



# Terms and conditions for the provision of software



## Terms and conditions for the provision of software

### 1. Scope of application

Where software is provided by QUNDIS GmbH (referred to below as “QUNDIS”) to customers, these terms and conditions for the provision of software apply in addition to the individual license contract. Together with these terms and conditions for the provision of software the QUNDIS terms and conditions for the supply and assembly of goods apply, as well as the special terms and conditions for central units which are fitted with a wireless modem. Any divergent terms and conditions on the part of the customer will not apply, unless QUNDIS expressly recognises their application in writing.

### 2. Provision of software

- 2.1 QUNDIS offers a number of programmes as software (referred to below as the software) for the use of customers.
- 2.2 The provision of the software can be for an indefinite time or for a specific period. The software can either be provided for use without hardware or as firmware as part of, or in connection with, the supply of the relevant hardware. In other respects the supply of hardware, measuring devices for example, is exclusively subject to the QUNDIS terms and conditions for supply and assembly.

### 3. Scope of supply

- 3.1 If nothing to the contrary has been agreed the software is supplied to the customer with user documentation in the version which applies at the time of delivery. QUNDIS will make the software and user documentation available either on machine-readable data media, as a download, or by enabling the customer to access them online as a service.
- 3.2 The source code of the software is not part of the contract and is not provided to the customer.
- 3.3 Third-party software products, databases and applications (referred to below as “outside components”) which are required for the use of the software as system requirements are not part of the scope of supply and have to be obtained by the customer separately, unless they are a contractual part of the supply from QUNDIS.
- 3.4 QUNDIS is not responsible for providing installation and training services for the purpose of activating the software at the customer’s premises. However, at the request of the customer QUNDIS will implement such installation and training services on the basis of a separate agreement and at extra cost.

### 4. Right of use

- 4.1 QUNDIS will grant the customer the non-exclusive right to use the software to the contractually agreed extent. This permitted use includes the installation of the software, unless this is made available as a service with remote access, installing it in the computer’s memory and the operation of the programme. The right of use is restricted to the agreed period of time, and in the absence of any such agreement the right of use will be for an indefinite time. Unless expressly agreed otherwise the right of use is only granted for the country in which the customer is located. The use must be based on a uniform data stock (productive system) to which the customer has access from multiple workstations at the same time. Simultaneous right of use may only be implemented by the contractually agreed number of users.
- 4.2 The customer may use the software only for the purpose of processing his internal business operations. In particular operating a computer centre for third parties or making the software available on a temporary basis (e.g. as application service providing) for third parties, or the use of the software for training persons who are not employed by the customer will only be permitted with the prior written agreement of QUNDIS. The customer will not have the right to rent out the software which has been provided or to sub-license it in any other way, or to reproduce or make it accessible publicly either in wired or wireless form.
- 4.3 If the software is provided as firmware with the accompanying hardware, the user may only use the software with the accompanying hardware. The use of the software with other devices will require the express written approval of QUNDIS. The use of the software with such devices will give QUNDIS a right to the appropriate additional payment. This will not apply if and for as long as the customer is unable to use the agreed device because of a defect, and temporarily uses the software on a replacement device to the contractually agreed extent.
- 4.4 The customer can operate a test system but this must be used exclusively for test purposes with test data and must not be used in production. The restrictions on use contained in this license contract apply to both production systems and test systems. QUNDIS wishes to point out that the establishment of a test system may require further licences for outside components or databases which are not covered by the scope of supply.

- 4.5 The customer will have the right to make a backup copy if this is necessary for future use. The customer will apply the remark 'Backup copy' and a reference to the copyright of QUNDIS on the backup copy in a visible way.
- 4.6 With the exception of cases covered by § 69e of Germany's copyright legislation (decompilation) or for the purpose of correcting programme errors, the user will not have the right to make software changes, reverse engineering, translating or removing parts of the programme. The customer may only entrust the implementation of any permissible programme changes to a third-party commercial operator if QUNDIS is in arrears with correcting the error.
- 4.7 The customer must not remove any alphanumeric or other markings from the data media, and must transfer these markings in an unchanged form to any backup copy.
- 4.8 If the right of use is assigned to a third party the customer must ensure that the third party is not granted any right of use to the software which goes beyond the right to which the customer himself is entitled. He will also ensure that as a minimum the obligations of this contract relating to the software are also imposed on this third party. In the process the customer may not retain any copies of the software or continue to use the software in any way.
- 4.9 If the customer is provided with outside components for which QUNDIS has been granted the right of use, the terms of use which have been agreed between QUNDIS and the licensed owner of such components will apply in addition and as a matter of priority. On request QUNDIS will make available the relevant terms of use. In the event of any breach of these terms of use the licensed owner of the outside components will, in addition to QUNDIS, also be entitled to assert any claims and rights arising from such breach in his own name.

## **5. Transfer of risk**

- 5.1 In the event of physical shipment the time at which QUNDIS hands the data media with the software and user documentation to the carrier will be decisive in terms of proving compliance with delivery dates and transfer of risk. In other respects it will be the time at which the software is made available for access online and the accompanying notification to the customer. If QUNDIS implements the installation of the software on behalf of the customer, the transfer of risk will be the time at which the installation begins.
- 5.2 If the software is made available by remote communication via the Internet, the risk is transferred to the customer when the programme leaves the QUNDIS router.
- 5.3 If QUNDIS is unable to supply the software and user documentation on the agreed date because of circumstances which are the responsibility of the customer, in particular a failure to cooperate or provide necessary information, the risk will be transferred to the customer when QUNDIS offers him the software and user documentation.

## **6. Terms of payment**

- 6.1. Payment for the provision of the software and user documentation without outside components will be in accordance with the applicable QUNDIS price list for invoicing software, together with the applicable rate of VAT.
- 6.2 If the use of the software by the customer exceeds the scope of the user rights which have been granted to him, QUNDIS will invoice the customer for the amount relating to the excess use in accordance with the applicable price list, unless the customer can prove that the damage was much less.
- 6.3 If direct debit has been agreed QUNDIS will collect any payments due. In such a case the customer has the obligation of ensuring that there are sufficient funds in his account. The cost of any returned debits will be paid by the customer.

## **7. Obligation of the customer to cooperate**

- 7.1 The customer will carry out without delay all his obligations under the terms of this contract relating to the provision of the agreed services. These will include in particular the actions outlined below.
- 7.2 Setting up a functional and adequately sized hardware and software environment for the software will be the sole responsibility of the customer. In particular the customer has the obligation of ensuring the necessary system requirements.
- 7.3 The customer will ensure that all employees who apply the software are sufficiently trained. Training of such employees must be maintained during the period of this license agreement.
- 7.4 The customer will take precautions for the eventuality that the software does not function correctly wholly or in part, in particular by daily data backups, diagnosing any faults, and regularly checking the results of data processing operations. Unless the customer provides express notification of this in advance, QUNDIS can assume that all the customer's data with which QUNDIS comes into contact has been backed up.
- 7.5 The customer is responsible for regular data backup. Before the installation of new versions or other operations to the software the customer must ensure that all data has been correctly backed up and can be restored if required.

- 7.6 The customer must report to QUNDIS without delay any breakdowns, errors and damage in connection with the software and the service of QUNDIS. Breakdown reports must be in sufficient detail so that it can be analysed and above all reproduced by QUNDIS. For this purpose the customer should describe the breakdown as clearly as possible and make available informative material such as screenshots or logs.
- 7.7 The customer has the duty to accept and enable remote access to the software by QUNDIS. On request QUNDIS will inform the customer of the precise specifications for the remote support. The customer is responsible for ensuring that the requirements for access by remote support are available. On request QUNDIS will, as part of its additional services, provide support in setting up the facilities for remote maintenance. If the customer does not enable remote maintenance, the customer will be responsible for any additional costs which are incurred by QUNDIS as a result.
- 7.8. If necessary the customer must, during normal business hours and to the required extent, provide QUNDIS with access to his premises and to the hardware and software necessary for the provision of the service, and to make available the necessary technical facilities. If this is required by the urgency of the support service the customer will also provide access outside of his normal business hours. QUNDIS will make sure that such activities on the customer's premises disrupt operations as little as possible.
- 7.9 The customer will be liable for any disadvantages and additional costs arising from any failure to comply with these obligations.

## **8. Treatment of data, data protection**

- 8.1 The parties undertake to comply with the applicable national data protection regulations. QUNDIS confirms that all staff who are involved in the provision of the services which are the subject of this contract are subject to data secrecy in accordance with § 5 BDSG (federal German data protection legislation).
- 8.2 If in the implementation of its services QUNDIS has access to the personal data of the customer, the parties will in advance agree separate data protection and data security provisions for the processing of order data which will in particular meet the statutory requirements of § 11 BDSG. In addition, on request QUNDIS will provide the customer with details of the technical and organisational activities it has implemented in accordance with § 9 BDSG.
- 8.3 The customer has the duty to carry out regular data backups to the required extent. In addition he must meet the technical and organisational requirements as specified in the schedule to § 9 BDSG.
- 8.4 QUNDIS will have the right to inform the suppliers of outside components about the onward sale of these outside components under this license agreement, while revealing the identity of the customer.

## **9. Material defects**

- 9.1 Only deficiencies which are demonstrated by the customer and can be reproduced will be classed as material defects in the software. However, it will not be classed as a material defect if it does not appear in the latest version of the software provided to the customer, and if the customer can reasonably be expected to use this latest version. The customer is aware of the fact that complex programmes such as the software are never fully free from error, and because of this fact absolute freedom from error is not a contractual obligation.
- 9.2 For the establishment of a material defect the failure to meet a contractually agreed characteristic will be required.
- 9.3 If there is a defect QUNDIS will remedy this in the form of supplementary performance. For this purpose QUNDIS will, at its own discretion, provide the customer with a new, defect-free software condition or will remove the defect. It will also be classed as correcting the defect if QUNDIS shows the customer an acceptable possibility for avoiding the defect. If it proves impossible to correct the error, QUNDIS will suggest an alternative solution to the customer. If it would be reasonable for the contractual partner to accept it, this solution will be classed as supplementary performance.
- 9.4 If the supplementary performance proves unsuccessful after a reasonable period of time, the contractual partner can set a further reasonable period for a further attempt at supplementary performance. If this, too, proves unsuccessful the contractual partner will have the right after the end of the second period to reduce his payments or, in the case of a significant defect, to terminate the contract or withdraw from the contract.
- 9.5 QUNDIS accepts no warranty for the fact that the functionalities of the software will meet the requirements of the customer. In addition QUNDIS is not responsible for ensuring that the software will produce the desired results in interaction with other programmes. The customer is responsible for making sure that other programmes do not affect the functionality of the software.

- 9.6 There will be no claims for material defects in particular
- if there is only minor failure to meet the contractually agreed feature,
  - if usability is only affected to a minor extent,
  - if damage results from incorrect or careless use of the software,
  - if damage results from external influences which could not be foreseen by this contract,
  - in the event of changes made by the customer or a third party and the resulting consequences,
  - in the case of software extensions implemented by the customer or a third party via an interface provided by QUNDIS for this purpose,
  - if the software is not compatible for the data processing environment applied by the customer.
- 9.7 If a data medium or documentation is defective, the customer's only remedy is to require QUNDIS to replace it by one which is free from defect.
- 9.8 At the discretion of QUNDIS the correction of the material defect will be implemented either at the customer's premises or at QUNDIS. If QUNDIS opts for correction at the customer's premises, the customer will be responsible for making available the required hardware and software together with other relevant operating conditions (including the necessary computer time) and suitable operating personnel.
- 9.9 The customer will only have a right to correct the defect himself in cases where QUNDIS has previously been given sufficient opportunity to rectify the situation but without success, and if after a reasonable period of time the customer has notified QUNDIS in writing that he will be correcting the defect himself. In this event the claim on the reimbursement of costs is restricted to the necessary and reasonable costs which also would have been incurred in the course of the correct rectification of the defect by QUNDIS itself.
- 9.10 If QUNDIS provides services in looking for or removing errors without being under an obligation to do so, QUNDIS will be able to require payment for these services in accordance with its current price list. This will apply in particular if a defect cannot be proved to exist or is not attributable to QUNDIS. The additional costs which arise to QUNDIS from the fact that the customer has not or does not meet his obligations arising from Section 7 must also be reimbursed.

## **10. Rights defects**

- 10.1 QUNDIS warrants that the software and the user documentation are not subject to the rights of third parties.
- 10.2 If the use of the software in accordance with the contract is affected or prohibited by claims of copyright infringement, QUNDIS will have the right at its own discretion to modify the service without cost to the customer in such a way that there is no longer any infringement, or to obtain authorisation in such a way that the service can be used by the customer without restriction and without additional cost to the customer. If the above possibilities are financially not justified, QUNDIS will be able to withdraw from the contract or terminate the contract, refunding any payments which have already been made after offsetting any services already provided and use which has been made of the software.
- 10.3 Subject to the following restrictions on liability QUNDIS will indemnify the customer against any legally ordered costs and compensation in the event of claims made by third parties. The claim to indemnification is subject to the customer informing QUNDIS without delay that a claim has been made, that QUNDIS is able to exert sole control of the defence, and that QUNDIS receives the requisite support from the customer in all actions which need to be taken.

## **11. Liability**

- 11.1 QUNDIS will be liable without restriction for intentional wrongdoing or gross negligence. In other respects liability will be limited or excluded in accordance with the following provisions.
- 11.2 Liability will be limited to damage and the corresponding costs which are typical for this kind of contract and could reasonably be foreseen.
- 11.3 QUNDIS will only be liable for minor negligence if it is in breach of a contractual obligation which are of particular importance for the achievement of the purpose of the contract (cardinal obligation). In this case the limitations on liability in accordance with the two previous paragraphs will apply. Otherwise liability for minor negligence is excluded in full.
- 11.4 Liability is excluded for indirect damage and consequential damage, in particular in relation to interruptions to business operations and loss of profit.
- 11.5 Liability is also excluded if the damage would not have occurred if data backup had been implemented correctly. In other respects liability in the event of data loss is limited to the typical cost of recovery operations which would have been incurred in the event of regular data backups which are appropriate to the risk.
- 11.6 These limitations on liability will not apply in the event of damage to life, limb or health, or to claims arising from product liability legislation. In addition they do not apply in the case of warranties which have been provided by QUNDIS.

11.7 If services in relation to a rental contract are provided, QUNDIS will not be liable for defects which were already in existence at the start of the contractual relationship. § 536a Section 1 BGB (German Civil Code) will not apply.

11.8 The above limitations on liability will also apply to the personal liability of QUNDIS staff, representatives and bodies.

## **12. Sub-contractors**

12.1 QUNDIS will have the right to commission third parties to provide the services which it is obliged to provide. QUNDIS will in particular have the right to assign to a third party the entire provision of the services to the customer.

12.2 Even if the services are provided by a third party QUNDIS will in principle retain responsibility towards the customer for compliance with the provisions of the contract.

## **13. Assignment and set-off**

13.1 The customer may assign to a third party any claims he has on QUNDIS only with the written agreement of QUNDIS.

13.2 The customer may only set off claims which are uncontested or have been legally recognised.

## **14. Termination**

14.1 Ordinary termination of the individual license agreement can be implemented by either party by giving the period of notice specified in the licence agreement. In addition either party has the right of extraordinary termination for good cause. Such good cause applies if, taking into account all the circumstances of the individual case and the interests of both parties, it would be unreasonable for one party to continue the contractual relationship until its agreed end or until the expiry of a period of notice.

14.2 Notice of termination must be given in writing.

14.3 If one party has the right to terminate the contract for good cause it can only implement this right within a period of two months after it has become aware of the circumstances which entitle the termination (limitation period). If a series of events gives a party the right to terminate the contract for good cause, the limitation period will begin with the last of these events.

14.4 Before any termination for good cause the other party must be notified in writing. The party which is in breach must be sent a written warning giving it the possibility of rectifying, within two weeks after receipt of the warning, the circumstances which have given cause to the threat of termination. There is no need for a warning to be provided if the party which is in breach of contract is guilty of multiple infringements or culpably and finally refuses to carry out its contractual obligations, or if there are special circumstances which, in consideration of the interests of both parties, justify immediate termination.

## **15. Ending the cooperation**

15.1 When the licence agreement is ended the customer must return the software to QUNDIS on its original data media, if the software was provided on data media. In addition the customer must remove from his computers all the installed copies of the software and delete or return to QUNDIS all copies on other data media, unless the customer is legally obliged to store these for a longer period. When required by QUNDIS the customer will confirm in writing the full implementation of the above measures or, if appropriate, give the reasons for the longer storage period.

15.2 Any use by the customer of the software after the end of the contractual relationship is not permitted.

## **16. Confidentiality and non-disclosure**

The parties hereby agree not to disclose confidential information. Such confidential information is any documentation and information of the other party which is designated as confidential or can be regarded as confidential because of the related circumstances. This includes in particular information about operational processes, business relationships and know-how.

16.1 The above obligation does not cover information (i) which was demonstrably already known to the recipient when the contract was concluded or became known from a third-party source without any breach of a non-confidentiality agreement, legal regulations or regulatory action; (ii) which on the conclusion of this contract was publicly known or became publicly known afterwards without any infringement of this contract; or (iii) has to be disclosed because of statutory regulations or in complying with the order of a court or public authority. To the extent permitted and possible, the party which is obliged to disclose the information will inform the other party in advance and give this party the opportunity to prevent the disclosure.

16.2 The parties will provide access to confidential information only to advisors who are subject to professional secrecy or who have been subjected in advance to the non-disclosure obligations of this contract. In addition the parties will only make confidential information available to such employees who need to know it for the implementation of this contract and, to the extent allowed by labour legislation, place such employees under the obligation of non-disclosure, even after they leave the company.

**17. Applicable law and place of jurisdiction; severability clause**

17.1 The laws of the Federal Republic of Germany will apply, to the exclusion of the UN Convention on Contracts for the International Sale of Goods (CISG).

17.2 The sole place of jurisdiction and of fulfilment will be the registered location of QUNDIS (Erfurt).

17.3 If one or more provisions of these terms and conditions is or becomes wholly or partly invalid or is incomplete, this will not affect the validity of the remaining provisions. The parties hereby agree to replace any invalid clause by whatever valid clause comes closest to fulfilling the aim of the parties as contained in the original invalid clause. The same applies in the event of any omissions in these terms and conditions.