

# **General Terms and Conditions for the Provision and Use of the Online Services of ADN Distribution GmbH**

Status as at: March 2015

## **Section 1 Scope of application**

1. These general terms and conditions of Business (T&Cs) are valid and apply for all online services rendered by ADN Distribution GmbH, of Josef-Haumann-Straße 10 in 44866 Bochum, Germany (hereinafter known as Seller) to its Buyer (hereinafter known as Buyer).
2. Orders for specific online services to be provided by the Seller shall be placed on the basis of corresponding service level agreements agreed with the Buyer.
  - 2.1 The T&Cs shall also apply for a subsequent expansion of the contracted online services or degree of use of an online service already contracted.
  - 2.2 All the Seller's obligations under this contract shall only apply in connection with the contracted online services and their functions.
3. Terms and conditions of business of the Buyer differing from, or supplementary to, these T&Cs shall only apply if they have been expressly accepted by the Seller in writing. The rendering of a service by the Seller without reservations being expressed by him shall not constitute his acceptance of the Buyer's T&Cs.

## **Section 2 Materialisation of the contract**

1. The contract (hereinafter known as contract) shall materialise on the basis of a service level agreement agreed between the Buyer and Seller on the basis of these T&Cs.

## **Section 3 Definitions**

1. "Online service" describes the provision of internet-based software applications including offline components relevant to them via the Seller's internet site stated for the service in the service level agreement.
2. "ADN Platform" is the entire hardware and software which will be made available by the Seller directly or indirectly in order to provide the online services. Hardware and Software for communications with third parties, e.g. telecommunications providers is not included in the ADN platform even in so far as it is made available by the Seller.
3. "Availability" means the technical availability of the contracted online service for use at the hand-over point by the Buyer, as described in detail in Section 6.
4. "Defect" is an objective detrimental discrepancy in the function of the online service from that function described in the user documentation or, in so far as there is no function described, from the normal function to be expected of the respective online service.
5. "Subscription" describes a contract for an online service for an agreed fixed minimum term.

## **Section 4 Provision of online services**

1. The subject-matter of the contract is the provision of the online services specified by the Buyer by means of a service level agreement on the ADN platform at a place the Seller is at liberty to specify for use by the Buyer by means of browser software via the internet for the Buyer's business purposes.

2. The function content is shown by the service level agreement and the user documentation of the manufacturer of the software application constituting the subject-matter of the service which is available on the ADN platform.

## **Section 5 Hardware, System software and Infrastructure**

1. The Seller shall keep the necessary hardware including system software and technical computer infrastructure available to provide the online services and he shall ensure the technical operation of the ADN platform.

1.1 External access to the ADN platform at the connection point (E.g. the Buyer's clients' technical hardware and software set up and the provision of a corresponding internet access) comes under the responsibility of the Buyer. The Seller's point of hand-over for online services and user data is the connection point between the ADN platform and the public internet.

2. The Seller shall keep ready memory capacity agreed in the service level agreement on the ADN platform for the data required to use the online service and data generated by the Buyer using the online service.

2.1 The Seller shall keep ready the memory capacity for the Buyer's user data on the ADN platform. Additional memory capacity may be acquired in accordance with the Seller's price list in force at the point in time at which the order is placed.

2.2 The Buyer's movement data may be deleted from the ADN platform following at least one month's prior notice being given by the Seller, only from 36 months onwards however. In so far as the Buyer instructs the Seller to do so, the Seller shall transfer the data affected by the deletion on a suitable medium to the Buyer prior to deletion. The remuneration for this shall be determined by the Seller's price list in force at the point in time at which the instruction is given.

2.3 The Seller shall back up the database and the file system of the online services covered by the contract on a regular basis. The Buyer shall be responsible for compliance with statutory safekeeping periods. If it is necessary to play back data from the back-up copies into the productive system as a result of data loss for which the Seller is not to blame, the time required to do so shall be charged to the Buyer in accordance with the price list in force at this time.

## **Section 6 Availability**

1. The Seller shall guarantee the availability named in the corresponding service level agreement within the agreed service time (availability target) for the contracted online services.

2. The availability target of the contract shall be regarded as having been achieved if the above-named threshold value has been achieved in the measurement period by the Seller. Unless specified otherwise in the service level agreement the measurement period shall always cover a full calendar month. Should the Buyer place a contract for the online service in the current calendar month, the availability for those days of the calendar month already elapsed shall be set at 100%.

3. The Seller may adjust the availability target by means of a written declaration to the Buyer with a notice period of three months. In this case Section 12 Number 3 of this contract shall apply.

4. If the Seller is responsible for the failure to achieve the availability agreed here, the Buyer shall receive the credits agreed in the service level agreement (Appendix 1 to these T&Cs) as lump sum compensation for damages. This means that all claims on account of the non-

availability of the online service at times shall be settled, unless this was not caused by the Seller intentionally or as a result of his gross negligence.

5. In order to assert his claim, the Buyer has to submit a detailed list of downtimes including dates, time and duration to the Seller within 30 days from the end of the measurement period.

### **Section 7 Rights of use**

1. The Buyer shall be entitled to the non-exclusive right to use the online services and the relevant user document for his own business purposes during the term of the respective contract. The Buyer is in particular forbidden from modifying the ADN platform or the online service outside the configuration options intended for him.
2. The right of use is transferrable and may be used, in whole or in part, by or for third parties by way of remarketing the online service for a consideration. The right of use may only be remarketed and transferred by the Buyer in his own name. The contractual claims of his customers against the Seller cannot be established if the online services have been remarketed. If the Buyer's customers assert contractual claims against the Seller, the Buyer shall have to exempt the Seller from such claims. Should the Buyer have any of his own claims against the Seller these shall not be affected by the above.
3. The Buyer shall not be conceded any title rights whatsoever of any type or permanently beyond the end of the contractual term and in excess of the intended use defined by the respective functions of the online service. All other rights to the online services and the original underlying software applications and copies or modifications thereof shall remain with the Seller and / or the respective manufacturer of the software applications.

### **Section 8 New Versions of the Online services**

1. The Seller shall develop the ADN platform and the online services on an on-going basis and may install new versions as he sees fit.
2. The Buyer shall not, however, be entitled to have new versions installed, unless installation is absolutely necessary as a result of statutory changes. For such purposes changes resulting on a contractual basis outside formal legislation shall not constitute statutory changes even if these changes are subject to confirmation or a declaration that they are binding from the legislature.
3. The Seller is entitled to stop individual functions of the online services by giving six months' notice. In this case Section 12 Number 3 of the T&Cs shall apply.

### **Section 9 Support**

1. The Seller may render support services which serve to advise and support the Buyer. The support services are described in detail in the service level agreements.
2. Defects must be reported using the reporting channels stated in the service level agreement within the service times agreed in the service level agreement.

### **Section 10 Quality defects of the online services**

1. If defects occur in the online services the Buyer is to inform the Seller in accordance with Section 9 Number 2 of these T&Cs.
2. Defects reported by the Buyer must prove reproducibility, and, provided that this is possible and reasonable, state the programme function and the text of the error report as well as the description of the impact of the defect.
3. The Buyer shall allow the Seller the access to his data necessary to analyse and remedy the defect. On so far as the Buyer's data required to analyse and remedy

the defect should not be available on the ADN platform, the Buyer shall provide this data separately. The Buyer shall support the Seller by providing sufficient qualified computer operation staff free of charge and all other assistance required to analyse and remedy the defect.

4. The Seller shall provide sufficient resources to rectify the defect within a reasonable amount of time given the degree to which the function has been impaired. If it is possible to circumvent the reported defect, the Seller shall inform the Buyer whether, and if applicable, which alternative functions may be used to circumvent the defect.
5. Defects in the online services shall be rectified by repeated cures. The Buyer may only have the purchase price reduced and terminate the service level agreement concerned on account of failing to be granted use in compliance with the contract if the cure is unsuccessful and it is unreasonable to expect the Buyer to tolerate further attempts to carry out a cure. Moreover, a service level agreement may only be terminated if the defects are significant.

### **Section 11 The Buyer's responsibilities**

1. The Buyer shall procure all the licences from third parties (E.g. the works council) or from the authorities concerning the use of the online services. This shall not apply for the technical operation of the ADN platform as well as with regard to any possible third party rights there maybe to the ADN platform or to the software application.
2. Within his sphere of control the Buyer shall guarantee the data protection, data security and the safeguarding of the Seller's expertise or the software manufacturer's expertise, his technical proprietary rights and copyrights against employees and third parties.
  - 2.1 This includes in particular that the data and information sent to the ADN platform is free of viruses as well as that the Buyer has the authorisation required for the Seller to collect, use and process personal data.
3. The Buyer is responsible for securing state of the art internet access as well as for his systems complying with the other system preconditions.
  - 3.1 The corresponding specifications and system preconditions are shown in the user documentation. The Seller may adjust the specification by means of a written statement to the Buyer with advance notice of three months. In this case Section 12 Number 3 of the T&Cs shall apply.
4. The Buyer must not use the online services and the ADN platform for unauthorised or illegal acts or process illegal or unauthorised contents with them. The Buyer shall have to refrain from all acts which could be detrimental to the online services themselves, the use of the online services by third parties and / or the integrity of the ADN platform and the data contained in the ADN platform.
5. The Buyer shall be responsible for all activities taking place in keeping with his user accounts and access and he shall be liable for all employees and third parties having access to the ADN platform and / or the online service from his systems and / or with his access data with his knowledge or without his knowledge but on the basis of the Buyer's negligent or intentional conduct.

## **Section 12 Term and Termination**

1. The contract is open-ended and shall begin when this contract has been signed (see Section 2).
2. The contract may be terminated by either Party to the contract serving three months' notice in writing to the end of a month. In the event that payment is made by subscription, this notice of termination may only be served to take effect from the point in time at which the minimum term expires.
3. If these T&Cs provide the Seller with the right to amend his performance or the terms and conditions of these T&Cs or individual online services by unilateral announcement with future effect, the Buyer shall consequently be entitled, in so far as he does not agree with the amendment, and regardless of whether he has paid by subscription, to terminate the contract concerned within one month from receipt of the notification of amendment in accordance with the above regulations. In the event that notice of termination is served, the original terms and conditions of the contract shall continue to apply until it expires.
4. The right of both Parties to the contract to serve extraordinary notice of termination on the contract for an important reason shall not be affected. If extraordinary notice of termination is served in response to a breach of contract committed by the other Party to the contract, it shall be assumed that the other Party was sent a written warning to refrain from breaching the contract and given a reasonable period of time within which to do so and that the breach of contract continued nevertheless or was repeated.
5. Notice of termination must be served in writing.

## **Section 13 Relationship with other agreements entered into between the Parties to the contract**

1. Additional work performances and /or services shall only be rendered on the basis of an independent stand-alone consultancy and service agreement. This shall apply in particular also for parametrising or configuring an online service to meet a customer's specific requests by the Seller.
2. The Parties to the contract shall comply with the statutory data protection regulations. In keeping with rendering the services owed in accordance with this contract, the Seller shall also process and use inter alia the Buyer's personal data by way of order data processing in accordance with the Buyer's instructions. The rights and duties of the Parties to the contract with regard to this are shown in the separate agreement on order data processing.
3. In the event of contradictions between individual contractual documents, the provisions of appendices shall prevail over the provisions of these T&Cs. The contents of the service level agreements shall prevail over the contents of appendices as well as the provisions of these T&Cs.

## **Section 14 Remuneration, Ancillary costs, Payment dates**

1. The amount of the service fees and the settlement period of time are shown in the respective service level agreement.
2. The service fee shall become due for payment in advance at the beginning of each settlement period when the corresponding invoice is presented by the Seller. The Buyer shall automatically find himself in arrears at the end of the period of time

- agreed for payment in the service level agreement without a payment reminder having to be sent by the Seller.
3. If the contract for an online service for which payment is to be made begins or ends in the course of a settlement period the service fee for this period of time shall be invoiced on a pro rata time basis. 1/30 of the monthly service fee shall be invoiced for each day of a monthly service fee when invoicing service fees on a pro rata time basis.
  4. The amount of the service fee may however be adjusted by not more than 5% p a by the Seller at the end of the settlement period, but if payment is made by standing order, the service fee cannot be adjusted before a minimum period has expired with a three-month notice period which has to be served by the Seller in writing. In such cases Section 12 Number 3 of these T&Cs shall apply.
  5. All prices are net cash prices to be paid in full and do not include the rate of value added tax in force at the point in time at which the service is rendered together with any other taxes and customs' duties charged on online services.
  6. Payments are to be made such a way to the account stated in the invoice so that bank charges are to be paid by the Buyer and the Seller can dispose of the money no later than the expiry of the period of time allowed for payment.
  7. In cases of default the Seller shall be entitled, subject to the reservation that he may assert additional claims, to charge interest amounting to 8 percentage points above base rate in accordance with Section 247 of the German Civil code [BGB] In the event of default in payment or other substantiated doubts in the solvency or creditworthiness of the Buyer the Seller, irrespective of his other rights, shall be entitled to demand securities and payments in advance for outstanding performances and to make all his claims under the business relationship payable immediately.
  8. If the Buyer is in default with the payment of more than one invoice or significant parts thereof, the Seller shall be entitled, having given the Buyer an appropriate warning, to revoke the rights he has granted the Buyer and / or to prohibit access allowing use of the online service with immediate effect. In cases of doubt such a revocation or prohibition shall not constitute withdrawal from the contract. Access is to be re-established as soon as the Buyer has paid up his payments in arrears in full.
  9. Only uncontested or adjudicated claims shall entitle the Buyer to withhold payment or to offset. The Buyer may moreover only assert a right of withdrawal in so far as it is based upon the same contractual relationship as that upon which the Seller's claims are based.

## **Section 15 Proprietary rights**

1. The Seller guarantees that the online services provided by him are, as far as he is aware, unencumbered by third party rights precluding or restricting their use by the Buyer in accordance with the contract.
2. If, after the contract has been concluded, breaches of proprietary rights in accordance with Number 1 are asserted, and if the use of the online services in accordance with the contract is impaired or forbidden, the Seller shall consequently be obliged, as he chooses, to either modify the online services in such a way or replace them so that they are no longer covered by the proprietary rights, but nevertheless comply with the contractual provisions, or obtain the right so that the

online services may be used in accordance with the contract without restriction and without incurring additional costs.

3. The Buyer is obliged to inform the Seller without undue delay in writing if claims are asserted against him on account of a breach of proprietary rights and in disputes with third parties he is to act with the Seller's consent.
- 3.1 The Seller is entitled, in particular, and, in so far as this is allowed by law, obliged, to conduct all legal disputes arising from such claims at his own expense. The Seller shall exempt the Buyer from all costs and claims which are asserted against the Buyer within the context of third party claims based on breach of proprietary rights.
- 3.2 The Buyer shall not be entitled to assert any other compensation claims for damages, in so far as the Seller is not aware of the breaches of proprietary rights.

### **Section 16 Liability and Compensation for damages**

1. The Seller shall be liable in accordance with the statutory regulations for damages arising from death, personal injury or physical harm, in the event of liability in accordance with the German Product Liability Act or under a guarantee as well as for intent and gross negligence.
2. The Seller cannot be held liable regardless of negligence or fault for compensation for damages on account of defects which already existed when the respective service level agreement was signed.
3. Other than in the cases in Number 1 the following shall apply:
  - 3.1 The Seller shall be liable for the insured risks, in particular those which have been covered by the Company's liability insurance policy, up to the sum of 500,000.00 Euro.
  - 3.2 The Seller shall be liable for claims not insured, regardless of the basis of the claim coming into question, for his own employees as well and for third parties called in within the scope of the contract up to a maximum of a claim for payment amounting to the average monthly service fee of the preceding six months.
  - 3.3 The Seller cannot be held liable in so far as a cardinal duty has not been breached, that is, the fulfilment of which makes it possible to carry out the contract properly in the first place and upon compliance with which the other Party to the contract may rely on a regular basis.
  - 3.4 Likewise, the Seller cannot be held liable for indirect and consequential harm caused by a defect.

### **Section 17 Limitation of time**

1. Compensation claims for damages shall expire, in so far as they are not based on intent, within one year from the Buyer becoming aware of the circumstances upon which the claim is based.

### **Section 18 Force majeure**

1. Cases of force majeure (circumstances and events which cannot be prevented by the due diligence of diligent business management shall be regarded as such) shall suspend the contractual obligations of the Parties to the contract for the duration of the disruptions and for the scope of their effect. If the restrictions following from them last for a period in excess of one week, both Parties to the contract shall consequently be entitled to terminate the contract with regard to the online services

affected without having to comply with a further notice period. The Parties shall not be entitled to assert any other rights over and above this.

2. The consequences of a labour dispute at the Seller's business or at a third party business for which the Seller is not responsible shall also be regarded as force majeure, in so far as the Seller's performance is affected as a result.

### **Section 19 Non-Disclosure**

1. Both Parties to the contract are obliged to handle the information acquired before or after signing the contract about secret expertise or internal company matters of the other Party to the contract in strict confidence. This applies, in particular, to all information not in the public domain about the Seller's online services as well as to the Buyer's data processed in the course of the online service.
2. Both Parties to the contract shall place their respective employees (including those employees, trainees and similar employed on a temporary basis,) and if applicable, sub-contractors called in over the course of executing the contract under an obligation to maintain secrecy to the extent stated above and to hand over the corresponding non-disclosure declarations to the other Party to the contract upon request. The obligation to maintain secrecy shall also continue to apply in full after the contract has ended.
3. The Seller is entitled to communicate the conclusion of the contract as part of his press releases and public relations work.

### **Section 20 Miscellaneous**

1. In so far as these T&Cs make no provision for unilateral rights of amendment or adjustment for the Seller, amendments and supplements must be made in writing to be valid, whereby this requirement for written form itself can only be set aside in writing. Amendments or supplements within the scope of the rights to make amendments or supplements provided for in the contract may also be notified in text format, i.e. in particular by e-mail.
2. Should individual provisions in the contract or these T&Cs be invalid, the remaining provisions shall not be affected by this. In such circumstances the Parties to the contract shall be obliged to replace the invalid clause with a valid clause which comes closest to the economic objective of the invalid clause.
3. Only the law of the Federal Republic of Germany shall apply. The regulations of the UN law on sales [CISG] and references to non-German legal systems shall not apply.
4. The sole place of jurisdiction and place of performance for all obligations created by this contract shall be Bochum.