

General Terms and Conditions for Software of Kapsch BusinessCom AG (General Software Conditions)

1. Scope of application

1.1 The sale as well as the provision of software and of other software services to the principal shall be made by Kapsch BusinessCom AG (hereinafter shortly referred to as „Kapsch“) subject to the present General Terms and Conditions for software deliveries (as amended from time to time). With regard to the delivery of systems and system components the General Delivery Terms and Conditions of Kapsch BusinessCom AG shall prevail. Service performances for software products shall primarily result from the General Conditions for service agreements as well as the respective service level agreements.

1.2 Deviations from the conditions stated in item 1.1 shall only be effective if acknowledged by Kapsch in writing. Legal conditions and/or General terms and conditions of the principal shall not apply and are herewith mutually excluded.

2. Subject-matter

2.1 Software

2.1.1 Software in terms of the present conditions are computer programs which are either distributed as standard or individually developed or adapted for the principal within the meaning of section 40a Austrian Copyright Act for the use, the operation or the control of electro-technical and/or electronic facilities and systems inclusive of documents provided for such purpose.

2.2 Rights (of use) to the software

2.2.1 Upon complete payment of the agreed fee the principal shall be granted the non-transferable and non-exclusive right to use the software subject to the contractual specification at the agreed installation site. In case of hardware included in the delivery this right shall be limited to the exclusive use on this hardware.

2.2.2 Any and all software licenses shall be requested with the licensor based on the data of the principal present with Kapsch at the time of contract conclusion (company name, company address, legal form and VAT- number) and may after that date only be changed upon consent of the licensor. Provided that the licensor gives such consent, any additional expenses connected to the change of the software license shall be invoiced to the principal according to actual costs.

2.2.3 In case of a possible contribution of the principal to the production/development and/or adaptations of software to the requirements of the principal, no rights of whatever kind shall be obtained beyond the use determined in the present agreement.

2.2.4 If software products are used within a network, a (separate) license shall be required for each concurrent user. In case of use of software products on “Stand-Alone PCs” each PC shall require a license.

2.2.5 With regard to software products of third parties provided to the principal by Kapsch, the respective license conditions of the producer of these software products in their currently valid form shall prevail; from experience these conditions may change from time to time, they shall then apply in their modified form. The principal is aware of this fact and explicitly agrees to accept these modified license conditions of the producer.

2.2.6 Unless separately agreed, the principal shall not be granted any further going rights to the software products. The rights of the principal according to sections 40 (d), 40 (e) Austrian Copyright Act shall not be affected hereby.

2.2.7 Any and all documents provided to the principal by Kapsch, particularly documentations to software products, may neither be reproduced nor in any other way be distributed, against payment or without.

2.2.8 With regard to independent software the use shall be permitted exclusively on hardware whose type, number and installation site is defined in the agreement. The use on a different hardware than the one defined in the agreement and on multiple workplaces shall require a separate written agreement against payment.

2.2.9 Any and all other rights to the software shall be reserved for the licensor resp. for Kapsch. Without their prior written consent the principal shall therefore, notwithstanding the provisions of section 40d Austrian Copyright Act, in particular not be entitled to sell, lease or lend the software, sublicense it, assign, reproduce whether wholly or in part, modify, reverse-engineer or reset it, separate parts of it, make it available to third parties or to use it on another hardware than the contractual one, to analyse it, decompile or to disassemble it.

2.2.10 With the use of software subject to a license provided to the principal by Kapsch, the principal shall observe the respective software license conditions as well as the use conditions for the software stated by the respective producer. Upon request Kapsch shall transfer these provisions to the principal in the original language; Kapsch shall not be obliged to translate these into German.

2.2.11 Any violation of these rights by the principal shall however entail injunctive relief and damage claims with full compensation to be made in such case.

2.2.12 If the producer of the software due to violations of the use- and license provisions divests the principal of his rights to use the software, the principal shall however continue to pay the agreed fees.

2.3 Additional services and – deliveries, as by way of example listed in the following, shall be performed on the basis of separate agreements and shall be charged by Kapsch at the currently valid rates, unless they are included in an existing service level (agreement) with Kapsch:

- works for duplicating, translating or generating the software as well as performances according to item 5.4;
- data carriers delivered by Kapsch unless they are part of hardware delivered by them;
- the analysis and the removal of disturbances which have been caused by improper handling or faulty operation resp. by errors in the use of the software or by other circumstances which Kapsch is not responsible for;

- support with the introduction of the software as well as training insofar as the agreement does not provide respective provisions.
- Software-Updates
- Upgrades, system support
- Maintenance works with regard to deliveries and performances beyond possible obligations from warranty claims.

3. Customer duties

3.1 The principal shall be responsible for:

- the selection from the software offered by Kapsch
- the transfer of all information necessary for the production of the software and the establishment of the system specification before contract conclusion in case of individual software;
- the use of the software as well as the results achieved by it;
- the protection of any and all rights of the licensor to the software (such as e.g. intellectual property rights, copyright including the right to copyright notation) and the protection of claims of the licensor to confidentiality of business- and trade secrets equally by his employees and vicarious agents resp. by third parties; the same shall apply if the software has been modified or connected with other programs. This obligation shall remain in force even after termination of the agreement.

3.2 The principal undertakes to use the service object in the contractually agreed form and to indemnify and hold Kapsch harmless in this respect. With regard to legal consequences of possible violations of intellectual property rights of third parties by the principal or by third parties attributable to him see item 11.ff.

4. Software specifications

4.1 With regard to standard software Kapsch shall provide the specifications according to the demands of the producer. Kapsch shall be entitled to amend the software specifications for new versions.

4.2 With respect to individual software commissioned by the principal a written system specification shall be agreed between the principal and Kapsch. Software specifications may for example include performance features, documents on specific functions, prerequisites for hard- and software, installation requirements, use conditions, operation (user manual).

4.3 Compatibility: the contractual software may be installed on existing systems or migrated to subsequent technologies insofar as this is possible on the basis of the product politics of the respective producer (e.g. upwards and downwards compatibility of products or product lines, mutual support of products or product lines). Kapsch shall not perform any examination with regard to possible compatibility problems and thus no compatibility covenant shall be given by Kapsch. Possible additional costs for migrations which are necessary due to the product politics of a producer shall therefore not be part of the offer and shall not be borne by Kapsch.

5. Delivery, Risk of loss and acceptance

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5.1 Kapsch shall deliver the software to the principal in machine-readable form (object code). Kapsch shall be entitled to deliver the current version as of the delivery date.

5.2 If no delivery date is agreed, the delivery shall be planned in accordance with the delivery periods in force with Kapsch and the delivery date shall be announced to the principal.

5.3 The shipping (including amongst others the transfer of the license key) of software and data carriers shall take place at the expense and risk of the principal. In addition to the stipulations in the General Delivery Conditions it shall be agreed that with the allocation of software via electronic communication media (e.g. via the internet) the risk shall pass over when the software leaves the scope of influence of the producer/supplier (e.g. with download).

5.4 If software in possession of the principal is entirely or partly damaged or accidentally deleted, Kapsch shall provide substitutes within the scope of availability and reasonability and against charging appropriate prices for handling, data carriers and shipment.

5.5 If acceptance in written form is explicitly agreed, the software shall be available to the principal for use free of charge during a test period. The test period shall start upon delivery of the software and shall last for one week unless agreed otherwise or unless the license conditions of the producer exclude such a test period.

5.6 After the test period the software shall be deemed accepted, if:

- the principal confirms compliance with the contractual specifications or
- the principal during the test period does not notify in writing gross faults, or
- if the principal uses the software after expiry of the test period.

5.7 If no acceptance is agreed, the time of delivery shall replace acceptance with regard to the legal consequences according to item 6.1.

6. Warranty and responsibility for defects

6.1 With regard to software Kapsch warrants compliance with the specifications valid as of contract conclusion, provided that the software is applied according to the current installation requirements and that it is operated subject to the current use conditions.

6.2 Warranty shall include

- fault tracing
- troubleshooting

during the term of the warranty obligation. Unless agreed otherwise, a warranty period of six months from transfer of perils shall apply, if no acceptance takes place according to item 5.6 resp. delivery according to item 5.7. Fault tracing shall take place upon an immediate, qualified fault reporting by the principal or determinations by Kapsch. Possible malfunctions shall be announced to Kapsch by the principal in writing, in detail and without delay.

6.3 The burden of proof that the defect already existed at the time of delivery shall be with the principal.

6.4 Precondition in any case of warranty claim shall be the immediate notice of defect in terms of section 377 UGB (Austrian Commercial Code) as well as an immediate inspection resp. examination of the software at the time of delivery.

6.5 The removal of faults, i.e. dysfunctional deviations from the current specifications, shall at the choice of Kapsch be executed either by implementing a workaround, delivery of new software or by a respective modification of the program. Modifications of the program by an inputting of patches (e.g. bug fixes and the like) shall only be made when these patches are released by the producer. In such case Kapsch shall however be able to wait with troubleshooting until then. The inspection of such patches is made exclusively by the producer and not by Kapsch.

6.6 Any troubleshooting shall be subject to the fact that it is a dysfunctional fault, that it is reproducible, that the principal has installed new versions offered to him free of charge during the warranty period, that Kapsch is provided by the principal all documents and information necessary for fault recovery and that Kapsch during normal working hours of the principal is allowed access to hard- and software.

6.7 With regard to software which the principal or third parties have performed modifications on without the prior written consent of Kapsch, no warranty shall be granted, even if the fault occurs in a part which has not been modified. If during the course of fault recovery it is determined that no warranty case is given or that the cause of the error does not originate from the delivered software, the principal shall bear all costs incurred hereby. Equally no warranty can be assumed for faults, disturbances or damages which are particularly due to improper wiring, lack of power supply or air conditioning and operation as well as non-compliance with security provisions by the principal or one of his employees as well as to transport damages.

6.8 Furthermore Kapsch shall not warrant for dysfunctions and breakdowns due to force majeure. Warranty shall not refer to exchange of parts subject to natural wear-out. Errors, dysfunctions or damages caused by operating errors or dedication-adverse use by the principal or his employees shall not be subject to warranty.

6.9 Kapsch does not warrant that the software functions satisfy the requirements of the principal, that the programs cooperate with each other as selected by the principal, that these will operate without interruption or error, nor that any and all software errors may be removed.

6.10 With regard to the installation of firewall systems Kapsch shall proceed according to the current state of the art, but shall not warrant their absolute security and shall neither be liable therefore. Equally Kapsch shall not be liable for possible disadvantages resulting from a bypassing or disabling of the firewall system installed with the principal.

6.11 If during upright warranty the software does not comply with the specifications in a dysfunctional manner and if Kapsch despite sustainable efforts is not able to establish compliance with the specifications within appropriate time (in case of the necessity of a patch by the producer not before the respective patch is available), each contracting party shall be entitled to cancel the agreement for the software concerned with immediate effect and against restoration of the benefits received.

6.12 Defects in single programs shall not entitle the principal to cancel the agreement with regard to the remaining programs.

6.13 Further claims from the title of defectiveness of the software, apart from those according to item 7, shall be excluded.

6.14 If the principal has not concluded a software maintenance agreement with Kapsch, Kapsch shall invoice maintenance works which do not belong to the correction of defects (e.g. fault tracing and – restoration, maintenance) according to the currently valid list prices.

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7. Intellectual property rights and Copyright

7.1 Kapsch shall support the principal in the defense of any and all claims based on the violation by the contractually used software of any intellectual property right or copyright effective according to the provisions of Austrian Law. The principal shall immediately notify Kapsch in writing and shall, in case of a legal dispute, perform a third-party notice according to section 21 Austrian Code of Civil Procedure if such claims are raised against him. If claims are raised on the basis of a violation of intellectual property rights, which Kapsch is responsible for, Kapsch may, at its own expense, modify the software, exchange it or obtain a right of use. If that is not possible at appropriate expense, the principal shall upon request by Kapsch restore the original as well as any and all copies of the software inclusive of provided documents without delay.

7.2 Herewith any and all claims of the principal with respect to the violation of intellectual property rights and of the copyright, shall be finally settled, excluding any further going obligation of Kapsch.

8. Internet access and Data protection

8.1 In order to be able to use the stated services, the customer requires internet access. This is not part of the scope of performance. The software may induce the computer of the principal without notice, to automatically establish a connection to the internet and to communicate with a website or domain of the producer in order to examine the software license for example and to provide additional information, service features and functions to the licensor. Data protection provisions of the producer, which are available on the respective homepage, shall apply with regard to such a connection and communication.

9. Computer – Computer connection

9.1 The software may without additional notification automatically establish a connection to other software of the producer, via the connection of the principal to a local network. Thereby the software may announce within the local network that it is available for communication with other software of the producer. With such a connection the IP-address of the principal's connection may be transmitted to the local network.

10. Liability

10.1 In case of non-compliance with possible conditions for installation, implementing and use (as included for example in user manuals) or of regulatory admission requirements, any kind of damages shall be excluded.

10.2 Kapsch or its vicarious agents shall be liable for personal damages and loss of property which they are responsible for, only insofar as statutory provisions provide a compulsory liability which may not be excluded by contract, for example in case of intent or gross negligence or due to provisions of Product Liability Law. Otherwise any liability shall be excluded, such as in particular the liability for slight negligence, for claims from damages due to operation interruptions, loss of data and/or information, breakdown of data processing facilities, software damages, lost profits, not achieved savings, loss of interest, secondary damages and loss of property as well as damages from claims of

third parties against the principal. The shifting of the burden of proof for gross negligence shall be excluded.

10.3 Damage claims shall become time-barred 12 months after the date when the principal became aware of the damage and the party at-fault.

11. Abuse of services

11.1 If claims are raised against Kapsch by third parties due to an abuse of services by the principal or if such claims are imminent, the principal shall immediately inform Kapsch. Kapsch shall enable the principal to defend the claim resp. to fully enforce his right.

11.2 The principal undertakes to make up for any damage which Kapsch suffers due to a proven violation of rights of third parties by the principal – in particular due to patent-, trademark-, design-, semiconductor-, copyright claims as well as other claims in this respect (e.g. according to UWG=Austrian Law against Unfair Competition) or claims on the basis of personal rights or other intellectual property rights.

11.3 Payments for an extrajudicial settlement of disputes, which Kapsch may negotiate with the principal's consent, shall also be part of the damage to be made up for. The principal may only refuse such consent for important reason, but not unreasonably.

12. Settlement- and payment conditions

12.1 If a non-recurring user fee is agreed – that may incur instead of or in addition to recurring user fees – it shall, unless agreed otherwise, be due as follows:

- 30% of the total price upon contract conclusion
- 70% of the price of each software service stated separately in the offer, upon its acceptance according to item 5.

12.2 If a recurring user fee is agreed, settlement shall, unless agreed otherwise, take place in advance according to the term of use determined in the offer. If no term is determined, settlement shall anyhow take place on a yearly basis in advance.

12.3 In the case that the fee is calculated according to the number of actual users, the number of expected users based on the statements of the principal is taken as a basis for the initial billing. Upon expiry of the first month of use of the respective software, the number of actual users is being evaluated by Kapsch – with the costs of such an evaluation being invoiced separately – and subsequently this settlement is taken as a value basis for the billing in advance according to the agreed periodic billing. If with the respective evaluation it should be determined that more users than planned have used the software (insofar as this is allowed at all according to the license provisions of the producer), these users shall be invoiced additionally.

12.4 Any and all invoices shall however be due for payment within 14 days from invoicing.

12.5 Recurring user fees shall be value-guaranteed according to the conditions of the respective producer and shall be invoiced to the principal in accordance with the stipulations of the producer, resp. they modify the fee amount.

13. Taxes and Duties

13.1 Any and all agreed prices and fees do not include Value Added Tax; that shall be invoiced separately. If in connection with the provision of the contractual object fees, taxes or other dues (particularly also customs duties, turnover tax on imports, withholding taxes and the like) fall due, these shall be borne by the principal.

14. Restoration and Destruction of the software

14.1 Upon termination of the right of use the principal shall at the choice of Kapsch undertake to either restore to Kapsch the entire software inclusive of provided documents or to verifiably destroy it. The same shall apply to modified software or software connected with other programs.

15. Term and Termination

15.1 The term of the right of use shall depend on the license agreement to be concluded with the producer, with regard to possible software maintenance services on the stipulations of the respective service ticket. The right of use shall however end

- upon expiry of the agreed term of use;
- upon end of use of the contractual hardware without this influencing the contractual user fee to be paid;
- by termination upon expiry of a possibly agreed minimum term of use and – unless agreed otherwise – subject to a three months notice to the end of the billing period;
- by early cancellation due to severe contract violations if the contractual condition is not re-established within an appropriate written grace period;
- by early cancellation in case of institution of insolvency proceedings on the assets of the principal or in case of a rejection of such a request for lack of assets. This cancellation shall be effective immediately upon declaration that the company will not be continued. If the company is continued, the cancellation shall become effective only six months after the institution of insolvency proceedings.

If for the avoidance of severe economic disadvantages of Kapsch the cancellation is indispensable, it shall have immediate effect.

16. Export limitations

16.1 Any transfer of contractual objects, documents or other material, in particular any re-export may be subject to the obligation to gain a permit according to the export rules of the USA, the European Union or possible other states. In such case the principal shall undertake to obtain the appropriate authorizations from the respective authorities before a transfer takes place. In case of a repeated transfer the same obligation must be contractually imposed on the transferee, resp. the person entitled to dispose of.

16.2 If after contract conclusion it should turn out that the delivery of contractual components is subject to the export limitations of the United States of America or the legal provisions of the European Union or the „Arab Boycott“, Kapsch shall be entitled to withdraw from the contract. If the principal upon

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contract conclusion has failed to inform Kapsch on such circumstances, the principal shall fully compensate Kapsch the expenses and damages resulting therefrom.

17. Law and Forum

17.1 The contractual relationships shall exclusively be subject to Austrian Law excluding its conflict of laws rules. The application of the UNCITRAL treaty of the United Nations on contracts on the international sale of goods shall be excluded.

17.2 Any and all disputes arising out of the contractual relationships – including those on their existence or non-existence – shall be exclusively settled by the Court in Vienna having subject-matter jurisdiction.

18. General / Final provisions

18.1 The rules of bilateral trading transactions shall be applied to the contractual relationships, even if one party is not a trading company. The principal shall inform Kapsch before contract conclusion if the system or system components are not acquired for the operation of his business; otherwise the principal shall acknowledge that contract conclusion shall belong to the operation of his business and that he is an entrepreneur in terms of the Consumer Protection Act.

18.2 Subsidiary agreements, amendments and supplements of agreements shall require written form for their validity. The same shall apply to the abandonment of the written form clause. Oral side agreements do not exist.

18.3 The contracting parties shall immediately notify to each other in writing modifications of the name, the company name, the address, the legal form, the company register number, the paying office etc., otherwise deliveries and payments shall be validly possible if made to the address resp. the paying office last announced.

18.4 If single provisions of these conditions or of the contract concluded should be ineffective, the effectiveness of the remaining provisions shall not be affected. The ineffective provision shall be substituted by a valid provision which meets the intended purpose most closely.