

General Terms and Conditions for the Provision of Software of esmo AG

A General Information, Scope of Application

1 Scope of Application

Present *General Terms and Conditions for the Provision of Software of esmo AG* shall apply in addition to the *General Terms and Conditions of Sale and Delivery of esmo AG* for the provision of software required for the operation of the systems/plants of esmo AG (hereinafter referred to as "esmo", "we" and/or "us") with our customers, if the customer is an entrepreneur (section 310, subsection 1 in conjunction with section 14 of the German Civil Code), or a legal entity under public law, or a separate estate under public law. With the provision of software, we shall not assume any obligation whatsoever to either render services or to adapt and/or install the software. The customer will receive the software in object code. If not expressly agreed otherwise between the customer and us, we shall not owe the surrender of the source code.

2 Rights of Use

2.1 Proviso

The software at hand is protected by German copyright law as well as international treaties, and will be used to operate the systems/plants delivered by us. The utilization authorization shall be subject to full payment of the purchase price of the system/plant and the software. With the conclusion of the contract, the customer will have acquired the right to use the software pursuant to the following provisions. Any and all rights not explicitly granted shall remain with us. In addition to the terms of use for our software, as set forth below, the license regulations of third parties shall apply to third-party software, which may contain or stipulate provisions deviating from the present license regulations.

2.2 Scope

The customer shall be granted the non-exclusive right to use the software in object code format, including all associated documentation, to operate the systems/plants supplied by us. Any use other than intended for the operation of the systems/plants supplied by us shall not be permitted. Any contractual rules of use (e.g. restriction to a specified number of workstations or persons) shall be technically configured/set up and complied with in practice. We hereby assign to the customer all authorizations required for such use as a simple right of use which shall exclusively be transferrable in accordance with the present General Terms and Conditions for the Provision of Software.

2.3 Duplication

The customer shall only be permitted to duplicate the software to the extent that this will be required for the use of the software. Such required reproductions include both the installation of the software from the original data carrier to the mass storage device of the hardware employed as well as uploading the software into the working/main memory.

2.3.1 Backup Copies

The customer shall furthermore be entitled to duplicate the software and the documentation for backup purposes. If, for reasons of data security or to safeguard a quick reactivation of the computer system after a total breakdown, the regular backup of the entire data stock including all computer programs used/installed is indispensable, the customer shall be entitled to generate backup copies in the number imperative for such measure. The respective data carriers shall be marked accordingly. The following copyright notice/reference shall be clearly visible on each copy of the software generated in this manner: © esmo AG + year. These backup copies may only and exclusively be used for archiving purposes. Copyright notices, trademarks, and product labels may by no means be deleted, changed, or suppressed. Any copies no longer required shall be deleted or destroyed.

2.3.2 Exclusion of Further Duplication

The customer shall not be authorized to produce further or other copies of the software or documentation, which also includes the output of the software code to a printer as well as the photocopying of any additional documents.

2.4 Copy Protection

Any removal of a copy protection or similar protection routines of the software shall only be admissible if such protection mechanism impairs or prevents the trouble-free use of the software. The customer shall bear the burden of proof for any impairment or prevention of trouble-free usability by the respective protection mechanism. Any removal of the proof of manufacture or any other corresponding references to us/our company shall be prohibited.

2.5 Decompilation of Data

The customer shall not be entitled to change or edit the user manual or the software in its entirety or in part. Any measures of reverse engineering, disassembly, or decompilation of the software, or any other changes or derivations thereof shall only be permitted to the customer under the provisions of section 69e of the German Copyright Act. Insofar as the customer carries out the corresponding actions, which are admissible under the aforementioned section 69e of the German Copyright Act by way of exception, her-/himself (or through her/his employees) within this framework, she/he shall be obligated to afford us the opportunity to carry out the corresponding operations to ensure the interoperability of the software prior to the involvement of third parties, by setting a reasonable deadline in writing as well as at an adequate remuneration. To the extent that third parties are involved, they shall commit not to pass on to third parties any knowledge obtained in this context, unless this information has been generally known, or we have given our prior written consent to the transfer of such information. The customer shall commit to provide us with appropriate proof upon our request.

2.6 Transfer

2.6.1 Sale and Give-Away

Insofar as the customer has received the software as well as the documentation materials on a physical data carrier (e.g. CD-ROM, DVD, USB stick), the customer shall not be permitted to sell or give away the software – including the documentation materials – to third parties on a permanent basis, provided that the acquiring third party expressly agrees to the continued validity of the respective contract, including present General Terms and Conditions for the Transfer of Software, also towards the customer, and we will be duly notified of such transfer in writing, indicating the name of the acquiring party. Any sale or give-away shall require a separate written agreement between the customer and us, if and to the extent that the customer has received the software, including the documentation materials, as a download or in any other way by means of remote data transmission (e.g. by e-mail) without any physical transfer of storage media. The same shall apply in any case if the customer intends to use the software and/or corresponding documentation materials for rental or lease with respect to third parties.

2.6.2 Legal Consequences

In the event of a transfer admissible under present General Terms and Conditions for the Provision of Software or on the basis of an individual agreement, the customer shall be obligated to surrender to the new acquirer any and all software copies, including any backup copies that may exist, or to destroy any backup copies not surrendered. As a result of the transfer, the customer's right to use the software, including any documentation, shall expire. The customer shall delete any and all programs on her/his hardware in their entirety. The customer shall furthermore inform us of such transfer in writing without any undue delay, specifying the new user.

2.6.3 Rental/Lease

The customer shall not be permitted to utilize the software in the form of rental/lease to third parties and/or similar forms of transfer, such as the provision of the software within the framework of an ASP (Application Service Providing) or SAAS (Software As A Service) model, in particular, if and to the extent that the rental/lease of the software is not performed within the framework of the rental/lease of the goods delivered by us, and this will also be permissible under the license terms of third parties.

2.7 Trade Mark Certificates and Proofs of Origin

The customer shall not be entitled to use our company name or registered trademarks of our company, except for the reference to copyright notice. Nevertheless, the customer may point out in the customary manner that the software has been developed, produced, and distributed by us.

2.8 Archiving and Backup

2.8.1 Archiving

The customer shall keep any documentation provided to her/him as well as any amendments thereto or other notices pertaining to contractual services up to date, and archive them accordingly.

2.8.2 Backup

The customer shall undertake to prevent any unauthorized third-party access to the software and the documentation by taking all appropriate technical and organizational measures. The customer's employees shall be expressly advised of compliance with the present contractual terms and conditions as well as with the provisions of copyright law.

3 Remedial Action

In addition to the warranty provisions as set forth in section B, subsection 6, of our *General Terms and Conditions of Sale and Delivery*, the following provisions shall apply:

3.1 Exclusion

We shall not assume any warranty for any and all defects resulting from inadequate or improper use, incorrect installation on the part of the customer or third parties, application on a system/plant other than the one supplied by us, or any unauthorized processing on the part of the customer or third parties without our prior written consent, unless the aforementioned circumstances may be attributed to our fault/negligence, or the aforementioned reasons may by no means be associated with an alleged defect, which the customer shall be required to explain and prove accordingly. In case of a defect, for reasons other than those previously mentioned, any warranty shall be void if, due to changes to the software without our prior written consent, the elimination of the defect will be impossible or unreasonably impaired for us. However, the customer shall be entitled to state and prove that the removal of the defect will not be impossible or unreasonably impaired as a result of any modifications made to the delivery item without our prior written consent. In any case though, the customer shall bear the additional expenses incurred by us for remedying defects as a consequence of the modifications made. We will not guarantee that the software provided is compatible with the data processing environment employed by the customer (particularly with the software and hardware products in use). Any software the customer has extended via an interface provided by us for this purpose shall only be warranted up to the respective interface.

3.2 Documentation

In case the customer receives any deficient software documentation, we shall only be required to supply defect-free software documentation. If any of the data carriers supplied are defective, we shall be exclusively obligated to provide to the customer a replacement of the defective copies by non-defective copies.

3.3 Subsequent Performance and Withdrawal

An equivalent, new program version or the equivalent, previous program version, without the respective defect, shall be accepted by the customer if this may reasonably be expected of her/him. The installation of software (either patches or new versions) shall be the responsibility of the customer. In the event of a defect of title of the software, subsequent performance may also consist of providing a different version to the customer which does not infringe any third-party rights.

3.4 Bypassing

We shall be entitled to bypass a possible program error if the defect itself may only be remedied with disproportionate effort, and if the runtime or the response time behaviour of the software is not insignificantly affected by this bypass.

3.5 Refusal

We shall be entitled to refuse subsequent performance to the extent that it would involve disproportionate expense for us, and this would be reasonable for the customer in view of the nature of the defect and the value of the software, in particular, if the runtime or response time behaviour of the software is not insignificantly affected by the defect. Any withdrawal from the contract shall be excluded in the event of only insignificant impairment of usability ("bugs").

3.6 Cooperation of the Customer

The customer shall undertake to make regular data backups appropriate and proportionate to the risk, in particular when installing new software. Upon request, the customer shall support us with the error analysis and elimination of defects, namely by specifically describing occurring problems, by attempting to determine which software is defective, if several software components are delivered, by providing comprehensive information to us, by printing error logs and making them available to us, and by granting us access to any documents, indicating the detailed circumstances of the occurring defect, as well as by affording us the time and opportunity required for the elimination of the defect. Insofar as the customer has agreed to grant us access to her/his computers via remote data transmission, the customer shall install the software, required for this purpose and made available to her/him by us, or make it available herself/himself, and have it used by us accordingly. To the extent that we carry out the rectification of defects on the customer's business premises, the customer shall provide appropriate facilities, hardware, and software enabling us to detect and rectify defects. Furthermore, the customer shall ensure that any current data from databases will be stored in such a way that it may be reproduced with reasonable effort.