

General terms and conditions of business StormForger GmbH (Working Translation)

– valid from 13 September 2018 –

1 Application of these T&Cs; definitions

- 1.1 StormForger GmbH (“Contractor”) operates Software as a Service (“SaaS”) software, which can be used online from various websites operated by the Contractor.
- 1.2 The general terms and conditions of business apply upon the creation of an account on one of the websites operated by the Contractor, to the use of the Software Services and other services offered on the websites and to all other agreements between the Contractor and the contracting party (“Customer”), even if they are not expressly included again, unless otherwise expressly agreed between the parties in written.
- 1.3 Divergent, conflicting or supplementary terms and conditions of business of the Customer shall not form a component part of the contract – even if they are acknowledged by the Contractor.
- 1.4 The Customer is a consumer if the purpose of the ordered goods and services cannot be predominantly attributed to their commercial and independent professional activity. In contrast, the Customer is an entrepreneur if he is a natural or legal person or a partnership with legal capacity that acts in exercise of their commercial or independent professional activity when entering into the agreement.

2 Services of the Contractor

- 2.1 The Contractor is the proprietor of a Software Service for conducting tests and evaluating the quality and robustness of IT systems (“SaaS”). To this end, the relevant system is stressed with a predefined number of requests (“Load Tests”) and the reaction of the system is evaluated using specific performance characteristics.
- 2.2 The Contractor takes on the implementation of Load Tests for the Customer on the basis of the following general terms and conditions of business in conjunction with the relevant individual contract.
- 2.3 Depending on the contractual agreement, the contractor grants the possibility of using the software service via a website operated by the Contractor (“SaaS Contract”) for the independent execution of load tests, or carries out services after conclusion of a consulting service contract (“Professional Services Contract”; in conjunction with a SaaS Contract). The SaaS Contract is subject to all provisions of these terms with the exception of special provisions for Professional Services Contracts in accordance with sections 16. The provisions of sections 1, 2, 3.2 and 6 to 15 shall apply accordingly to Professional Services Contracts.
- 2.4 The Contractor processes the orders issued to it on a service contract basis.

3 Conclusion of contract, right of revocation

- 3.1 The Customer's request for the conclusion of the indented contract consists in the online ordering of a licence of the Contractor. The contract comes into effect upon acceptance of a textual order or by activation of the license per click in the software service by the Contractor.
- 3.2 In the case of contracts concluded outside business premises and in the case of the conclusion of a distance contract, Consumers in principle have a statutory right of revocation, which the Contractor informs the Customer of (provided the Customer is a consumer within the meaning of section 1.2) through the information on revocation rights attached to these T&Cs. A model revocation form is also attached.

4 Subject matter of an SaaS Contract; costs for IT infrastructure; duty to provide information and indemnification in respect of third-party service providers; storage of data

- 4.1 The subject matter of the SaaS Contract is the granting of a possibility to use the Software Service. The specific range of functions of the Software Service and the requirements for the hardware and software environment that are necessary for the proper performance of the service by the Contractor can be found in the user documentation provided.
- 4.2 As an integral part of the SaaS Contract, the Contractor's IT infrastructure which is necessary for the performance of the test is made available to the Customer. Unless the parties expressly agree otherwise, this provision of the IT infrastructure for the Customer by the Contractor is included in the remuneration of the SaaS contract. Any IT infrastructure costs of the Customer associated with the performance of the SaaS Contract are to be borne by the Customer. Customer IT infrastructure also includes in this respect the IT infrastructure of third-party service providers (e.g. hosting companies) that is made available to the Customer on the basis of a continuing obligation (*Dauerschuldverhältnis*).
- 4.3 If the Customer IT infrastructure is partly or wholly provided by third parties on the basis of a continuing obligation, the Customer undertakes to inform the relevant third party service provider in advance of the implementation of load tests and performance analyses as a result of the SaaS Contract. In addition, the Customer indemnifies the Contractor against all costs or other claims, arising for whatever reason, that a third-party service provider may assert against the Contractor as a consequence of the SaaS Contract.
- 4.4 Any data generated and/or processed by the Software Service will be stored only for the duration of the contractual relationship and will be deleted immediately after the necessary processing of the data protection declaration. The archiving of the data in line with the retention periods under tax and commercial law is not included in the scope of services. The Customer is itself responsible for archiving.

- 4.5 The creation of an account in accordance with section 4.4 below is necessary in order to use the Software Service. The Software Service may be used exclusively by the Customer or by persons expressly commissioned by it.

5 Account

- 5.1 Registration and the creation of an account are required for the use of the Software Service of the Contractor. The data requested during registration and the creation of an account must be provided truthfully and in full by the Customer and updated immediately in the event of changes during the use of the account.
- 5.2 The Customer is responsible for all activities that are conducted through its account. The Customer alone is responsible for ensuring the confidentiality, security and compliance with data protection regulations relating to the account, especially the password and the access to the computer and/or mobile end devices of the Customer. If there are grounds for assuming that unauthorised third parties have gained access to the account of the Customer, the Customer is required to inform the Contractor of this immediately.
- 5.3 The Contractor reserves the right to block or to close accounts and to remove or to change any kind of contents if there are indications that the Customer is in breach of applicable law, these T&Cs or other applicable agreements. Use of the services of the Contractor is excluded if the use is connected with a criminal offence or unlawful activity and/or is employed to cause harassment or fear and/or is otherwise likely to have an adverse impact on the interests of the Contractor. In all of the above cases, there is additionally a right to refuse performance on the part of the Contractor until the breach of duties by the Customer has ended or the use of the services is no longer likely to have an adverse impact on the interests of the Contractor. The right of the Contractor to terminate the contract for good cause remains unaffected.

6 Intellectual property rights

- 6.1 The Contractor is the proprietor of all contents reproduced on the websites of the Contractor (such as texts, graphics, logos, software, etc.) and of the related intellectual property rights. Exceptions to this are partner, reference and co-operation contents (texts, graphics, logos, etc.) and the related intellectual property rights, which belong to the relevant rights holder.
- 6.2 The Contractor grants the Customer a simple, non-exclusive, non-transferable and non-sub-licensable right to use the Software Service and the accompanying user documentation for the duration of the relevant contract under the terms of this contract ("*Licence*"). The provision of the Software Service is limited to the use of the software as an SaaS service for retrieval via the Internet or to the use as part of and for the duration of the services covered by the Professional Services Contract. The provision of the software which forms the basis of the Software Services for local installation on systems of the Customer (on data storage media or by way of online transmission) is not included.

7 Cooperation; duties of the Customer to cooperate

- 7.1 The Customer is required to perform in full and in good time all cooperation services necessary for the Contractor to perform its services. The duties to cooperate include in particular the creation of the conditions for the use of the application services and any measures to protect Customer data and files (backup), especially the regular creation of backup copies in line with the risks. The Customer assumes in principle the sole responsibility for the predefined number of queries to be sent during the Load Test as well as the results thus intended by it, for information and data originating from it, for the devices (hardware and software) employed by it and their suitability for data transmission and for the proper functioning of its Internet access including the transmission channels.
- 7.2 The Customer provides the Contractor with the information, test data and services required to perform the services before the services commence or, if the Contractor requests these at a later time, without delay after they have been requested by the Contractor. The Customer ensures that any test data of the Customer required or requested by the Contractor does not establish any duties under data protection law for the Contractor (and in particular do not contain any personal data). The Customer additionally grants the Contractor access to the Customer's IT systems if these are necessary in order to perform the services and informs the Contractor of any information required for access in accordance with the sentence above. The Customer is required to inform the Contractor immediately of all new items and changes that affect the services.
- 7.3 The Customer is required to provide the Contractor immediately on request in the event of an error message with all documentation, logs and other information relevant for the analysis, unless it would breach applicable law or overriding third-party rights by doing so.
- 7.4 The Customer bears the sole responsibility for ensuring that the data and information provided by it are free of errors with regard to their contents. In the event of data transmission to the data storage provided by the Contractor, the Customer must create additional backup copies of this data on its own data storage media. Only data that is free of computer viruses or other malicious codes may be transmitted. In addition, the Customer shall ensure that data is processed in an orderly and lawful manner in compliance with the applicable law. The Contractor may not use either software or other techniques or processes in connection with the use of the software that are likely to have an adverse impact on the operation, the security and the availability of the Software Service or related platforms.
- 7.5 The Contractor can use independent subcontractors to perform the services it has undertaken to provide, where the Contractor remains bound by its direct obligation to the Customer.

8 Time of performance; force majeure

- 8.1 In the case of an SaaS Contract, the Customer itself determines the time at which it uses the Software Service after giving appropriate notice. There is no duty to call up the service on the part of the Contractor. Costs for the SaaS Contract also fall due for payment in advance without delay when the service has not been called up.
- 8.2 In the case of a Professional Services Contract (see section 16), the time of performance and the implementation of the services by the Contractor are defined precisely in advance with the Customer. After a Professional Services Contract has come into effect, the call-up of the services by the Customer must be made within 60 calendar days, otherwise the fee will fall due for payment also without any service provided in return.
- 8.3 The Contractor enables the Customer to use the Software Service generally seven days a week (24 hours). The time required for maintenance and service work (not undertaken to be provided by the Contractor) and technical improvements to the Software Services ("*planned downtimes*") as well as cases of force majeure in accordance with the following section 8.2 are excluded. A reduction of the contractual remuneration on account of planned downtimes is excluded unless a reasonable grace period has been set for the Contractor. If deadlines are not expressly agreed as binding, the occurrence of default is in any event subject to a warning letter from the Customer on the revocation of a reasonable grace period. Claims for damages exist only under the terms of section 9.4 (Contractor liability).
- 8.4 In cases of force majeure, the Contractor is exempt from the obligation to perform the service for the duration and in the scope of the impact. Force majeure is any unforeseeable event beyond the control of the Contractor, as a result of which it is prevented in full or in part from fulfilling its obligations, including fire, floods, strikes and legal lockouts as well as disruptions to operations that are not the fault of the Contractor, for example on account of unforeseeable shortage of labour, power or auxiliary materials, or official orders. The same shall apply if force majeure arises at a vicarious agent of the Contractor. If possible, the Contractor will inform the Customer of possible hindrances and disruptions caused by force majeure and endeavour to taken the interests of the Customer into consideration in its scheduling.

9 Prices, due date, set-off, retention

- 9.1 The agreed prices apply to the remuneration of the services of the Contractor. For the service packages offered on our pricing website (<https://stormforger.com/pricing>), which can be claimed against payment of a recurring monthly fee (subscription), the prices stated there apply. Unless otherwise stated, all prices are net amounts plus the statutory value added tax, if applicable. The documented cost of agreed trips and expenses or those required for the purpose of the contract will be invoiced additionally.
- 9.2 In the case of an SaaS Contract, the remuneration is due in advance for payment without deduction after fourteen (14) days from the invoice date, unless otherwise agreed. In the case of a Professional Services Contract, billing is made after the services have been performed and payments fall due for payment net fourteen (14) days from the invoice date. The Contractor is entitled to invoice partial services that have been performed on a monthly basis. Minimum remuneration, subscriptions and other prices related to a specific period (e.g. monthly, quarterly, semi-annually, annually, etc.) are due in the full amount for each period or part thereof.
- 9.3 Interest is charged on arrears at the statutory default interest rates from the due date irrespective of any fault of the Customer. The statutory rights are reserved in the event of default by the Customer.
- 9.4 If it becomes evident in a contract that requires the Contractor to perform advance services after the contract has been entered into that the enforceability of the claim for service in return is jeopardised on account of the lack of capability of the other party, the Contractor is entitled to make the further processing of the order and delivery dependent on the furnishing of appropriate security. A reasonable grace period will be set in writing for the Customer in advance for the furnishing of security. If the security is not furnished within the period set, the Contractor is entitled to claim immediate payment of all outstanding receivables and to terminate the service contract without notice. Claims that are not based on the same legal circumstance as the service that has been withheld or in respect of which the debtor has the right to a justified defence – with the exception of the defence of non-performance of the contract – are not affected by this right.
- 9.5 The Customer may offset the claims of the Contractor only with counterclaims that have been legally established by final judgment or are uncontested. The same shall apply for the assertion of a right of retention or of a right to refuse performance.

10 Liability of the Contractor

- 10.1 For damages arising from whatever legal reason that are based on breach of duty by the Contractor, a legal representative or vicarious agent of the Contractor, the Contractor is liable in the case of wilful intent and gross negligence or – and then limited to damages typical for this kind of contract and foreseeable at the time of conclusion of the contract – in the breach of material contractual obligations. Material contractual obligations are obligations, the fulfilment of which is an essential condition enabling the proper implementation of the contract, the breach of which jeopardises the accomplishment of the purpose of contract and on the compliance with which the Customer regularly relies and may rely. This limitation of liability does not apply to claims for compensation of damages on account of injury to life, body or health or on account of other bases for liability stipulated as mandatory by law.
- 10.2 The attention of the Customer is expressly drawn to the fact that the availability of the IT system to be tested by the Software Service or other services as part of a Professional Services Contract may be limited until its functional capability has been fully terminated. The Contractor shall therefore only be liable for consequential

damage caused by a defect, loss of profit, interruption of operations or other indirect damages in the event of intent, assumption of guarantee or fraudulent concealment of a circumstance causing the damage.

- 10.3 Strict liability for defects/errors already present at the time the contract is entered into is expressly excluded.
- 10.4 The Customer is required to create backup copies of all data that is handed to the Contractor or that could be adversely affected by the Software Service. If the storage violates data protection law or other legal regulations, the Customer is obligated to inform the Contractor immediately and to delete the data accordingly. In the event of the loss of or damage to data by the Contractor and related consequential damages incurred by the Customer, the Contractor is liable, except in the case of wilful intent, only in the scope of the costs that are incurred by the Customer for the creation of backup copies of the data or that would be incurred if the Customer has not created backup copies of this kind.
- 10.5 The Contractor is not liable for disruptions to the fulfilment of the contract as a result of force majeure within the meaning of section 8.2 for which the Contractor is not responsible.

11 Indemnification by the Customer

- 11.1 If claims for damages or the reimbursement of costs or expenses are asserted against the Contractor (or its managing directors, employees or other vicarious agents) by third parties that are based on the use of the Software Service by the Customer, the Customer shall immediately indemnify the Contractor (or its managing directors, employees or other vicarious agents) against these claims, including reasonable costs of the legal defence, and offer it the necessary support for the legal defence.
- 11.2 Claims of third parties that lie within the sphere of the Contractor (including alleged breaches of third-party intellectual property rights) are excepted from this.

12 Confidentiality

- 12.1 The Customer and the Contractor are obliged to maintain secrecy about confidential information even after the end of the contractual relationship. "Confidential information" means all information and documents of the other party which are marked as confidential or are to be regarded as confidential under the circumstances, in particular information on operational process, business relationships and know-hows, as well as all work results.
- 12.2 Such confidential information is excluded from this obligation,
 - 12.2.1 which were demonstrable already known the recipient at the time of conclusion of the service contract or which subsequently became known by a third party without this violating any confidentiality agreement, legal regulations or official orders;
 - 12.2.2 which were publicly known at the time of the conclusion of the service contract or is subsequently made public, unless this is due to a breach of this service contract; or
 - 12.2.3 which must be disclosed due to legal obligations or at the order of a court or an authority. To the extent permissible and possible, the recipient obliged to disclose will inform the other party in advance and give it the opportunity to take action against the disclose.
- 12.3 The Customer and the Contractor observe the relevant data protection regulations. Personal data are only collected, processed or used to the extent necessary for the performance of the service contract and permitted by the relevant statutory provisions. Your personal data will only be collected, proceed and used to the extent permitted by law or of you have given your consent.
- 12.4 Further information can be found in the contractor's data protection declaration.

13 Naming as a reference

By entering into the service contract, the Customer irrevocably agrees that the Contractor may conduct an anonymous case study of the performance of the order, collect the findings obtained from this study and publish them at its own discretion. The case study may not contain any references that enable a third party to associate them with the Customer without any doubt. The non-anonymised publication of a case study or other public mention of the Customer (including its company name, company logo and other product name or product logo) as a reference in online and/or offline media requires the prior approval of the Customer. If the Customer advertises in online and/or offline media using a past, current or future test of its IT systems by the Software Service, the Contractor has a right to be named as the proprietor of the Software Service and/or as the service provider.

14 Term, termination

- 14.1 Unless the parties expressly agree to a different contract term, the service contract ends upon the performance of the last service to be provided by the Contractor (irrespective of any service interruptions). The relevant service contract is therefore entered into for a fixed period of time by the parties. Early ordinary termination is not allowed.
- 14.2 In the case of a subscription, the subscription contract is entered into by the parties for the agreed subscription term. After the subscription term has ended, the subscription is extended by the same number of months for which it was originally agreed (e.g. by six months for a six-month subscription) if the subscription is not terminated by giving notice of three months to the end of subscription term or of the relevant extension period.

In the case of a one-month subscription, the notice period is three weeks to the end of the subscription term or of the relevant extension period; in the case of a three-month subscription, the notice period is one month to the end of the subscription term or of the relevant extension period.

- 14.3 The possibility of extraordinary termination of the contract for good cause remains unaffected.
- 14.4 Any notice of termination must be given in text form (written or electronic).

15 Final provisions

- 15.1 The individual contract entered into and these general terms and conditions of business contain the complete agreements of the contracting parties on the subject matter of the contract. Statements of one of the parties to the contract made previously within the framework of contract negotiations are invalid unless they are incorporated in the contract. This contract supersedes all agreements previously made between the parties to the contract on the same subject matter.
- 15.2 All amendments and supplements to the individual contract and to these general terms and conditions of business must be made in writing. The amendment of this provision also must be made in writing.
- 15.3 Should parts of the individual contract or of these general terms and conditions of business be or become invalid, the invalid parts are to be replaced by agreements that most closely approximate to the commercial intent of the parties to the contract. The contract as a whole is not affected by that.
- 15.4 German law applies; the provisions of international private law and of the UN Convention on the contracts for the international sale of goods are excluded.
- 15.5 The place of performance for all obligations arising from this contractual relationship, including the payment obligation, is the seat of the Contractor. If the parties to the contract are businesspeople, legal entities under public law or public law special funds, the venue for all disputes arising from or in connection with this service contract is the seat of the Contractor.
- 15.6 In case the English version deviates from the German version, then the German version shall prevail. Find the German version at <https://stormforger.com/terms>.

16 Special regulations for Professional Services Contracts

- 16.1 The special provisions for the Professional Services contract are shown below. Professional Services contracts include the services of requirements gathering, project management and coordination, preparation and execution of load tests, analysis and evaluation of result data as well as consulting on possible solutions.
- 16.2 Within the framework of a Professional Services Contract, the requirements and objectives are first analysed together with the Customer and the IT system to be tested, including the volume of queries to be generated in the Load Test, is defined. The correspondingly defined Load Tests are subsequently performed and evaluated by the Contractor. Depending on the agreement in the individual case, consultancy is additionally provided to the Customer using the individual evaluations or by way of a comprehensive overall evaluation with findings and recommendations, which are provided to the Customer.
- 16.3 Unless otherwise agreed, an existing SaaS contract is the basis for the conclusion of a Professional Services contract. If the services of the SaaS contract are not sufficient to fulfil the Professional Services contract, the SaaS contract will be adapted to the Customer after prior notice. Any costs of the IT infrastructure associated with the execution of the Professional Services Contract on the part of the Customer are to be borne by the Customer himself. The Customer's IT infrastructure also includes the IT infrastructure of third-party providers (e.g. hosting companies), which is made available to the Customer on the basis of a continuing obligation.
- 16.4 If the Customer IT infrastructure is partly or wholly provided by third-party services providers, the Customer undertakes to inform the third-party service provider in advance of the implementation of Load Tests and performance analyses within the framework of the Professional Services Contract. In addition, the Customer indemnifies the Contractor against all costs or other claims, arising for whatever reason, that a third-party service provider may assert against the Contractor as a consequence of the Professional Services Contract.
- 16.5 Any data generated and/or processed by the Software Service will be stored only for the duration of the contractual relationship. The archiving of the data in line with the retention periods under tax and commercial law is not included in the scope of services. The Customer is itself responsible for archiving.
- 16.6 The service can be performed at the Customer on site or remotely depending on agreement. If the Customer wants the service performed on site or if this is necessary to achieve the purpose of the contract, the Contractor reserves the right to bill the Customer for reasonable travel costs and cash expenses in accordance with the actual expenses or the usual mileage rates.
- 16.7 The results of the Load Tests are prepared as graphs and/or tables and evaluated in principle in digital form. If appropriate, Load Tests that have been concluded are documented in a report with reference to the non-functional requirements.
- 16.8 The time recording on the part of the Contractor takes place in two (2), four (4) or eight (8) hours blocks. Professional Services are billed in the same way as time recording.
- 16.9 A daily rate or a person day corresponds to eight (8) working hours. Services exceeding eight (8) working hours are additionally recorded.
- 16.10 Due to the complexity of distributed systems and their test scenarios, services under the Professional Services contract are provided by means of "pairing". This means that, as a rule, two persons work in parallel on the task, in particular during test creation, execution and result analysis.
- 16.11 The usual business hours for inquiries and the provision of services by the Contractor are Monday to Friday from 8:00 a.m. to 7:00 p.m.; individual appointments require prior agreement and are not guaranteed.

- 16.12 Outside business hours, the Contractor is entitled to charge a surcharge of 25% on the agreed hourly/daily rate on Sundays as well as 50% on public holidays.
- 16.13 The Contractor points out that Professional Services can only be guaranteed after consultation and availability.
- 16.14 In the event of a short-term cancellation of an appointment by the Customer (within 48 hours before the planned date), the Contractor is entitled to charge 50% of the scheduled time with the agreed remuneration. If services were to be provided on site at the Customer's premises, travel expenses already incurred will be invoiced in full.

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Template for the information on revocation for users in the case of contracts entered into outside business premises and in the case of distance contracts with the exception of contracts for financial services

Information on revocation

Right of revocation

You have the right to revoke this contract within fourteen days without indicating any reasons. The right of revocation is fourteen days from the date that the contract is entered into.

In order to exercise your right of revocation, you must inform us (StormForger GmbH, Hochstadenstraße 1-3, 50674 Cologne, Germany, tel. + 49 221 92 428 192, support@stormforger.com) in a clear statement (e.g. a letter sent by post, by telephone, fax or e-mail) of your decision to revoke this contract. You can use the attached model revocation form for this; it is not mandatory, however,

To meet the revocation time limit, it is sufficient that you send the notice that you are exercising your right of collection before the time limit expires.

Consequences of revocation

If you revoke this contract, we have to pay back to you all payments that we have received from you, including the costs of delivery (with the exception of the additional costs that are incurred as a result of you having selected a different type of delivery than the least expensive standard delivery offered by us) without delay and no later than within 14 days from the date on which we have received the notification of your revocation of this contract. We use the same means of payment for this repayment that you used in the original transaction, unless otherwise expressly agreed with you; in no event will you be charged fees for this repayment.

If you have requested that the services commence during the revocation period, you will have to pay us an appropriate amount corresponding to the proportion of the services already performed up to the time at which you inform us that you are exercising your right to revoke this contract to the overall scope of the services provided for in the contract.

Model revocation form

If you wish to revoke the contract, please fill in this form and send it back to:

StormForger GmbH
Hochstadenstraße 1-3
50674 Cologne

E-mail: support@stormforger.com

I/we herewith revoke the contract entered into by me/us for the performance of the following service:

Ordered on:

Name of the consumer:

Address of the consumer:

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....., 20....

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Signature of the consumer
[only for notification on paper]