

Terms and Conditions (State 06 | 2020)

§1 Governing provisions

(1) maxcluster GmbH, Lise-Meitner-Str. 1b, 33104 Paderborn (hereinafter referred to as the “Provider”) performs all services exclusively on the basis of these Terms and Conditions (T&Cs). The services are solely directed at entrepreneurs as per Art. 14, para. 1 of the German Civil Code (BGB).

(2) These T&Cs shall only apply if the customer is an entrepreneur (Art. 14, para 1 BGB), a legal person under public law or a special fund under public law. Any terms and conditions of the customer or third parties shall not apply, even if the provider does not object to their validity in individual cases. In the event that the provider refers to a notification that contains the terms and conditions of the customer or third party, or refers thereto, this shall not constitute acceptance of the applicability thereof by the provider.

(3) The provider reserves the right to amend or supplement these T&Cs at any time, provided this does not disadvantage the customer in bad faith. The provider shall announce any amendments or additions to these T&Cs with a notice in writing or text form. The customer reserves the right to lodge an objection to the respective amendments or supplements in writing or text form. A contractual amendment shall be regarded as approved if it is not objected to by the customer within 2 months of receipt of the provider’s notification about the amendment or addition to the T&Cs. The customer shall be adequately warned of this repercussion in the notification.

§2 Services and conclusion of the contract

(1) Our services are solely directed at entrepreneurs, traders, freelancers and public institutes and in no event at consumers.

(2) All of the provider’s services – particularly those included on the provider’s website – are offered in a non-binding manner, provided they have not been explicitly marked as mandatory or incorporate a set acceptance period. The provider shall be entitled to accept orders or contracts within 14 days after receipt thereof.

(3) The customer shall submit a contractual offer to the provider either via the order interface on the provider’s website, by email or fax.

(4) The contract shall enter into force once the provider expressly accepts the customer’s contractual offer or commences performance of the ordered service.

(5) The concluded contract in written or text form, including these T&Cs, is the sole governing force for the legal relationship between the provider and the customer. This fully reflects all agreements between the contracting parties on the contractual object. Any verbal statements made by the provider prior to the conclusion of this contract are non-binding and verbal agreements, which shall be superseded by the written contract, provided nothing has been expressly agreed to the contrary, causing them to continue to apply as binding.

(6) Any amendments or additions to the agreed terms, including these T&Cs, require the written or text form. With the exception of managing directors or authorised officers, the provider’s employees shall not be permitted to conclude deviating verbal agreements.

§3 The provider's contractual duties

(1) The provider performs its services on the basis of the performance specification for the respective product or individual quote and on the basis of the pertinent service level agreement and applicable price list. Other commitments or ancillary agreement shall only apply if confirmed in writing or the text form by the provider.

(2) The provider shall make amendments to the hardware performance, such as the number of CPU cores, the amount of memory or disc space volume at the written request of the customer. Any change requests must be submitted to the provider's ticket system by email at support@maxcluster.de. Change requests submitted by the customer (e.g. by email) shall constitute an request to amend the contract, which is subsequently accepted by the provider through the provision of the respective service.

(3) In addition to the hardware performance, the provider also offers monitoring. This comprises active monitoring of the hardware resources and server services. In the event that the customer's application requires a change to his hardware services to ensure the hardware stability, due to increased traffic, for example, the provider shall implement this change automatically in order to achieve optimal availability and stability for the customer. The hardware services are billed on the basis of the provider's price list, as amended.

Following the implementation of the hardware change, the customer shall be informed of the change by an email sent to the contact persons specified by the customer. The customer shall be able to check the necessity of the change to the hardware service for two weeks after the change (review period); the change can only be rejected during this review period, either by post, fax or email in text or written form. In the event that a rejection is submitted after expiration of this review period, this shall be deemed a change request for the future as per para. 2 above.

The customer reserves the right to refuse the automatic implementation of changes by the provider to ensure the availability of the web application. In this case, the provider shall deactivate monitoring to the technically feasible extent. As a result, the provider shall no longer have any influence on the stability of the web application and consequently no longer assume any liability in this regard.

(4) The provider is only obligated to provide technical support to the customer to the extent stipulated in contractual agreements. Any support services that go beyond the scope of these agreements shall be billable. The provider shall not offer any direct support to the customer's customers, unless this has been agreed in writing or text form with the customer.

(5) In the event that the provider voluntarily performs additional services without extra remuneration, the customer shall not be entitled to establish any claims to performance. The provider reserves the right to cease, amend or demand payment in the future for the provision of services of this kind offered free of charge without notice at any time.

(6) The provider must secure the customer's systems with regular backups and retain these backups for 14 days. In the case that the customer's servers are available, the data backup must be performed in a manner that facilitates the restoration of data to a status that is no longer than 48 hours in the past in each case. The customer shall not be entitled to the issuance of a particular backup medium; he may only request the retransfer of the backed-up data on the server.

(7) The customer shall not be entitled to a particular physical server. The provider must ensure that the customer's application is solely operated on modern hardware. The customer is aware that the data may need to be migrated onto another physical server without his consent. In this regard, that customer shall be informed in a timely manner of an impending migration.

(8) The provider reserves the right to amend the server configuration if necessary for technical and legal reasons or if advisable due to technical advancements. The scope of performance shall not be limited by this form of amendment. The provider shall inform the customer of any planned changes in good time.

§4 The customer's duties

(1) The customer is obliged to operate the infrastructure provided by the provider according to the maxcluster GmbH guidelines. The pertinent guidelines are published on the maxcluster GmbH website <https://maxcluster.de/richtlinien>.

(2) The customer assures that all information provided for the conclusion of the contract is accurate and complete. In this regard, the customer must inform the provider of any amendments to his contact details without delay and provide any data required for the conclusion of the contract. The above particularly applies to email addresses and phone numbers, the invoice address and the VAT ID and payment information, if applicable.

(3) The customer must set-up and manage his servers in such a way that the security, integrity and availability of the networks, other servers, software and third-party is not compromised. In particular, the customer must maintain strict confidentiality with regard to login information (e.g. passwords) for the provider's services and safeguard it against third-party access. The provider must be informed immediately if the customer becomes aware of any unauthorised third-party access to login information.

(4) The customer must configure his programs in such a way that they are automatically restarted by the provider when the hardware or OS are rebooted.

(5) When necessary and reasonable, the customer shall participate in the performance of simple configuration changes, e.g. a simple adjustment to his systems or the re-entry of login information.

(6) The customer must not misuse the provider's services. In particular, he must not transfer or grant access to content that violates copyrights, infringes personal rights or constitutes a criminal offence. In this regard, the provider's "Guidelines" shall also apply. In the event of a culpable breach of duty, the customer indemnifies the provider from all third-party claims, including claims for costs incurred.

(7) If the customer breaches one of the duties specified above, the provider shall be entitled to cease its services with immediate effect or block access to the customer's data. Claims for compensation remain expressly reserved.

(8) In the event of serious or repeated breaches against the duties specified above, the provider shall be entitled to terminate the contractual relationship without notice.

§5 Contractual term, termination and duties

- (1) The contractual relationship shall commence with the transfer of login information for the ordered product from the provider to the customer.
- (2) The contract shall remain in force for 1 month after commencement. The contract may be terminated with 14 day's notice to the end of the contractual term.
- (3) The contractual term will be automatically extended by another month if the contract is not terminated with the required notice by the end of the respective contractual term.
- (4) The right to terminate without notice for good cause remains unaffected. In particular, good cause is deemed to exist for the provider if,
- (a) the customer defaults in payment by a minimum of 60 days;
 - (b) the customer culpably breaches a key contractual duty and fails to remedy this breach within an adequate grace period despite a written warning.
- (5) Each termination must be submitted in the form of a written declaration, which must be signed by the customer. This notification may be sent by post, fax or email.
- (6) Upon termination of the contractual relationship, the customer must stipulate key instructions for the retention of his data and his web domain. The provider shall only be required to adhere to these orders if they are issued by post, fax or email up to 14 days prior to the end of the contractual term. To this end, the provider shall provide the customer with a cancellation form that can be downloaded in the customer portal in which the customer can specify his instructions for the retention of his data and domain. Any entries in this form or further instructions sent by post, email or fax by the customer shall be regarded as orders for the provider on how to proceed with the customer's data and domain upon expiration of the contractual relationship.
- (7) Following expiration of the contractual relationship, the provider shall no longer be obligated to perform the contractual services. The provider must erase all of the customer's data stored on the system within 14 days after the expiration of the contractual relationship. This applies in particular if the customer has not issued instructions on how the provider should handle his data and domain after the expiration of the contractual relationship. The customer may request that the provider erases his data.
- (8) The domain registration relationship is governed by the partially deviating terms of Section 8 of these Terms and Conditions.

§6 Prices and payment terms

(1) The prices listed in the provider's service offer, which forms the basis for this agreement, shall apply. Any additional services shall be billed according to the maxcluster GmbH standard price list, as amended.

(2) Services are invoiced on a monthly basis. All payments are due within 7 days of the invoice date.

(3) The provider issues automatically generated invoices, which are sent as email attachments to the customer at the specified email address on the invoice date and available for viewing and download in the customer portal. The customer hereby declares his consent to email invoicing. At the express request of the customer, the provider may also send invoices in the post.

(4) The provider is entitled to charge an appropriate processing fee for retroactive invoice corrections for which the provider is not responsible.

(5) The provision of services by the provider is contingent upon timely payment of invoices by the customer. In the event that the customer defaults in payment by over 60 days, the provider shall be entitled to block the customer's internet access to the server without a grace period or further notification.

(6) The customer may pay by bank transfer, SEPA direct debit or credit card. The customer can enter his referred payment method in the provider's customer portal and update or amend this entry at any time. In the case of SEPA direct debit, the provider shall notify the customer in advance of the corresponding direct debit collection in a timely manner (pre-notification). This notification must be sent by email to the customer's email address specified for the receipt of invoices at least one working day prior to the direct debit. In the case of payment by credit card, "maxcluster GmbH" will be stated as the payment recipient on the credit card statement.

(7) If the provider permits the customer to pay by credit card or SEPA direct debit, the customer must ensure that his payment information is up-to-date and that adequate funds are available in his account at the time of collection. The customer must reimburse the provider for any costs incurred as a result of payment refusal by the bank that holds the account. Furthermore, in the case of transfers from abroad, the customer shall be responsible for any applicable fees.

§7 Copyright and licence agreements

(1) The provider grants the customer a temporary, non-exclusive right to use the software provided by the company and third-party software for the duration of the contractual term. Further use of the software after expiration of the contract is not permitted. The customer must delete all copies of the leased software immediately upon expiration of the contract.

(2) The licence terms of the respective software manufacturer or provider shall apply accordingly.

§8 Web domain

(1) If the customer registers a domain through the provider, the provider shall solely act on behalf of the customer within the scope of an agency agreement. The contract for the domain shall be concluded directly between the customer and the respective registrar. Accordingly, the terms and directives issued by the registrar shall apply.

(2) The provider does not have any influence on the brokerage of domain names. As such, it does not assume any guarantees regarding the uniqueness of the domain name requested by the customer and that it does not infringe third-party rights or that it is permanently available. The above shall also apply to the brokerage of subdomains.

(3) The customer must cooperate with the registrar to a reasonable extent for the registration, transfer and deletion of domains in addition to the entries in databases.

(4) The customer assures that his domain and the related content does not infringe any third-party rights or applicable laws.

(5) If the customer is required to relinquish a domain due to the infringements of third-party rights, the customer must inform the provider hereof without delay. In turn, the provider must notify the customer if the customer is required to relinquish the customer's domain. In this case, the provider shall be entitled to renounce the domain on behalf of the customer in the event that the customer has not provided adequate provisions for the possible costs of litigation and lawyer fees. If the customer renounces a domain to the registrar, the provider must be informed without delay.

(6) The provider shall be entitled to suspend the availability of a domain or temporarily block its content if it receives credible information from a third party that the domain or its content infringes the third party's rights or if the provider has reason to believe that a violation may be possible on the basis of the objective circumstances.

(7) The customer shall indemnify maxcluster GmbH from all claims for compensation asserted by third parties in relation to his domain.

(8) As the provider manages the domain for the domain owner, the provider must forward all notifications from the domain owner to the respective registrar. To this end, instructions to terminate the registered domain must be addressed to the provider. This notification must be sent by post, fax or email. Termination of the contractual relationship with the provider will not invalidate the registration agreement concluded between the customer and the registrar.

(9) A termination of the contractual relationship with the provider by the customer or termination of the contractual relationship with the customer by the provider automatically includes the termination of the management of the domain registration agreement by the provider. Section 5, paras. 7 and 8 shall apply accordingly.

§9 Email services

- (1) In the case that email inboxes are included in the services agreed with the provider, the provider's scope of supply shall include the receipt, storage and forwarding of emails addressed to the customer in addition to the receipt, storage and forwarding of emails that the customer wishes to send to specified recipients.
- (2) The provider's duties in terms of email forwarding are limited to the receipt of emails to be forwarded by the customer and, in the case that the recipient's address is not within the provider's communication network, the forwarding of this email to the internet at a transfer point to the internet provided by the provider. Accordingly, the service in terms of emails addressed to the customer comprises the receipt of emails at the transfer point of the provider's communication network from the internet and the provision of the received emails for retrieval by the customer.
- (3) The email inboxes provided to the customer by the provider may solely be used to process email traffic.
- (4) The customer must retrieve his personal emails within 3 months after receipt on the email server. The provider reserves the right to delete emails received on behalf of the customer if they are not retrieved within this 3-month period. Furthermore, the provider shall also be entitled to delete emails received on behalf of the customer if they are retrieved or forwarded.
- (5) The email inboxes are subject to storage limits. To this end, the provider reserves the right to return emails received on behalf of the customer to the sender if the agreed storage limit is exceeded. Furthermore, the provider is entitled to limit the volume of incoming and outgoing emails as appropriate.
- (6) An email address to the email may be rejected by the provider on the grounds of objective criteria if circumstances give rise to the suspicion that this email contains malware (viruses, worms or Trojans, etc.), the sender information is incorrect or concealed or the email constitutes unsolicited or concealed commercial communication (spam).
- (7) The customer is not permitted to send spam emails. These include, in particular, unsolicited, unlawful advertising emails sent to recipients. Furthermore, the customer is not permitted to send emails containing incorrect sender information or to otherwise conceal the identity of the sender. The customer is obliged to solely send commercial emails in compliance with the pertinent statutory provisions and to mark them as commercial communication with a corresponding design.
- (8) If the customer sends spam emails as per the above section, the provider reserves the right to temporarily block the respective inbox on the email server.
- (9) The provider's obligation to save incoming emails is limited to the duration of the contractual relationship. THE PROVIDER WILL DELETE ALL EMAILS SAVED ON BEHALF OF THE CUSTOMER TWO WEEKS AFTER THE END OF THE CONTRACTUAL RELATIONSHIP WITHOUT PRIOR NOTIFICATION.
- (10) The customer is entitled to receive his personal data in a structured, conventional and machine-readable format. Provided this is technically feasible and legally permissible, the customer may also demand that the provider transfers the data to a third party. If the provider renders this service, the customer must provide the applicable remuneration stipulated in the standard price list, as amended.

§10 Warranty

- (1) If the services rendered by the provider are defective as their suitability for intended use as contractually agreed is significantly impaired, the provider shall be liable for materials defects and defects of titles according to statutory provisions.
- (2) All defects must be remedied free of charge. The provider must be informed of any defects or faults that emerge promptly following detection thereof in writing or text form. The customer must assist the provider to the best of his ability with the remedying of defects. In particular, the customer shall be required to introduce all reasonable measures to ensure data security.
- (3) For defects that were present at the time the resources and software products were provided to the customer by the provider, the provider shall only be liable if it is found to be liable for these defects.
- (4) As an agreed characteristic of the provider's services, the hardware and software employed or provided by the provider at the time of the transfer shall be required to function according to the respective manufacturer's performance specification under normal operating conditions and with normal maintenance.
- (5) The provider does not grant any assurances.
- (6) In particular, the provider does not warrant that the resources and software products provided will be sufficient for the customer's requirements or suitable for certain applications. The provider does not warrant that the software used by the customer runs without errors.
- (7) The provider shall inform the customer that due to the current state of technology, faultless operation of all hardware and software cannot be guaranteed in all application configurations. Furthermore, hardware and software cannot be protected against third-party manipulation.

§11 Liability

- (1) The liability of the provider for damage incurred due to the use of public telecommunication services is governed by the provisions of the Telecommunications Act.
- (2) Beyond the scope of para. (1), the provider's liability is governed by the following provisions: The provider shall be liable to damage caused by intent and gross negligence. In the case of slight negligence, the provider shall only be liable for breaches of key contractual duties, the fulfilment of which is required for proper performance of the contract and compliance with which the customer can rely on, in addition to damages caused by injury to life, limb or healthy, or any other liability stipulated by the Product Liability Act. To this end, the provider shall only be liable for foreseeable damages, the occurrence of which is typically expected. Liability in the case of slight negligence is limited to twice the amount of the contractual remuneration paid to the provider for its services by the customer in the month during which the loss event occurred.
- (3) In the case that the provider's services are utilised by unauthorised third parties through the use of the customer's login information, the customer shall be liable for any fees incurred within the scope of civil liability until the receipt of the customer's instruction to change his login information or the notification of the loss or theft, provided the customer is responsible for the unauthorised third-party access.

(4) If liability is excluded or limited according to the above clauses, this shall also apply – to the legally permissible extent – to any personal liability for the provider’s employees, workers, representatives, committees and vicarious agents.

§12 Data protection

The provider collects, processes and uses the customer’s personal data in accordance with statutory data protection regulations. Please find more information on data protection in the maxcluster GmbH privacy policy <https://maxcluster.de/datenschutz>.

§13 Place of jurisdiction

(1) To the extent that customer is a merchant, legal entity under public law or special fund under public law, or does not have a general place of jurisdiction within the Federal Republic of Germany, the place of jurisdiction for all legal disputes arising from the contractual relationship between the provider and the customer shall either be Paderborn or the customer’s registered place of domicile at the provider’s discretion. In this regard, Paderborn shall be the sole place of jurisdiction for claims asserted against the provider, unless mandatory legal provisions rule otherwise.

(2) The relationship between the provider and the customer is exclusively governed by the law of the Federal Republic of Germany. The application of the United Nations Convention on Contracts the International Sale of Goods (CISG) dated 11th April 1980 is hereby excluded.

§14 Final provisions

(1) All communications from maxcluster GmbH may be electronically sent to the customer. This also applies to the settlement of services within the scope of the contractual relationship. The customer hereby declares his consent to email invoicing.

(2) The customer shall only be entitled to exercise a right of retention on the basis of undisputed or legally established claims arising from the same contractual relationship. Offsetting with counterclaims is only permissible provided the claims are undisputed or legally established or pertain to a right of retention granted to the customer from the same contractual relationship.

(3) In the event that the contract concluded with the customer or these Terms and Conditions are found to contain regulatory gaps, this gap shall be filled with a legally valid provisions that would have been agreed between the parties according to the economic objectives of the contract and purpose of these Terms and Conditions had they been aware of the regulatory gap.