than three months before the end of the agreement.

17.2 If the Parties agreed upon implementation services as PROFESSIONAL SERVICES and work results related to the use of LICENSED PRODUCT, the term shall not start

unless such work results have been or are considered accepted.

17.3 If the Customer culpably exceeds the agreed scope of use or transfers the LICENSED PRODUCT to third parties in culpable disregard of the provisions set forth in Sections B.1 to B.8, Xain has the right to terminate the agreement immediately.

17.4 If a TESTING LICENSE is provided, Xain may demand the return of the LICENSED PRODUCT at any time.

17.5 In the event the right of use ends, the Customer will promptly surrender all versions of the LICENSE PRODUCTS and delete them from his computers and networks; in addition, the Customer will delete all copies in connection with the LICENSED PRODUCTS unless he is required by law to store them for a longer period of time. The same applies with respect to the old versions within the meaning of Section B.6 after expiration of the transitional right of use.

17.6 On demand by Xain, the Customer will confirm to Xain that he has fully and completely satisfied his obligations under Section B.17.5.

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## **PART C. SPECIAL PROVISIONS FOR SUPPORT SERVICES**

### **1. SUPPORT SERVICES**

If agreed in an Order, Xain will support the Customer via e-mail on request in connection with installing and using the LICENSED PRODUCT. Outside of German legal holidays in Berlin as well as Saturdays and Sundays, Xain shall make efforts to answer queries within two business days. Xain shall make efforts to answer queries to the Customer's satisfaction according to the standards of due care and diligence. Xain assumes no responsibility for the ultimate success of problem correction.

### **2. SUPPORTED VERSIONS**

Support is available for the current and immediately preceding version of the LICENSED PRODUCT and for any version published within 18 (eighteen) months before the support request.

### **3. CONTACT PERSONS**

Providing support assumes that the queries and problems are forwarded to Xain by the Customer's internal helpdesk support staff; support is not provided to each individual licensed user.

### **4. OTHER SERVICES**

4.1 The SOFTWARE SUPPORT SERVICES specifically do not include:

- Commercial and corporate consulting and training services;
- Solutions for network, workstation or environment errors of which the causes are not directly connected with the software governed by this agreement, including but not limited to water, fire, lightning strike, misuse, viruses and other forms of force majeure;
- Services for software that is used outside the contractually specified conditions of use;
- Services that become necessary due to programming or software modifications not performed by Xain;
- Individual updates requested by the Customer and adaptations and modifications of the software;
- Services for the LICENSED PRODUCT that work together with a database, operating system or similar hardware or software product or system that is not explicitly designated as interoperable with the corresponding version of the LICENSED PRODUCT; all beta versions or noncertified versions of such products and systems are specifically excluded;
- Services for database products, including adjustment, modification and/or configuration of database products and correction of errors that are database-specific or specific to the database linkage software;
- Services on site, unless these are required in Xain's reasonable discretion to fulfill its obligations under the agreement;
- Explanations on using LICENSED PRODUCTS that are also adequately contained in the DOCUMENTATION.

4.2 Especially the following services require a separate written order as PROFESSIONAL SERVICES:

- Support to the Customer in the implementation or system modification of LICENSED PRODUCTS and other software and Customer-specific programming thereof
- Customer-specific reports and forms
- On-site assistance
- Database and network administration
- Customer training

### **5. TERM**

If no special arrangements are made, agreements concerning SOFTWARE SUPPORT SERVICES have an initial term of one year and then automatically are renewed for one additional year at a time unless a Party gives written notice of termination no later than three months before the end of the agreement.

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## **PART D. SPECIAL PROVISIONS FOR THE PERFORMANCE OF PROFESSIONAL SERVICES**

### **1. SERVICES**

1.1 If agreed in an Order, Xain will provide PROFESSIONAL SERVICES..

1.2 Xain will provide the services according to the recognized technical standards. Technical or other norms must be observed only to the extent and in the version in which they are explicitly stated in the respective Order.

1.3 Cost estimates and delivery dates are considered targets and are binding only if explicitly so agreed in writing in the respective Order. The description of services and costs are based on good faith estimates prepared on the basis of the information provided by the Customer; Xain will update its estimates on request by the Customer.

1.4 Xain provides all PROFESSIONAL SERVICES as work results within the meaning of German Civil Code Sections 631 et seq. if the Parties explicitly agreed in writing in the respective Order that the services to be performed are a contract for work (*Werkvertrag*) or that Xain shall deliver work results; otherwise, Xain performs all PROFESSIONAL SERVICES as services in accordance with German Civil Code Sections 611 et seq. (*Dienstvertrag*).

### **2. RIGHTS OF USE**

2.1 If performing PROFESSIONAL SERVICES involves creating or providing software, the provisions set forth in Part B shall apply accordingly unless supplemental or deviating rules are stipulated in the present Part D.

2.2 Supplementary to Section B.7, Xain reserves all proprietary and similar rights, intangible property and similar rights, and any and all other rights, including the right to register the named rights as may be necessary, to any and all objects and items created by Xain for the Customer in connection with the providing of services by Xain. The objects and items covered by sentence 1 specifically include expertise, ideas, inventions, concepts, drawings, models, designs, formulas, methods, information, work, software, documents, and any and all other currently relevant tangible and intangible objects and items.

### **3. SERVICE CHANGES**

3.1 Either Party may propose a change to the content of the agreed services (hereinafter referred to as "CHANGE REQUEST"). CHANGE REQUESTS must be submitted to the other Party in writing.

3.2 If the Customer submits a CHANGE REQUEST, Xain will inform the Customer of its estimate regarding the likely expense and time period necessary to implement the CHANGE REQUEST. Xain is not obligated to review the CHANGE REQUEST if the Customer is not willing to compensate Xain for the expense involved in the review.

3.3 Xain will not refuse to perform a CHANGE REQUEST without a substantial reason if there is an offer of reasonable compensation. There is a substantial reason, for instance, if in Xain's opinion the success of the originally agreed services would be put at risk as a result of performing the CHANGE REQUEST or if the desired change is outside Xain's range of services or if the resources necessary to implement it are not readily available at Xain.

3.4 The Customer may reject CHANGE REQUESTS from Xain without stating the reasons. To the extent Customer makes use of this right, Customer assumes responsibility for the consequences resulting from the rejection, although the contractual obligation to provide services is not affected thereby.

3.5 Contract changes do not take effect until a written agreement is signed by the Parties, explicitly listing the changes associated with implementation of the CHANGE REQUEST (particularly with regard to the content and scope of services, timetable and compensation). Xain will continue its services on the basis of the existing contract pending written agreement of the changes.

### **4. INSPECTION AND ACCEPTANCE**

4.1 To the extent Xain is to provide work results for the Customer in terms of section D.1.4, such work results must be inspected and accepted by the Customer.

4.2 To the extent the Parties do not make specific arrangements in the Order on inspection and acceptance of the work result concerned:

- (a) The Customer must inspect and accept work results within five business days after completion by Xain;
- (b) In the case of software development, software implementation or system integration, the Customer must provide test data in machine-readable form in sufficient quantity and quality to perform the acceptance tests;
- (c) Xain is entitled to attend acceptance tests and see the respective results;
- (d) Only Class 1 and Class 2 defects within the meaning of section B.13.3 are considered to be defects preventing acceptance;
- (e) The Customer will document the inspection and acceptance in an inspection record;
- (f) Work is considered inspected and accepted if the Customer commences productive use thereof or does not deliver the list of defects in a timely manner pursuant to (a) and (e) of the present Section D.4;
- (g) Xain will correct the defects preventing acceptance to the extent the Customer justifiably refused to accept the work;
- (h) Other aspects are governed by the statutory regulations.

### **5. COMPENSATION**

In case the Parties agreed upon a time period within which work results shall be provided and accepted and the time period has expired without the work results being (considered) accepted, Xain is entitled to claim an extra compensation for any hour being worked beyond the initial time period to the extent such hour is caused by the Customer having been or being in default of Customer's cooperation obligations.

### **6. TERMINATION**

6.1 In case of a contract for work, agreements to perform PROFESSIONAL SERVICES run from the date they take effect until full completion of all services agreed therein. In all other cases, agreements to perform PROFESSIONAL

SERVICES are valid until terminated with three months' written notice by either Party.

6.2 SOWs and other individual Orders may be terminated by either Party if the other Party commits a major violation of the agreement that is not corrected within 30 (thirty) business days after a written notice threatening to terminate the agreement. Any default of the Customer in providing Customer's cooperation obligation is considered a major violation.

6.3 In case of a termination, Xain shall be entitled to claim a compensation for a) – in case of a contract for services – the time worked until the termination becoming effective and b) – in case of a contract for work – the agreed remuneration for the entire work if Xain could not use the respective freed resources for other projects.

## **7. PROVISION OF SERVICES**

Xain will determine the work schedule of its personnel and the place where the PROFESSIONAL SERVICES will be performed. Xain will use his own equipment. The PROFESSIONAL SERVICES shall not be performed on the Customer premises unless otherwise agreed between the Parties. Xain is solely responsible for its personnel and is solely entitled to give instructions to its personnel.

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## **PART E. SPECIAL PROVISIONS FOR THE PERFORMANCE OF MAINTENANCE SERVICES**

### **1. SERVICES**

1.1 If agreed in an Order, Xain shall provide maintenance services. Maintenance services comprise narrowing down the causes of a defect, defect diagnostics as well as services directed towards correcting a defect. Xain undertakes no responsibility for correction of the defect. Services for dealing with a defect may, at the option of Xain, also be provided through workarounds, updates, upgrades, defect corrections or, upon prior consultation with Customer, through delivery of a new version (collectively hereinafter referred to as "UPDATES"), for the SOFTWARE PRODUCT properly licensed by the Customer. UPDATES may also contain THIRD-PARTY SOFTWARE.

1.2 Customer shall carry out an analysis of the system environment as far as possible before submitting a defect, in order to ensure that the defect is not caused by system components which are not the subject of the CONTRACTUAL TERMS.

1.3 Customer undertakes to maintain a continuing system management of the system environment in which the SOFTWARE PRODUCT runs and to continue the support and maintenance of Customer's system environment (hardware and software) (Customer shall conclude and maintain appropriate support and maintenance contracts for this).

1.4 Defects must be notified by Customer in text form with a comprehensible description of the error symptoms, as far as possible evidenced by written recordings, hard copies or other documents demonstrating the defects. The notification of the defect should enable the reproduction of the error. This shall not affect the statutory obligation of Customer to inspect and notify defects.

1.5 Amendments or additions to the UPDATES delivered which Customer carries out itself or through third parties, shall cause Customer's rights in case of defects to be void, unless Customer proves that the UPDATE did not cause the defect. Xain shall also not be responsible for defects, which are caused by improper use or improper operation or the use of unsuitable means of operation by Customer.

1.6 Xain may refuse to remedy defects or deliver UPDATES if and while Customer is in default of payment with an amount not less than two monthly installments.

1.7 The term defect in this Part E shall be understood in terms of sections B.12, which shall apply accordingly to the obligation to provide UPDATES.

### **2. GRANT OF RIGHTS OF USE AND OTHER PROVISIONS**

2.1 The provisions set forth in Part B shall apply accordingly (provided that the right to terminate the agreement without notice takes the place of the Customer's right of rescission) unless supplemental or deviating rules are stipulated in the present Part E.

2.2 Liability for defects in quality when supplying UPDATES is limited to alterations in the UPDATES compared to the directly previous version.

2.3 Sections C.4 and C.5 shall apply accordingly.

### **3. WARRANTY CLAIMS**

Warranty claims under a SOFTWARE LICENSING agreement made between the Parties shall remain unaffected by the present Part E; after expiration of the warranty period under the specific SOFTWARE LICENSING agreement or in case no warranty applies under such SOFTWARE LICENSING agreement, defects in the LICENSED PRODUCT will be corrected in accordance with the present Part E.

### **4. COMPENSATION**

4.1 To the extent the Parties have not agreed on separate compensation for providing UPDATES, this will be determined according to the current Xain price list on hourly rates.

4.2 Flat maintenance fees are due and payable in advance at the start of each agreed billing period.

4.3 The agreed compensation for providing UPDATES may be adjusted once a year by Xain in a written notice to the Customer. If the adjustment results in an increase to the annual compensation of more than 3 percent, the Customer is entitled to terminate the SOFTWARE MAINTENANCE SERVICES within one month after the written notice.

4.4 If an agreement regarding SOFTWARE MAINTENANCE SERVICES is terminated or was not in effect even though the software was already used by the Customer, Xain reserves the right to charge a reinstatement fee to restart SOFTWARE MAINTENANCE SERVICES.

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