

# Terms & Conditions of Sale for DESMA smart-shopfloor®

(Valid as of 2 September 2019)



## Preamble

Licensee acquires from licensor a license to use the smart-shopfloor® software (henceforth "licensed software") and the selected modules. While these service conditions are applicable to both "Advanced" and "Basic" versions, the machine data agreement below applies only if licensee has chosen the "Advanced" version. Section 8 contains additional provisions for trial installations of the "Advanced" version.

### 1. Subject of the agreement

1.1 The subject of this agreement is the use of the licensed software for a limited period of time as a cloud service including the associated user documentation. The hardware and software environment required to use the licensed software is not included in the scope of delivery.

1.2 Licensor shall give licensee an access code for using the cloud-based licensed software and associated user documentation, in electronic form. For the login to the protected area of licensor's website, licensee shall choose a username (e.g. an e-mail address) and a cryptic password ("login details"). Licensee is responsible for ensuring that the username and password are issued only to persons authorised by him to use the licensed software, and must change the password as soon as authorisation is withdrawn from any person who was authorised by him to use the software. Licensee shall be liable for any improper use of the licensed software due to using an insecure password or failing to change the password.

1.3 Installation and configuration services are not covered by this agreement. Licensee has to ensure that the machine/system being used with the licensed software has the required hardware and software configuration.

1.4 In the case of the "Advanced" version, licensor shall store the machine data transmitted by licensee using the licensed software on his servers, on which the stored data shall be available to licensee for a period of 24 months from collection of the data for direct live access. Older data is still stored by licensor, but is not available for live evaluations and requires a separate query from the licensee. In the case of the "Basic" version, it is up to the licensee to specify conditions for accessing the data.

### 2. Grant of rights

2.1 Licensee shall receive upon full payment of the fee a non-exclusive right to use the licensed software to the extent granted in this document. The licensed software may be used on not more than the same number of machines for which licensee has purchased licenses. (A non-transferrable license has to be purchased for each machine.) Permitted use consists of the proper use of the licensed software by licensee. Licensee is not entitled to make the licensed software accessible to third parties to be used for purposes of the licensee or third party.

2.2 The licensee may not make any modifications to the software. He is entitled to decompile the licensed software only if this is essential to obtain the necessary information to achieve interoperability of an independently created computer program with the provided licensed software or with other computer programs and the conditions set out in section 69e (1) nos. 1. to 3. of the German Copyright Act (*Urhebergesetz*, *UrhG*) are met and the licensor upon request has not made the information necessary to achieve interoperability available to the licensee within a reasonable period of time. If licensee uses the licensed software to an extent that exceeds the acquired rights of use quantitatively (in respect of the number of licenses purchased), then he shall promptly purchase the rights of use required for allowed use.

### 3. Fee, due date, default and termination

3.1 The fee for using the licensed software consists of a purchase price and a maintenance and usage fee.

3.2 From the fifth year of the term of the agreement, licensee shall owe licensor for each year of the agreement a maintenance and usage fee amounting to 18% of the purchase price. Licensor is entitled, after a period of three years of the agreement, to adjust the maintenance and usage fee for the future. He must notify licensee of the amount of the future maintenance and usage fee at least six months before the end of the year of the agreement.

3.3 The purchase price payment is due with the notification of the login details to licensee and must be paid within 14 days of invoicing. Payment of the maintenance and usage fees is due on the first day of each extended year of the agreement and must likewise be paid within 14 days of invoicing. If payment is not made on time and in full, licensor is entitled to block use of the licensed software until payment is made in full. Other rights of licensor owing to non-payment or late payment are reserved.

3.4 Licensee is entitled to terminate this contractual agreement giving three months' notice from the end of a year of the agreement. Notice of termination must be given in writing. Licensee's right of use and his obligation to pay the maintenance and usage fee end upon termination of the agreement.

3.5 Licensor is entitled to terminate this contractual agreement giving six months' notice from the end of a year of the agreement. Notice of termination must be given in writing. Upon termination of the agreement, licensor shall make available to licensee in machine-readable form all machine data which he collected from licensee during the term of the agreement.

### 4. Warranty

4.1 Licensor warrants that the licensed software complies with the agreed specifications and that licensee may use the licensed software without infringement of third-party rights. The warranty for defects does not apply to defects resulting from the licensed software being used in a hardware and software environment that does not meet the requirements for its use.

4.2 In the case of the "Advanced" version, licensor undertakes to constantly maintain and update the licensed software and to maintain online access to his server. He is entitled to modify the licensed software, particularly to adapt it to technological advances. He is not responsible for the online link outside of the data centre used by licensor, via which licensor's server is to be accessed.

4.3 A software error exists if the licensed software does not fulfil the functions specified in the user documentation, returns false results, interrupts data processing in an uncontrolled manner or otherwise does not function properly in such a way that use of the software is not possible or possible only to a limited extent.

4.4 Licensee undertakes to have the licensed software and its functioning tested promptly, following the granting of the opportunity for use, by a qualified employee, and to give notification of identified defects in writing (e-mail, post, fax) with a precise description of the error. If licensee fails to make such notification, the licensed software shall be considered accepted unless the defect was not detectable during the test. Regardless of the above, licensee shall inform licensor of any malfunctions in the licensed software. Licensor undertakes to remedy defects that impair the control and monitoring of machines on licensee's premises without delay; licensor undertakes to remedy minor defects that do not impair the functional use of the licensed software by licensee as part of regular maintenance of the licensed software.

4.5 To assist licensee with technical issues, licensor shall provide customer service (support), which the customer can reach via e-mail, fax, post or phone.

### 5. Liability

Licensor shall be liable without restriction in cases of intent or gross negligence, for death, bodily injury or injury to health, in accordance with the provisions of the German Product Liability Act (*Produkthaftungsgesetz*) and within the scope of any warranty given by licensor.

5.1 In cases of slightly negligent breach of an obligation that is essential for achieving the purpose of the agreement (cardinal obligation), the amount of licensor's liability shall be limited to foreseeable typical damages resulting from the use of the licensed software.

5.2 No further licensor's liability exists. The claim for damages regardless of negligence or fault pursuant to section 536a (1) alternative 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) is excluded.

5.3 The above limitation of liability also applies to the personal liability of employees, representatives and bodies of licensor.

5.4 In the event of improper use by licensee of the licensed software and the hardware interacting with it, licensor's liability is extinguished. Furthermore, licensee's warranty claim (see section 4) is also extinguished as a result of such use.

### 6. Security measures

Licensee shall take appropriate measures to protect the licensed software and where applicable the login details for online access against access by unauthorised third parties.

### 7. Confidentiality

7.1 "Confidential information" is all information and documents of the respective other party that are marked as confidential or which according to the circumstances are to be treated as confidential, particularly information about business processes, business relationships, personal data, production and machine data, and know-how.

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7.2 The parties agree to maintain secrecy concerning confidential information.

7.3 Confidential information shall be exempt from this obligation in so far as

7.3.1 it was demonstrably already known to the recipient at the time the agreement was entered into or subsequently becomes known via a third party, without breaking a confidentiality agreement, statutory provisions or official directives;

7.3.2 it was public knowledge at the time of entering into the agreement or subsequently becomes public knowledge, provided this is not due to a breach of this agreement;

7.3.3 it has to be disclosed based on legal obligations or a court order or by order of a public authority. To the extent permissible and possible, the recipient who is required to make a disclosure shall inform the other party in advance and give him the opportunity to take action against the disclosure.

7.4 The parties shall grant access to confidential information only to such advisors as are bound by professional secrecy or upon whom obligations corresponding to the confidentiality obligations of this agreement have been imposed in advance. Furthermore, the parties shall disclose confidential information only to those employees who need to know it in order to implement this agreement, and shall impose a confidentiality obligation on these employees including for the period after their employment ends to the extent permissible under employment law.

## 8. Trial installation

8.1 This section is applicable only if licensee acquires a trial installation from licensor in accordance with the following conditions. Furthermore, this section applies only for the trial installation period.

8.2 Licensee may receive from licensor one time for all locations a trial installation of the selected module of the licensed software for a limited-duration trial period of 3 months from signing the license agreement (in the case of retrofitting an existing machine and in the case of purchasing a new machine) and from the completed and accepted installation of the DESMA direct soling machine (in the case of purchasing a new machine).

8.3 The service conditions set out above and below as well as the machine data agreement apply in their entirety to this trial installation. Restrictions apply solely to:

8.3.1 Section 1 of the service conditions

8.3.1.1 Concerning 1.4 of the service conditions: Only data that arises during the period of the trial installation shall be available to licensee.

8.3.2 Section 3 of the service conditions:

8.3.2.1 Concerning 3.1 of the service conditions: Use of the trial installation is free of charge for the maximum period of 4 months, i.e. no license or maintenance fees shall be charged.

8.3.2.2 Concerning 3.4 of the service conditions: Licensee can terminate the trial installation by giving notice in writing to licensor 14 days before the end of the trial installation. If notice of termination is not given, the trial installation account will be deactivated at the end of the trial installation period, and the corresponding data deleted.

8.3.2.3 Concerning 3.5 of the service conditions: Licensor can terminate the trial installation by giving notice in writing to licensee 14 days before the end of the trial installation period.

## 9. Miscellaneous

9.1 Licensee may set off only claims that are undisputed or recognised by declaratory judgement.

9.2 Amendments and additions to this agreement must be made in writing. This also applies to any modification or waiver of this clause. Electronic documents in text form do not satisfy the written form requirement.

9.3 General terms and conditions of licensee shall not apply.

9.4 To enable proper use of the licensed software, licensee must ensure a permanent internet connection to licensor's database ("Advanced" version) / to his own database ("Basic" version). Licensor is available to licensee in an advisory capacity for this purpose.

9.5 Licensee shall receive from licensor a time-limited right to use the software. This right shall not be regarded either as a transfer of ownership or as a transfer of intellectual property or any other claim to the licensed software itself.

9.6 Licensee consents to licensor using data that accumulates during use of the software for product improvement purposes. This data shall be used in anonymised form so that the data cannot be linked to the machine owner.

9.7 This agreement is subject to German law to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980 (UN Sales Convention).

9.8 The place of fulfilment is Achim. The exclusive place of jurisdiction is Verden, provided that each party is a businessman (*Kaufmann*) or legal person under public law (*juristische Person des öffentlichen Rechts*) or has no general place of jurisdiction in Germany.

9.9 If individual provisions of this agreement are ineffective, this shall not affect the validity of the remaining provisions. The parties to the agreement shall endeavour to replace the ineffective provision with an effective provision that comes as close as possible in economic significance to the ineffective provision.

## Machine Data Agreement (only for "Advanced" version)

If the licensee has chosen the "Advanced" version or uses a trial installation, licensee (henceforth referred to as "machine owner") consents to the machine data agreement (produced by licensor who henceforth is referred to as "processor") and its conditions. If the "Basic" version is chosen, the following provisions are not applicable.

## 10. General

10.1 Machine owner authorises processor to process machine-related data. This agreement governs the rights and obligations of the parties in connection with the data processing.

10.2 Where the term "data processing" or "processing" (of data) is used in this agreement, it shall be understood to mean the use of machine-related data in general. Any use of machine-related data comprises in particular the collection, storage, transfer, blocking, erasure, anonymisation, pseudonymisation, encryption or other use of data.

10.3 Since the machine owner authorises the processor to process machine-related data generally on his behalf, the General Data Protection Regulation (GDPR) does not apply to this machine data.

10.4 If, in the course of providing the service, processor gains access to personal data for which the machine owner is the controller, then pursuant to Art. 28 GDPR the processor is carrying out processing on behalf of the machine owner in respect of this personal data. With this agreement, the parties to the agreement define their data protection obligations in respect of this personal data that result from this processing carried out on behalf of a controller. This agreement does not create other performance obligations.

10.5 The performance of the contractually agreed processing of machine-related and personal data shall take place exclusively in a Member State of the European Union or another contracting state of the European Economic Area. Any relocation to a third country requires the prior consent of the machine owner and may only take place if the special conditions of Arts. 44 et seq. GDPR for personal data are fulfilled.

## 11. Rights and obligations of the machine owner

11.1 Machine owner is the controller for the processing of data on behalf of a controller by the processor. It is the sole responsibility of the machine owner to assess the permissibility of data processing.

11.2 As the controller, machine owner is responsible for safeguarding the rights of any persons affected by the data processing.

11.3 Prior to the commencement of data processing and regularly thereafter, machine owner must satisfy himself that the technical and organisational data security measures implemented by processor are being complied with. Machine owner is required to document the result in a suitable manner.

11.4 Machine owner shall inform processor without delay if he discovers errors or irregularities relating to the processing of machine-related data by the processor. This applies equally to the processor, if he notices irregularities or errors.

## 12. Rights and obligations of the processor

12.1 Processor shall process machine-related data exclusively in accordance with the agreements made and shall handle personal data in accordance with GDPR.

12.2 Machine owner expressly consents that processor may himself use the machine-related data collected from the machine owner for improving the processor's products and services. He further consents that the machine-related data, particularly for product safety purposes, may remain linked with the identity of the machine owner. The linking of the machine-related data with the identity of the machine owner comes under the secrecy obligation set out in section 7.

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12.3 Processor shall assist machine owner in the carrying out of checks by the machine owner and cooperate in the full and swift conduct of checks.

12.4 Machine-related data and files may not be erased or otherwise destroyed without the prior consent of machine owner or until all data is issued to the machine owner in an electronically readable form.

12.5 Processor is required to organise his business and operating procedures in such a way that the data he processes on behalf of machine owner is secured to the extent required in each case, and protected against unauthorised access by third parties. Processor shall promptly notify machine owner of changes in the organisation of data processing that are relevant to data security.

12.6 Processor is required to notify machine owner without delay of any breach of data protection rules or agreed contractual arrangements in the course of the processing of data by him or other persons engaged in the processing.

12.7 The processing of data on behalf of the machine owner outside of the business premises of the processor or subcontractors is permitted only with machine owner's consent.

12.8 Processor shall in a suitable way mark data that he processes on behalf of machine owner.

### **13. Subcontractual relationships**

13.1 Processor is allowed to appoint subcontractors.

13.2 Processor must choose the subcontractor carefully and, before appointing him, check that he is able to comply with the agreements made between machine owner and processor. In particular, processor shall check in advance and regularly during the term of the contract that the subcontractor has implemented the necessary technical and organisational measures to protect machine-related data. Processor shall document the result of the check and forward it to machine owner on request.

13.3 Processor must ensure that the arrangements agreed in this agreement are also applicable to subcontractors. Processor must regularly check compliance with these obligations.

13.4 The subcontractor's commitment must be made in writing. The machine owner shall be provided with a copy of the written commitment on request.

### **14. Supervisory powers**

14.1 Machine owner has the right to check compliance by processor with contractual arrangements agreed between the parties at any time to the extent required.

14.2 Processor is required to provide information to machine owner where this is necessary in order to carry out the check within the meaning of paragraph (1).

14.3 Machine owner may demand to inspect the data processed by processor for machine owner as well as the data processing systems and programs used.

### **15. Confidentiality**

15.1 Processor undertakes to maintain confidentiality regarding the processing of data for machine owner.

15.2 Processor gives an assurance that the currently applicable data protection rules are known to him and he is familiar with their application. He further gives an assurance that he will familiarise employees who are tasked with carrying out the work with the data protection provisions that are relevant to them, and that they will be required to sign a confidentiality undertaking.

### **16. Confidentiality obligations**

16.1 Both parties undertake to treat as confidential for an unlimited period of time all information that they receive in connection with the implementation of this agreement, and to use it only for the implementation of the agreement and to optimise processor's products and services. No party is entitled to use this information in whole or in part for other than the aforementioned purposes or make this information accessible to third parties.

16.2 The above obligation does not apply to information that any of the parties has demonstrably received from third parties who are not bound by a confidentiality obligation or that is public knowledge. The obligation shall also not be applicable if any party is required in law by a court or government agency to disclose the information.

### **17. Duration of the contract**

The machine data agreement commences when the license agreement is signed and ends at the time of termination of the license agreement between the parties.

### **18. Termination**

18.1 Upon termination of the agreement, processor shall deliver to machine owner all documents, data and results derived from the processing and use of the data which he has obtained in relation to the contractual relationship. Processor's data media shall subsequently be physically erased. This also applies to any data backups held by processor. The erasure shall be documented in a suitable way. Test and scrap material shall be destroyed or physically erased without delay.

18.2 Machine owner has the right to check the complete return and erasure of data by processor as contractually agreed. This can also be done by inspecting the data processing systems on the processor's business premises. The machine owner should give reasonable notice of the on-site check.

### **19. Concluding provisions**

19.1 If machine owner's property on processor's premises is put at risk by the actions of third parties (for example through attachment or seizure), by insolvency proceedings or by other events, processor must notify machine owner without delay. Processor shall inform creditors of the fact that the data concerned is processed on a behalf of a controller.

19.2 Subsidiary agreements must be made in writing.

19.3 Exercising the right of retention within the meaning of section 273 BGB is excluded in respect of the processed data and associated data media.

19.4 If individual parts of this agreement are ineffective, this shall not affect the validity of the remaining provisions of the agreement.