

## **EMAG General Terms and Conditions of Licensing for On Premise Software (as of August 2021)**

### **1. Subject Matter**

- 1.1. These General Terms and Conditions of Licensing for On Premise Software shall apply to the temporary or perpetual delivery of standard software to the Customer installed and operated locally or in the Customer's area of responsibility (On Premise) by EMAG GmbH & Co. KG, Austraße 24, 73084 Salach, Germany, or by the EMAG group company named in the order form ("**EMAG**" or "**Licensor**") in the version specified in the order form and delivered in object code including documentation (collectively "**Software**").
- 1.2. For Software and services provided by EMAG via the internet ("Software as a Service"), separate terms and conditions - the Software as a Service (SaaS) Terms and Conditions ("SaaS Terms") - shall apply. These SaaS Terms are available on the EMAG homepage on the Internet. If the Software is delivered together with hardware (e.g. the *EMAG IoT Ready Package*), the General Terms and Conditions of Delivery of EMAG shall apply exclusively to the hardware. If supplementary services (e.g. installations, consulting, training, installations) are provided in connection with the Software, these services shall be the subject of separate contractual agreements. In case of doubt, the General Terms and Conditions of Services shall apply to such services.
- 1.3. Deviating, conflicting or supplementary general terms and conditions of the Customer shall not become part of the contract, even if EMAG is aware of them, unless their validity is expressly agreed to in writing.
- 1.4. These General Terms and Conditions of Licensing shall also apply to later service releases (Updates) and major releases (Upgrades) provided to the Customer, unless otherwise agreed when the respective later version or Upgrade is provided.
- 1.5. The services of EMAG are exclusively directed at entrepreneurs within the meaning of Section 14 para. 1 German Civil Code (BGB), i.e. natural or legal persons or partnerships with legal personality, who or which when entering into a legal transaction, act in exercise of his or its trade, business or profession.

## 2. Granting of Rights of Use and Conditions

- 2.1. EMAG grants to the Customer a non-exclusive, non-transferable,
  - (i) in the event of delivery of Software for an unlimited period of time against a one-time fee (Software Purchase, Section 3.1), a perpetual right
  - (ii) in the event of the temporary provision of Software against continuous remuneration (Software Lease, Section 3.1 "**Subscription**"), a right limited in time to the duration of the Software license agreementto use the Software for his own internal business purposes.
- 2.2. The license type applicable to the Software can be found on the order form. The following license types are offered:
  - (i) "**Machine License**" means that the Software is licensed exclusively for a particular machine and, if applicable, is bound to that machine by means of a hardware ID. The use of the Software is limited to the number of computer systems which are in direct possession of the Customer and serving the purpose of use as agreed in the order form. Installation on a network server with the possibility of parallel access is only permitted if EMAG offers a server license for the specific Software product and the Customer has acquired such a license.
  - (ii) "**Server License**" means that the use of the Software is designated to a single local server specified by the Customer and the Software may be used on or by multiple machines and/or users simultaneously. Unless the Server License expressly specifies the number of machines, access by an unlimited number of Customer's machines is permitted.
- 2.3. The right of use pursuant to Section 2.1 apply only to the country of destination agreed in the order form in which the Software is to be used. Unless expressly agreed otherwise, the right of use shall be granted exclusively for the country in which the Customer has its place of business.
- 2.4. The Customer may only use the Software for his own purposes.
- 2.5. Copyright notices, serial numbers and other features serving to identify the Software may not be removed or changed. The same applies to any screen displays of corresponding features.
- 2.6. The Software shall only be provided in machine-readable form (object code). The Customer has no right to the transfer and use of the source code of the Software.

- 2.7. The Customer does not acquire any ownership rights to the Software. All rights to the Software and all relevant rights to patents, copyrights, trade secrets or other industrial property rights to the Software shall remain with EMAG.
- 2.8. The granting of rights shall be subject to the condition precedent of full payment of the remuneration due in accordance with Section 7.
- 2.9. The Software may include or require the use of third-party technology, including, but not limited to Open Source Software delivered with the Software. For third party technology, Customer is granted to a license either under the terms of these General Terms and Conditions of Licensing or under separate license terms set forth in the applicable documentation, "readme" files, notice files or other corresponding documents or files ("**OSS License Terms**"). In the event that Customer's rights to use the Software or any part thereof is subject to OSS License Terms, such Customer's rights shall not be limited in any way by these General Terms and Conditions of Licensing. If applicable OSS License Terms require the provision of the source code, EMAG will provide it upon written request, if necessary, against payment of the costs for delivery and handling.
- 2.10. The Customer is not entitled to duplicate, translate, modify, export or decompile the Software. Excluded from this restriction are OSS components whose licensing conditions require that the Customer may be allowed to reverse engineer for his own use or for debugging purposes. The provisions of Section 69 d) para. 3 and Section 69 e) German Copyright Act (UrhG) shall remain unaffected. In all other respects, any modification of the Software shall result in the loss of claims for defects pursuant to Section 8
- 2.11. EMAG reserves the right towards the Customer to use a corresponding security mechanism in the Software, which monitors the use of the Software and evaluates whether the Customer complies with the licensing conditions. This security mechanism may store data related to the Software and the number of copies made of the Software. EMAG reserves to Customer the right to use a license management Software, a license authorization key to control access to the Software, and/or a device backup for the hardware. Customer shall not take any steps to circumvent or suppress these measures.
- 2.12. If EMAG needs to access the Software delivered under this agreement in order to provide further services for the Customer, Customer grants to EMAG a non-

exclusive right to use such Software for the duration and purposes of providing these services.

### **3. Term of Licensing**

- 3.1. In the event of a Software Purchase, the license is granted in perpetuity, i.e. without a time limit. In this case, the right to ordinary termination of the license is excluded for both parties.
- 3.2. In the event of Software Lease, the license is granted for the minimum term specified in the order form. Unless otherwise specified in the order form, the minimum term shall be twenty-four (24) months. Unless terminated by either party at the end of the respective term with three months' notice, the lease shall be automatically extended by a further twelve (12) months. The right of each party to extraordinary termination for good cause shall remain unaffected. Termination must be given in writing in order to be effective.
- 3.3. If the Customer has not fully paid the fee for the use of the Software in the form of the annual Software Lease fee for the following year by the agreed due date, the right of use shall expire and EMAG shall be entitled to technically prevent the use of the Software by the Customer after a reminder and unsuccessful expiry of a reminder period of 14 days (blocking). Provided that the due fee for the use of the Software (including any default interest and reminder fees) is paid in full after the reminder, the Software can be reactivated upon Customer's request.
- 3.4. In the event of a culpable violation of the provisions of these General Terms and Conditions of Licensing by the Customer, EMAG is entitled to immediate withdrawal from the agreement in the event of a Software Purchase and to terminate the agreement without notice in the event of a Software Lease, unless the violation and its consequences are only insignificant. In this case, Customer shall not be entitled to a refund of the remuneration paid for the Software. EMAG reserves the right to assert further claims for damages.
- 3.5. In the event of a withdrawal or termination by EMAG pursuant to Section 3.4 the Customer's right to use the Software shall expire. Customer shall return to EMAG all provided original data carriers, backup copies and other copies of the Software

located on separate data carriers together with the provided program documentation and shall delete the copies of the Software and the documentation installed on its system. The complete return or deletion is to be assured to EMAG in writing and to be proven in a suitable form upon request.

#### **4. Scope of Services, Maintenance**

- 4.1. The (i) individual setting of variable parameters of the Software according to Customer's requirements (Customizing), (ii) individual adaptations of interfaces of the Software and (iii) the provision of consulting, implementation and training services shall not be subject matter of this licensing agreement, unless otherwise agreed in the order form.
- 4.2. Agreements according to Section 4.1 must be concluded separately.
- 4.3. The Software Lease includes the maintenance of the Software with the following services based on the General Terms and Conditions of Maintenance for Software Products:
  - (i) Remedy of defects and application support in case of Software malfunctions ("bug fixing")
  - (ii) Delivery of releases and patches (Updates)
  - (iii) Delivery of new program versions (Upgrades)
  - (iv) Provision of a service hotline (1st level support)
- 4.4. In the event of a Software Purchase, the maintenance of the Software, with the exception of error correction pursuant to Section 4.3 lit. (i) in the warranty period (Section 8.10), is not the subject of the Software license agreement, but requires the conclusion of a separate maintenance agreement based on the General Maintenance Conditions.

#### **5. Transfer of Software**

- 5.1. If the license has been granted on a perpetual basis, EMAG grants to the Customer the right to transfer the Software to a third party entirely and with complete waiver of the use of the Software. The temporary or partial transfer of use to a

third party against payment is prohibited, regardless of whether the Software is transferred in a tangible or intangible form. The same shall apply in the event of gratuitous transfer.

- 5.2. The Software may only be transferred if (i) the Customer ensures that it has transferred all original copies of the Software to the third party and has deleted all copies it has made itself, and (ii) the third party declares in writing its consent to the provisions of these General Terms and Conditions of Licensing, in particular the terms of use and transfer agreed herein. Any costs and expenses incurred by EMAG for the license transfer shall be borne by the Customer.
- 5.3. In the event of Software Lease, the Customer is not entitled to transfer the Software to third parties, in particular to sell or rent it, without the prior written consent of EMAG.

## **6. Customer's Obligations**

- 6.1. The Customer has informed himself about the essential functional features and system requirements of the Software and bears the risk as to whether it meets his wishes and needs; he has sought advice on questions of doubt from employees of EMAG or from expert third parties before concluding the contract.
- 6.2. The establishment of a functional - and also considering the additional requirements of the Software sufficiently dimensioned - hardware and Software environment is - as far as the hardware is not supplied by EMAG - the sole responsibility of the Customer. The minimum requirements specified by EMAG is always to be observed.
- 6.3. The Customer shall carefully test the Software for absence of defects and for usability in the existing hardware and Software configuration before using it. This shall also apply to Software received under warranty.
- 6.4. The Customer shall inspect and give notice of defects with regard to all deliveries and services of EMAG in execution of this contract in accordance with Section 377 German Commercial Code (HGB).

- 6.5. Insofar as EMAG is obligated to perform further obligations beyond the provision of the subject matter of the contract, the Customer shall cooperate to the necessary extent free of charge, e.g. by providing employees, work space, hardware and Software, data and telecommunication facilities.
- 6.6. The Customer shall take reasonable precautions if the Software does not work properly in whole or in part (e.g. by daily data backup, fault diagnosis, regular check of data processing results). Unless the Customer expressly indicates otherwise in advance, EMAG may assume that all data of the Customer EMAG may come into contact with are backed up.
- 6.7. The Customer shall bear any disadvantages and additional costs resulting from a breach of these duties to cooperate.

## **7. Remuneration**

- 7.1. The Customer shall owe the license fee specified in the order form for the granting of the rights to use. Unless otherwise agreed, the remuneration shall consist of
  - (i) a one-time license fee in the event of a Software Purchase;
  - (ii) in a license fee payable annually in advance by no later than the fifth business day of each year in the event of a Software Lease,
- 7.2. In the event of a Software Lease, EMAG is entitled to adjust the annual license fee with a notice period of three months at the beginning of a contractual year, for the first time at the end of the 12-month minimum contract term, in order to compensate cost increases (in particular personnel, material, energy costs or paid advance services), or within the scope of the general increase of service prices for the Software. If the increase is more than 3% compared to the last paid annual license fee, the Customer is entitled to terminate the license at the beginning of the new contract year with a notice period of one month in writing. If the Customer does not terminate the contract, the price adjustment will become effective at the beginning of the new contract year. EMAG will point out this consequence to the Customer when announcing the adjustment.
- 7.3. The license fee is exclusive of the applicable statutory value-added tax.
- 7.4. The remuneration is due and payable within 14 days after receipt of the invoice.

- 7.5. EMAG reserves all rights to the Software until receipt of all payments due under the Software license agreement.
- 7.6. Offsetting by the Customer with counterclaims is not permitted unless the counterclaim is undisputed or has been legally established.

## **8. Claims for Defects**

- 8.1. EMAG warrants that the Software complies with the product description attached to the order form. Technical data, specifications and performance data in public statements, in particular in advertising material, are not quality data.
- 8.2. If the Software is defective, the Customer may request EMAG to remedy the defect within a reasonable period of time. If the defect does not or only insignificantly impair the functionality of the Software, EMAG shall be entitled to remedy the defect by delivery of a new program version or a further development of the Software within the scope of its general version planning, to the exclusion of any further warranty rights.
- 8.3. Within the scope of removal of defects, measures can be provided by remote maintenance by telephone, e-mail or via remote access at the Customer's option. The Customer shall allow EMAG access to its systems and the Software installed thereon to the extent necessary for the performance of the contractual remedy of defects. This includes the possibility to access the Software via remote maintenance (e.g. via VPN). The Customer is obliged to create the necessary technical requirements for remote access as requested by EMAG.
- 8.4. EMAG may refuse to remedy the defect until the Customer has paid EMAG the agreed remuneration, deducting an amount corresponding to the economic significance of the defect complained about. EMAG is further entitled to reject the warranty, if the Customer has not reported the defects in writing with a comprehensible description of the error symptoms and, as far as possible, by handing over written records, screenshots or other documents illustrating the defects immediately after their detection and/or has not enabled EMAG the remote access according to Section 8.3.



- 8.5. The Customer shall designate a qualified employee as the main contact person for EMAG, who shall adequately support EMAG in the context of removal of defects and make or promptly cause all decisions in connection with the provision of services by EMAG or cooperation services by the Customer.
- 8.6. EMAG warrants that the Software is free from any third party rights that may prevent the Customer from using the Software in accordance with this agreement.
- 8.7. In the event that defects of title exist, EMAG shall be entitled, at its option, (i) to eliminate the third-party rights impairing the contractual use of the Software or the assertion thereof by taking appropriate measures or (ii) to modify or replace the Software in a way that it no longer infringes third-party rights, if and to the extent that the warranted functionality of the Software is not impaired thereby.
- 8.8. Warranty claims due to defects shall commence with the delivery of the first duplicate of the Software including application documentation. This shall not apply to warranty claims due to defects with which subsequent deliveries of duplicates are afflicted for the first time.
- 8.9. If an alleged defect cannot be attributed to a defect liability obligation of EMAG after appropriate investigation (sham defect), the Customer may be charged with the services conducted by EMAG for verification and remedy of the defect at the respective valid rates of remuneration plus the expenses incurred, unless the Customer could not have recognized the sham defect even by exercising due diligence.
- 8.10. Warranty claims shall become statute-barred within one year. The limitation period for all warranty claims begins with the provision of the Software to the Customer.
- 8.11. In the event of a Software Lease, strict liability due to initial defects is excluded pursuant to Section 536a para. 1 German Civil Code (BGB).

## **9. Liability**

- 9.1. In all cases of contractual and non-contractual liability, EMAG shall be liable only in accordance with the following provisions:
  - (i) in the event of intent in the full amount,

- (ii) likewise in the event of gross negligence as well as for losses from the lack of a quality for which EMAG has given a written guarantee;
  - (iii) in other cases: only for the breach of a material contractual obligation if the purpose of the agreement is jeopardized, but always limited to the amount of the foreseeable damage. The Customer and EMAG agree that the contract-typical foreseeable damage from breaches of obligations under this agreement shall not exceed the value of the remuneration paid by the Customer under this agreement. This shall also apply in the event of negligent breaches of obligations by EMAG's legal representatives, executive employees or simple vicarious agents.
- 9.2. The limitations of liability pursuant to Section 9.1 not apply in the event of liability for personal injury and liability under the German Product Liability Act (ProdHG).
- 9.3. EMAG is free to raise the objection of contributory negligence.
- 9.4. Apart from that, any liability for damages on the part of EMAG, irrespective of the legal basis, is excluded. The above limitations of liability also apply to claims for reimbursement of expenses.
- 9.5. Section 8.10 sentence 1 shall apply mutatis mutandis to the limitation period, with the proviso that the statutory limitation period shall apply to claims under Section 9.1 lit. (i) and Section 9.2. The limitation period pursuant to sentence 1 shall commence at the point in time specified in Section 199 para. of the German Civil Code (BGB). It shall commence at the latest upon expiry of the maximum periods specified in Section 199 para. 3 and para. 4 of the German Civil Code (BGB).

## **10. Excessive Use, Audit Right**

- 10.1. The Customer shall maintain complete and accurate records that permit a clear judgment as to whether the Customer is using the Software in accordance with the terms of these General Terms and Conditions of Licensing. EMAG shall have the right to verify Customer's compliance with the General Terms and Conditions of Licensing by self-disclosure or conducting an on-site audit by an independent auditor. EMAG shall engage an independent auditor for this purpose, who shall be subject to a confidentiality obligation.

- 10.2. The audit shall be announced at least 30 days in advance and shall take place during normal business hours in a manner that does not unreasonably interfere with Customer's normal business operations. Customer shall promptly provide the independent auditor with all information that the independent auditor may reasonably request to support the review, including access to systems on which the Software is running.
- 10.3. Alternatively, EMAG may require the Customer to complete and submit EMAG's self-audit questionnaire with respect to the Software the Customer is using. However, EMAG reserves the right to use a review process as set forth above.
- 10.4. If the audit or self-audit reveals unlicensed use, the Customer must immediately order sufficient licenses based on EMAG's applicable price lists to cover its use. EMAG shall bear the costs of the audit, unless it reveals substantial deficient licensing. Otherwise, the Customer shall reimburse EMAG for the costs incurred during the review, in particular the costs of the commissioned reviewer.

## **11. Confidentiality and Data Protection**

- 11.1. The Customer and EMAG undertake to keep confidential for an unlimited period of time all knowledge of confidential information and business secrets within the meaning of Section 2 No. 1 of the German Law on the Protection of Business Secrets (GeschGehG) ("**Business Secrets**") obtained by the other contracting party in the course of the initiation and execution of the agreement and to use such information and secrets only for the purpose of the performance of this agreement. EMAG's Business Secrets include in particular the source code of the Software.
- 11.2. The Customer shall make Business Secrets of EMAG available to its employees and other third parties only to the extent necessary to exercise the rights of use granted. The Customer shall instruct all persons granted with access to Business Secrets of EMAG about the rights of EMAG and the obligation to maintain confidentiality and shall oblige these persons in writing to maintain confidentiality and to use the information only to the extent pursuant to Section 11.1 persons concerned are obligated to maintain confidentiality at least to the aforementioned extent for other legal reasons.

- 11.3. The foregoing obligations shall not apply to Business Secrets which (i) were already known or generally accessible to the other party at the time of its communication by the other party; (ii) became known after the day of receipt without a fault of the other party; (iii) became known after the day of receipt from a third party in a manner which is not unlawful and without restriction as to secrecy or exploitation; (iv) has been independently developed by a party without use of the other party's Business Secrets; (v) is required to be disclosed by law, governmental order or court order, provided that the disclosing party promptly notifies the other party and assists the other party in defending such order; or (vi) is permitted to be used or disclosed by the other party pursuant to the extent of mandatory legal provisions or the provisions of this agreement.
- 11.4. EMAG complies with the rules of data protection, especially when EMAG is granted access to the Customer's operation or hardware and Software. EMAG does not intend to process or use personal data of the Customer. If access by EMAG to personal data cannot be excluded, the Customer shall conclude an agreement with EMAG in accordance with the requirements of Article 28 of the EU Data Protection Regulation (GDPR) and inform EMAG of this requirement in writing.

## **12. Export Compliance**

- 12.1. EMAG's obligation to fulfill its obligations under this agreement is subject to the proviso that such fulfillment is not prevented by any obstacles arising from national or international regulations of customs and foreign trade law as well as any embargoes and/or other sanctions.
- 12.2. Customer agrees to comply fully with all applicable national and international export and re-export control regulations. In particular, but without limiting the foregoing, the Customer shall ensure that the Software and derivatives thereof are not (i) downloaded, exported, re-exported or directly or indirectly transferred in violation of any applicable economic sanction or export regulation, or (ii) used for any purpose prohibited by export regulations, or (iii) delivered to any person or entity that would not otherwise be permitted to acquire, license or use the Software.

- 12.3. EMAG reserves the right to perform the necessary export law audits. Upon request, the Customer shall immediately provide EMAG with the information necessary to fulfill its legal obligations. The Customer shall indemnify EMAG and hold EMAG harmless with respect to all claims, proceedings, actions, penalties, losses, costs and damages due to or in connection with non-compliance with export control law obligations. The Customer undertakes to compensate EMAG for all damages and expenses incurred in this connection.
- 12.4. These provisions of Section **Fehler! Verweisquelle konnte nicht gefunden werden**.shall survive any termination of these General Terms and Conditions of Licensing for any reason whatsoever.

### **13. Final Provisions**

- 13.1. Should one or more provisions of these General Terms and Conditions of Licensing be or become invalid or should these General Terms and Conditions of Licensing contain omissions, the validity of the remaining provisions shall remain unaffected. In this case, the contracting parties undertake to work towards a valid agreement that comes as close as possible in economic terms to the invalid or missing provision, if had the contracting parties known of its invalidity or absence.
- 13.2. There are no ancillary agreements to these General Terms and Conditions of Licensing. Amendments and supplements to these General Terms and Conditions of Licensing must be made in writing. This formal requirement may only be waived by written agreement.
- 13.3. These General Terms and Conditions of Licensing and all obligations arising hereunder shall be governed by and construed in accordance with the laws of the Federal Republic of Germany, excluding its conflict of laws principles and the UN Convention on Contracts for the International Sale of Goods (CISG).
- 13.4. The exclusive place of jurisdiction for all legal disputes arising from or in connection with these EMAG General Terms and Conditions of Licensing for On Premise Software shall be the registered office of EMAG GmbH & Co. KG, Austraße 24, 73084 Salach, Germany, or the registered office of the EMAG Group company named in the order form. However, EMAG shall also be entitled to sue at the Customer's general place of jurisdiction.

13.5. These General Terms and Conditions of Licensing are executed in the German and English languages. In the event of any inconsistencies, the German version shall prevail.

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