

Performates Software Terms of Use

Version: October 15, 2014

1. Scope of Application

- 1.1 Performates UG, a company incorporated under the laws of Germany with registered seat at Dircksenstrasse 40, 10718 Berlin, Germany (hereinafter "**Performates**", "**We**" or "**Us**") operates and makes available the software application Performates (the "**Software**") to customer (hereinafter "**Customer**" or "**You**") through Our website <https://www.performates.com> (the "**Site**") for the management and optimization of Customer's display retargeting campaigns and display campaigns (jointly the "**Campaigns**"). These terms of use (hereinafter "**Terms of Use**") govern the Customer's use of the Software, insofar as the Customer is a business (*Unternehmer*) - pursuant to Sec. 14 German Civil Code (*Buergerliches Gesetzbuch – BGB*), a legal person under public law, or a special fund under public law. You and Us also each referred to as a "**Party**" and jointly the "**Parties**". The Software is not provided to consumers within the meaning of Sec. 13 German Civil Code.
- 1.2 These Terms of Use constitute an integral part of each agreement between Us and You unless expressly agreed otherwise between the Parties in writing.
- 1.3 This Agreement applies to any use of the Software exclusively. General terms and conditions of the Customer apply only if and to the extent that We expressly accept them in writing. This provision also applies if We unreservedly make available the Software to the Customer in the knowledge of the Customer's own general terms and conditions, or if We make reference to a written statement that contains or makes reference to the general terms and conditions of the Customer. Individual agreements concluded with the Customer in individual cases have priority over the terms of this Agreement.

2. Conclusion of Agreement

- 2.1 All of Our offers are non-binding and subject to change, to the extent that they are not expressly identified as binding or they do not contain a specific acceptance period.
- 2.2 Our offers will set out the provided scope of services, in particular the modules of the Software, e.g. the Bid Manager Module and the Campaign Optimization Module, You wish to use ("jointly the "**Customer Modules**"), the fees payable and the applicable technical specifications.
- 2.3 An agreement between You and Us on the supply and the use of the Customer Modules and Our other offered services relating thereto (jointly the "**Services**") shall enter into effect and become binding on both Parties when You accept in writing a written and signed offer from Us. Alternatively, We can provide You with an online process on Our Site as part of the account registration described in section 3 below during which You can choose the offered Software modules You wish to use and where You accept these Terms of Use and the technical specifications and make Us a binding offer by clicking on the "*Start free trial*" or "*Sign-up*" button. In this event an agreement between You and Us on the supply of the Services shall enter into effect and become binding on both Parties upon Our acceptance of Your online offer by email. We may accept or reject Your offer in Our free discretion. Any such binding agreement between You and Us, including these Terms of Use and the technical specifications is hereinafter referred to as the "**Agreement**".

3. Account Registration; Authorized Users

- 3.1 In order to access and use the Customer Modules, Customer has to register an account on Our Site (the “**Account**”) with user names and passwords. Five different users are permitted per Account. Customer shall only provide such user names and passwords to its own employees, directors and officers and to its agencies that are involved in the preparation and execution of the respective Campaigns (“**Authorized Users**”). Customer agrees to explicitly enter (and duly update) the names and positions of the Authorized Users into the Account. Customer shall not grant access to its Account and to the Customer Modules to any unauthorized persons and shall adequately safeguard the passwords taking at least such measures as it takes for safeguarding the passwords to its own computer systems.
- 3.2 Customer represents and warrants (*gewaehrleistet*) that all information and data, including any contact, financial and billing information, provided by Customer to Performates in connection with the performance of this Agreement is accurate, current and complete. You agree to promptly inform Us about any changes to this information and data and to update altered information and data in Your Account. You agree to take sole responsibility for any activities or actions under Your Account, whether or not You have authorized such activities or actions. You will immediately notify Performates of any unauthorized use of Your Account.
- 3.3 In the event of a culpable material breach of Your obligations under sections 3.1 and 3.2, Performates is entitled to suspend the access to Your Account and the use of the Customer Modules upon prior notice until such breach is remedied.

4. Scope of Services; Restriction on Use of Software

- 4.1 Performates operates the Software on a server structure controlled by Performates and located in a data center within the European Union.
- 4.2 During the Term of this Agreement (as defined in section 15.1 below) Performates will make available the Customer Modules to You. You can access and use the Customer Modules through Your Account through the Internet with a current version of a customary Internet browser.
- 4.3 For the Term of this Agreement, Performates hereby grants You a revocable, non-exclusive, worldwide, non-transferable and non-sublicensable right to use the Customer Modules for the management and optimization of Your Campaigns promoting Your own business or the business of your Affiliates (as defined in section 16.1 below).
- 4.4 Customer shall not
- Modify, translate, reverse engineer, decompile, disassemble or otherwise create derivative works from the Software or documentation. Information pursuant to Sec. 69e of the German Copyright Act (*Urhebergesetz - UrhG*) which is required to achieve interoperability with other programs created independently will be provided by Performates upon request as part of the Performates Services;
 - Resell, rent, lease or make otherwise available the Software and any documentation relating to the Software to any third party (other than the Authorized Users) or use or enable the use of the Software for the benefit of any third party or for providing services to third parties (other than its Affiliates); or
 - Remove, modify or make illegible the labels, markers or designations regarding copyrights and other intellectual property rights of the Software or the documentation relating thereto.

- 4.5 Performates reserves the right to modify, update and/or upgrade the Software at any time, and to make available updates, upgrades or other modifications of the Customer Modules (the “**Modifications**”) to the Customer, provided that such Modifications do not adversely affect the agreed use of the Customer Modules.
- 4.6 We provide You with the agreed storage capacity (as specified in the technical specifications), and store the proprietary data and information input (or authorized to be input) by You or by any Authorized Users into the Customer Modules as well as any data and information We retrieve from the Third Party Campaign Platform as set out in section 4.7 below, including any User Data (as defined in section 8.1 below), other Campaign data, creatives, briefings and reports, (jointly the “**Customer Data**”) on Our server system during the Term of this Agreement. We will perform a daily back-up of all Customer Data and a weekly server image back-up and store such back-ups on a separate server for a month on a rolling basis whereby the older back-ups will be overwritten by the new back-ups in a way retaining the historic Campaign Data.
- 4.7 If the agreed use of the Customer Modules requires (i) the input and analysis of User Data or other Campaign data (e.g. CPC (cost-per-click) bids, historic campaign data) that is collected and compiled by a third party provider Customer has commissioned for the creation, delivery and/or tracking of its Campaigns (the “**Third Party Campaign Platform**”) and/or (ii) the submission of data created by a Customer Module to the Third Party Campaign Platform (e.g. modified CPC bids or recommended creatives), Performates agrees to establish the necessary connection between the relevant Customer Modules and Your account on such Third Party Campaign Platform and to retrieve and provide the relevant data, subject, however, to Your compliance with the provisions of section 7 below.
- 4.8 Performates is not obligated to achieve a certain success with regard to Customer’s Campaigns targets or strategies. Any Campaign targets Customer communicates to Performates (e.g. certain volume of views, click and conversion rates, average CPC) are only unbinding targets to which the use of the Bid Manager and the Campaign Optimization Modules will be directed, but the achievement of which is not owed by Performates under this Agreement.
- 4.9 If You wish to set a maximum budget for a Campaign, You can submit such a budget to Us per email (the “**Maximum Campaign Budget**”). We will enter the Maximum Campaign Budget into the Software and send You an email requesting Your confirmation of the set-up of the Maximum Campaign Budget. Upon receipt of Your email confirmation, We will upload the Maximum Campaign Budget to the Third Party Campaign Platform. From November 2014, You can enter yourself the Maximum Campaign Budget into Your Account by using the Performates Dashboard.
- 4.10 In case of a termination of this Agreement by either Party under section 15.1 or 15.3 below, any modified bid data that Performates supplied to Customer during the Term of this Agreement shall not be reset and Customer shall have the right to retain and to use such data for its own internal business purposes after the termination of this Agreement. The foregoing sentence shall not apply if the Customer terminates this Agreement to the end of the free trial period pursuant to section 15.2.

5. Service Level

- 5.1 Each Customer Module shall be available 99% of the full time per calendar month (hereinafter “**Warranted Availability**”). For the purpose of calculating the achieved monthly availability, the

Bid Manager Module is deemed unavailable if it issues bids = EUR 0,--, and the Campaign Optimization Module is deemed unavailable, if it does not recommend any delivery of creatives for offered advertising placements (= 0% deliveries) within any given two (2) hours period during a running Campaign.

- 5.2 Performates may perform up to four (4) hours of scheduled maintenance on the Software (e.g. installation of patches, updates and upgrades) per calendar month that may restrict the availability of the entire Software or specific modules for up to two (2) hour per scheduled maintenance event (hereinafter “**Scheduled Maintenance**”). Scheduled Maintenance will usually be performed between 22 p.m. and 7 a.m. from Sunday to Monday (CET). If Performates plans to perform Scheduled Maintenance during other time periods, Performates will inform Customer of such time period by email at least 72 hours in advance. Any unavailability of the Software or a Customer Module resulting from such Scheduled Maintenance shall not be deemed as unavailability of the Customer Module under section 5.1 above.
- 5.3 If the Warranted Availability of a Customer Module is not achieved in a given calendar month, Customer shall be entitled to accordingly reduce the fee payable for the Customer Module concerned on a *pro rata temporis* basis pursuant to Sec.536 para.1 German Civil Code.

6. Problem Notification and Resolution

- 6.1 Subject to section 6.2 below, Performates responds to the notification of defects of the Customer Modules by Customer and works to remedy any notified defects during the following service hours:

“**Standard Service Hours**”: from 9 a.m. to 6 p.m. (CET) on business days (Monday to Friday except for public holidays at Performates registered office) with regard to all defect categories, and

“**Extra Service Hours**”: from 9 a.m. to 6 p.m. (CET) on Saturday, Sunday and public holidays with regard to Category 1 defects only

(jointly the “**Service Hours**”).

- 6.2 If Customer becomes aware of any defect of a Customer Module impairing its use, Customer shall notify Performates without undue delay per email to tickets@performates.com describing the problem as detailed as possible. If a Category 1 defect occurs at a weekend or on a public holiday, Customer shall notify Performates of such Category 1 defect per per email to tickets@performates.com during the Extra Service Hours.

Defect Classification	Response and Reaction Time	Resolution
<p>Category 1 (critical)</p> <p>The Bid Manager Module is not operative at all or it issues bids = EUR 0,--.</p> <p>The Campaign Optimization Module is not operative at all or does not recommend any delivery</p>	<p>Response within 3 hours upon receipt of defect notice during Service Hours (otherwise within 3 hours on the next day during Service Hours). Commence to analyze and remedy defect</p>	<p>Continuing best efforts to remedy defect during Service Hours.</p>

of creatives for requested advertising placements (= 0% placements) within any given 2-hour-period during a running Campaign.	without undue delay upon response and during Services Hours.	
Category 2 (degraded) Any other Customer Module is not operative at all or the use of a Customer Module is significantly impaired (other than described under Category 1), e.g. user can access the module or a functionality of the module only with significant delay or user cannot produce a materially correct output with the module	Response within 3 hours upon receipt of defect notice during Standard Service Hours (otherwise by 10 am on the next business day). Commence to analyze and remedy defect without undue delay upon response and during Standard Services Hours.	Continuing best efforts to remedy defect during Standard Service Hours.
Category 3 (minimal) Problems that have only insignificant effect on user access or usability of a Customer Module	Response within 5 business days upon receipt of defect notice.	Remedy of defect as appropriate (e.g. through next patch or update of module).

6.3 If a Category 1 or Category 2 defect of a Customer Module occurs, Customer is entitled to accordingly reduce the fee payable for the Customer Module concerned on a *pro rata temporis* basis pursuant to Sec.536 para.1 German Civil Code until Performates has fully remedied the defect. Pursuant to Sec.543 German Civil Code Customer has the right to terminate this Agreement with immediate effect upon written notice to Performates if Performates has not remedied a Category 1 or Category 2 defect within a reasonable time period from receipt of a written reminder by Customer requesting the remedy of such defect within such a reasonable time period. Sec.543 para.3 sentence 2 German Civil Code remains unaffected.

7. Obligations of Customer; Grant of Rights to Customer Data

7.1 The Customer is obligated to make available any data and information regarding Campaign targets, targeted users, historic Campaign data etc. that are reasonably required by Performates for the agreed use of the Customer Modules. An insufficient volume of historic campaign data will affect the efficiency of the bid and optimization analysis and recommendations by the Customer Modules. We will notify You if We deem the provided data volume insufficient to generate optimal recommendations.

7.2 As condition to Performates' obligations under this Agreement, if the agreed use of the Customer Modules requires **(i)** the input and analysis of User Data or other Campaign data (e.g. CPC bids, historic campaign data) that is collected and compiled by a Third Party Campaign Platform and/or **(ii)** the submission of data created by a Customer Module to the Third Party Campaign Platform (e.g. modified CPC bids), Customer shall assure that the provider of the Third Party Campaign Platform **(i)** allows Performates to connect the respective Customer Modules with Customer's

account on the Third Party Campaign Platform through the provider's technical interface (e.g. a API, Web login, FTP access, etc.), including the disclosure of the relevant technical data of the technical interface and the designation of a contact person of the provider who will provide support in case of technical problems, **(ii)** makes available such Campaign data for retrieval by Performates in due time and **(iii)** accepts delivery of data from Performates within due time. Customer is responsible for acquiring from the respective provider the necessary permission and licenses as well as for paying the respective license and/or service fees for the access to, and use of, such Campaign data by Performates on Customer's behalf. Customer shall indemnify Performates from any claims by the provider of the Third Party Campaign Platform resulting from Performates' access to, or the use of, such Campaign data, as well as the delivery of any data by Performates, provided that Performates performs these Services in accordance with this Agreement.

- 7.3 The use of the Customer Modules by You and by Your Authorized Users, including any data transfer between the Customer Modules and the Third Party Campaign Platform, is dependent upon access to telecommunications and Internet services provided by third parties not under the control of Performates. You shall be solely responsible for acquiring and maintaining at Your cost and expense all telecommunications and Internet services and other hardware and software required for Your access and use of the Customer Modules. We shall not be responsible for any loss or corruption of data, lost communications, or any other loss or damage of any kind arising from any such third party telecommunications and Internet services.
- 7.4 For the Term of this Agreement, You hereby grant Us the revocable, non-exclusive, worldwide, non-transferable, non-sublicensable and royalty-free right to store, reproduce, modify, use, make available and transmit to You, the authorized Users and the Third Party Campaign Platform Customer Data (including any User Data) for the purposes of this Agreement.
- 7.5 During the Term of this Agreement, We may **(i)** publish Your corporate logo on Our Site and in marketing materials that include examples of Our customers and **(ii)** publicly acknowledge You as a Performates customer in a press release. We will provide You with the press release for Your prior approval that shall only be withheld on important grounds.

8. USE OF DATA; DATA PRIVACY

- 8.1 Subject to the terms of this section 8, Customer will provide Performates with, or authorize Performates to retrieve from Customer's account on the Third Party Campaign Platform, non-personally identifiable user and use-related data collected and processed by Customer or its providers during the delivery of Campaigns, which are required for the use of the Software (jointly the "**User Data**"). The access and the use of the Software do not require the submission of any personally identifiable data of user (*personenbezogene Daten von Nutzern*) within the meaning of Sec. 3 para. 1 Federal Act on Data Protection (*Bundesdatenschutzgesetz – BDSG*) to Performates and Customer represents and warrants that the User Data will not contain any personally identifiable data of users to Performates under this Agreement.
- 8.2 With regard to the Campaigns, Performates represents and warrants that it will not collect itself any non-personally identifiable or personally identifiable user and use-related data.
- 8.3 Customer hereby represents and warrants to collect, process and use any user and use-related data for advertising purposes only in compliance with the applicable data privacy law and its respective data privacy policy.

- 8.4 Subject to applicable data privacy law and for the sole purpose of enhancing, improving and providing the Software to Our customers (in particular for optimizing media buying and (re)targeting with the Software), Customer hereby acknowledges and agrees that We shall have the perpetual right to analyze, combine with other non-personally identifiable user and use-related data and to use the User Data and the data generated by the Software for the Campaigns as well as to use any results derived from any such analysis, combination and use of such data in connection with the supply of the use of the Software to Our customers.
- 8.5 Performates represents and warrants that it will use the User Data only for the purposes defined in this Agreement and only in accordance with applicable data privacy law.
- 8.6 Each Party (the “**Indemnifying Party**”) agrees to indemnify, defend and hold the respective other Party (the “**Indemnified Party**”) harmless from and against any and all third party claims and any and all costs, damages and losses relating to such claims (including but not limited to reasonable attorney’s fees and legal costs for the defense against such claims) that directly or indirectly result from a culpable breach of the Indemnifying Party’s obligations set out in this section 8.

9. Remuneration, Taxes, Adjustment of Remuneration

- 9.1 As remuneration for the supply of the Services under this Agreement, Customer shall pay Performates the fixed and/or volume based fees agreed between the Parties in writing or online. Unless expressly stated otherwise, all fees are quoted exclusive of the statutory value-added tax (VAT). No fees are payable for the use of the Customer Modules during any free trial period We have agreed with You.
- 9.2 If the supply of Services is subject to VAT under the applicable tax jurisdiction, VAT in the statutory amount applicable at the time of payment shall be added and paid on the agreed fees by Customer to Performates, provided that Performates as provider of the Services is the debtor of such VAT amount (*Steuerschuldner*).
- 9.3 If Customer is required by any law or regulation to make any withholding or deduction from fees payable to Performates on account of any taxes, duties or levies in connection with the supply of the use of the Customer Modules to Customer, Customer shall, together with the relevant payment, pay such additional amount as will ensure that Performates receives an amount equal to the sum it would have received if no such withholding or deduction had been required. Upon Customer’s request, Performates shall provide the Customer with such available information and documents as reasonably necessary for obtaining an exemption from the withholding or deduction of amounts or for a refund of the amounts withheld or to be withheld by Customer on the account of taxes, duties or levies under the applicable tax jurisdiction.
- 9.4 In case of an increase of Our costs and expenses for the supply of Our Services (e.g. costs for hardware and software provision, telecommunications/Internet costs, electricity costs, salary increases, increase or new charging of taxes and duties in connection with Our Services, etc.), We shall have the right to accordingly increase the agreed fees payable for the Services affected, however, not more than once per calendar year. We shall notify You of any such price increase at least six (6) weeks before such price increase becomes effective. In case of a price increase of 10% or more for an individual Customer Module, You shall have the right to terminate this Agreement upon written notice to Us within three (3) weeks after Your receipt of the price increase notification with effect to the date on which such price increase becomes effective.

10. Accounting, Payment

- 10.1 The compensation will be calculated and invoiced for each calendar month. Performates will calculate any agreed volume based fees on the basis of the reporting data it retrieves from the Third Party Campaign Platform (e.g. the actually spent Campaign budget).
- 10.2 The compensation shall be due and payable to the bank account of Performates specified in the invoice within fourteen (14) days from Customer's receipt of an invoice from Performates that shall be issued within fifteen (15) days after the end of each calendar month. If Performates becomes aware of a risk that Customer may no longer be able to make due payments, Performates shall have the right to supply its Services only against prepayment by Customer or the provision of adequate security.
- 10.3 Any bank charges and costs connected with the payment, including any loss from the exchange rate differences, if the payment was made in any currency other than the invoice currency, shall be fully borne by Customer.
- 10.4 **Customer shall submit to Performates any objections relating to an invoice in writing or by email to accounting@Performates.com specifying the reason for such objection within fourteen (14) days upon receipt of the invoice. If no such objection has been made within fourteen (14) days upon receipt of invoice, the invoice shall be deemed accepted by Customer with regard to all defects (in quantity and quality) of the supplied and invoiced Services and all errors of the invoice that the Customer could have discovered by a due and reasonable examination of the supplied Services and/or the invoice by the expiration of this deadline.**

11. Warranties and Indemnification by Performates for Customer Modules

- 11.1 Performates hereby represents and warrants that **(i)** Performates holds the rights in the Customer Modules granted to Customer under section 4.3, **(ii)** Performates is entitled to grant such rights to Customer and **(iii)** the use of the Customer Modules by the Customer in accordance with the terms of this Agreement does not infringe copyrights, neighboring rights to copyrights, moral rights, patents, design rights, rights to mask works, utility models, trademarks, legally protected trade secrets, portrait rights and/or any other intellectual or industrial property rights ("**IP Rights**") of third parties in Germany.
- 11.2 In case of an infringement of a third party's IP Rights, Performates shall at its option **(i)** acquire at its cost a license for Customer to continue to use the Customer Modules, or **(ii)** modify or replace at its cost the infringing components of the Customer Modules, provided that such modification or replacement shall not impair the agreed use of the Software. If Performates fails to perform the alternatives set out in the foregoing sentence within a reasonable time after receipt of a written notification from Customer of such infringement of third party IP Rights, and, as a result of such failure, the infringement of the third party IP Rights impair the agreed use of the Software by Customer, Customer shall be entitled to terminate this Agreement upon written notice to Performates.
- 11.3 Performates shall indemnify, defend and hold Customer harmless from and against any claims by third parties, liability, damage, loss or expense (including reasonable attorneys' fees and legal expenses for a necessary defense against such third party claims) directly or indirectly arising from a culpable breach by Performates of any of Performates' warranties made under section 11.1. Any claim by Customer for indemnification is subject to the condition precedent that **(i)** Customer notifies Performates in writing and without undue delay of any such third party claim

that is brought or threatened to be brought against Customer (“**Third Party Claim(s)**”) and **(ii)** Customer does not make any admission with respect to the Third Party Claims, which might be prejudicial to the defense against such Third Party Claims (e.g. any acknowledgement or settlement of the Third Party Claims) without Performates' prior written consent that shall not unreasonably be withheld, and **(iii)** Customer gives Performates at Performates' cost and expense full control over the defense against such Third Party Claims (e.g. to conduct any ensuing litigation and all negotiations for a settlement of such Third Party Claims). Upon Performates request and at its expense, Customer shall reasonably support Performates in the defense against such Third Party Claims, in particular provide all necessary or useful information and documents.

12. Warranties and Indemnification by Customer for Customer Data

- 12.1 Customer hereby represents and warrants that **(i)** Customer is the owner of the rights in and to the Customer Data granted to Performates under section 7.4, **(ii)** Customer is entitled to grant such rights to Performates, **(iii)** the use of the Customer Data by Performates in accordance with the terms of this Agreement does not infringe any IP Rights of third parties and does not violate applicable law and **(iv)** the Customer Data do not contain or promote any illegal content or activities, including but not limited to activities and contents that glorify violence or war, are deceptive or misleading, are defamatory or libelous; are pornographic or harmful to minors, are racist, contain or promote software piracy (warez, cracking, etc.), hacking, phreaking, emulators, or illegal MP3 activities or other destructive programming or devices that could impair or injure any data, computer system or software (e.g. viruses).
- 12.2 Customer shall indemnify, defend and hold Performates harmless from and against any claims by third parties, liability, damage, loss or expense (including reasonable attorneys' fees and legal expenses for a necessary defense against such third party claims) directly or indirectly arising from a culpable breach by Customer of any of Customer's warranties made under section 12.1.

13. Reservation of Rights

Except to the extent expressly set forth in this Agreement, neither Party grants the other Party any license, express nor implied, to its IP Rights. Ownership of any rights in and to work created using a Party's IP Rights, will inure to the sole benefit of the original owner of such IP Rights from which such work resulted. Each Party expressly reserves all rights, title, and interest in and to its IP Rights, and Customer reserves all rights, title and interest in and to the Customer Data, not expressly granted to the other Party under this Agreement.

14. Liability; Force Majeure

The Parties claims to damage compensation and reimbursement of futile expenditures (collectively the “**Damages**”) are exclusively set forth in this section 14, regardless of the legal nature of the respective claim (e.g. contractual claims, claims arising from tortious acts, defects, delay or impossibility of fulfillment).

- 14.1 Except for the cases set out in section 14.3, the liability of the Parties for all Damages is excluded to the extent that the Damages **(i)** were not caused by gross negligence (*grobe Fahrlaessigkeit*) or willful misconduct (*Vorsatz*) of the other Party, its legal representatives, executive officers or other vicarious agents or **(ii)** were not caused by a culpable (*schuldhaf*), i.e. at least negligent (*fahrlaessig*), breach of a material obligation by the other Party, its legal representatives, executive officers or other vicarious agents, which jeopardizes the attainment of the contractual

purpose; in particular by a culpable breach of ‘cardinal obligations’ (*Kardinalpflichten*). A cardinal obligation according to the meaning of the foregoing sentence is a material contractual obligation of a Party, the fulfilment of which is prerequisite for enabling the proper fulfilment of the agreement in the first place, and on which the other Party regularly relies and may rely.

- 14.2 The liability of the Parties **(i)** in the case of a culpable breach of material obligations, to the extent that it is not caused by gross negligence or willful misconduct, as well as **(ii)** in the case of a grossly negligent breach of other (i.e. not material) obligations by employees or vicarious agents of the Parties who are not legal representatives or executive officers (*leitende Angestellte*) of the Parties, is limited to those Damages foreseeable at the time of conclusion of this Agreement that typically arise in transactions of this nature.
- 14.3 The limitations and exclusions of the Parties’ liability for Damages set forth in this section 14 shall not apply to Damages **(i)** for which a Party is liable as a result of a breach of a written and express guaranty (*Garantie*) by that Party as to the quality of works and services (if any), **(ii)** caused by defects of the Services fraudulently concealed by Performates, **(iii)** arising from personal injury and death, **(iv)** arising from a breach of the representations and warranties set forth in section 8, 11 and 12 above, and **(v)** for which a Party is otherwise liable pursuant to applicable mandatory law and regulations where such liability cannot be excluded by agreement between the Parties in advance, e.g. any product liability under the German Product Liability Act (*Produkthaftungsgesetz*).
- 14.4 The limitation period for any claims of the Parties arising from or in connection with this Agreement (including any claims for defects of Performates’ Services) shall be one year from the full supply of the Service concerned; this does not apply to a defect which consists of a third party’s rights in rem, based on which the return of the item can be demanded, nor does it apply to claims for Damages which are both subject to the statutory limitation provisions.
- 14.5 A Party shall not be in default of fulfilling any of its obligations under this Agreement if, and to the extent, that the performance of such obligations is prevented or delayed by an event for which that Party cannot be held responsible pursuant to Sec. 286 para. 4 German Civil Code (the **Event**”), including without limitation **(i)** any events of force majeure (*hoehere Gewalt*), i.e. events which cannot be reasonably foreseen and averted by this Party by taking reasonable precautions, such as war, acts of terrorism, internal unrest, forces of nature, sabotage by third parties, strikes in areas for whose functioning this Party is not responsible (this also applies when such a case of force majeure occurs at one of this Party’s subcontractors or suppliers) and **(ii)**, with respect to Performates’ obligations, any act or omission by a Third Party Campaign Platform commissioned by Customer, always provided that this Party has notified the other Party of the Event without undue delay, has specified a date from which it will be able to continue performance of its obligations (if possible) and shall use reasonable efforts to minimize the effects of the Event. The other Party’s obligations under this Agreement shall also be suspended for the period of delay or inability to perform resulting from the Event. If the Event continues for a continuous period of a month, either Party may terminate this Agreement with immediate effect upon written notice to the other Party at no cost.

15. Term; Termination

- 15.1 The Term of this Agreement shall commence on the date on which this Agreement enters into force and effect pursuant to section 2.3 above and shall be one (1) year (the **“Initial Term”**). This Agreement shall automatically renew by further one (1) year periods (each a **“Renewal Term”**) if

neither Party terminates the Agreement for convenience upon three (3) months written notice to the other Party to the end of the Initial Term or of the then current Renewal Term (jointly the “**Term**”); whereby You shall have the right to terminate this Agreement with regard to all Customer Modules or only a part of the Customer Modules. In the latter case, the Agreement renews for a further year only with regard to the not terminated Customer Modules.

15.2 If We and You have agreed on a free trial period for your Use of the Customer Modules, you shall have the right to terminate this Agreement upon seven (7) days written notice to the end of the free trial period.

15.3 The Parties’ right to terminate the Agreement for cause shall remain unaffected. In particular, Performates has the right to immediately terminate the Agreement upon written notice

- a) if Customer violates any of the provisions set out in section 4.4, 8.1 sent.2, 8.3 and 16; or
- b) if Customer violates any of its other material obligations set out in this Agreement (including its obligations set out in section 10.2) and fails to cure such breach within 30 days upon receipt of a written notice from Performates specifying the breach. No such notice is necessary if the violation cannot be cured, or if the violation is so material that Performates cannot be reasonably expected to adhere to the Agreement. A violation is also being deemed material if the Customer has received such notices of warnings several times with regard to similar violations, or
- c) if the Customer is illiquid, a petition for the opening of insolvency proceedings over Customer’s assets is filed by a creditor of Customer or by Customer itself with the competent court or authority and such petition is not withdrawn or dismissed by the court or authority as unreasoned within four weeks from filing; or
- d) if insolvency proceedings are opened by the competent court or authority over all or a part of Customer’s assets or the competent court or authority rejects the opening of such proceedings for insufficiency of assets; or
- e) any order to winding-up is issued by any competent court or any resolution is passed by Customer for its winding-up or dissolution.

15.4 In case of a termination of this Agreement by either Party under section 15.1 or 15.3, any optimized bid data that Performates supplied to Customer during the Term of this Agreement shall not be reset and Customer shall have the right to retain and to use such data for its own internal business purposes after the termination of this Agreement. The foregoing sentence shall not apply if the Customer terminates this Agreement pursuant to section 15.2.

16. Confidentiality

16.1 The Parties shall keep strictly confidential any information about the affairs of the respective other Party, the companies affiliated with the other Party within the meaning of section 15 et seq. German Stock Corporation Act (*Aktiengesetz - AktG*) (the “**Affiliate(s)**”), subcontractors, suppliers and customers, including but not limited to technical, commercial and financial information (e.g. information on software, interfaces, drawings, documentation, processes, technical and business know-how, prices, cost calculations, pricing conditions, marketing strategies) **(i)** which one Party (the “**Disclosing Party**”) may make accessible to the respective other Party (the “**Receiving Party**”) or of which the Receiving Party becomes aware in performing this Agreement (collectively the “**Disclosure**”) and **(ii)** which is either marked as

confidential (or if disclosed orally confirmed in writing or by email as being confidential within seven days upon its Disclosure) or the confidential nature of which is obvious to a prudent business person (jointly the “**Confidential Information**”). Notwithstanding the foregoing sentence the Software (including any interfaces and documentation thereof) and any individual User Data shall always be deemed Confidential Information for the purposes of this section 16.

- 16.2 The Receiving Party shall not disclose any Confidential Information of the Disclosing Party to third parties without the prior written consent of the Disclosing Party. The Parties shall take adequate and customary measures to protect the Confidential Information against unauthorized disclosure, reproduction and use. The Receiving Party shall disclose the Confidential Information only to such of its officers, directors, employees, Affiliates, subcontractors, suppliers and external advisors (jointly the "**Associates**") if and to the extent that their knowledge of the Confidential Information is required for the performance of the Agreement, and provided that the Associates are bound by confidentiality obligations with regard to the Confidential Information of the Disclosing Party at least as restrictive as set out in this section 16. In addition, the Receiving Party shall be entitled to submit Confidential Information of the Disclosing Party to its Affiliates if so required under applicable law or for administrative purposes of the respective group of companies, provided that such Affiliates are bound by the same confidentiality obligations also with regard to the Confidential Information of the Disclosing Party as set out in this section 16.
- 16.3 Upon the Disclosing Party's written request, at the termination of the Agreement for whatever reason, the Receiving Party shall without undue delay return to the Disclosing Party all documents or media containing Confidential Information as well as all copies or excerpts of same; should it not be physically possible to return the Confidential Information (e.g. digital copies on the Receiving Party's servers), then the Receiving Party shall delete the Confidential Information from all of its systems and networks and confirm the deletion in writing to the Disclosing Party. However, the Receiving Party shall have the right to keep and archive a copy of Confidential Information if and to the extent required by applicable mandatory law for the required record retention period. In this event the Receiving Party shall destroy or delete (as the case may be) such copy upon the expiration of the required record retention period.
- 16.4 The Receiving Party and its Associates shall not use, directly or indirectly, in whole or in part any Confidential Information of the Disclosing Party for any purposes other than set forth in this Agreement without the prior written consent of the Disclosing Party (which consent shall be at the Disclosing Party's discretion).
- 16.5 All Confidential Information (including all material and documents containing Confidential Information) shall remain the property of the Disclosing Party. Except as otherwise expressly set forth in this Agreement, the Receiving Party shall not acquire any rights in the Confidential Information of the Disclosing Party.
- 16.6 The confidentiality obligations of the Parties set out in this section 16 shall not apply to any information of which the Receiving Party can prove that it:
- (i) was already in the possession of the Receiving Party (as evidenced by its written records) prior to its Disclosure under the Insertion Order without any obligation of confidentiality or restriction on use by the Receiving Party; or
 - (ii) is or comes into the public domain or otherwise ceases to be of a confidential nature other than as a result of an act or omission hereunder by the Receiving Party; or

- (iii) becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party, and that such other source is not in breach of a confidentiality agreement with the Disclosing Party; or
 - (iv) is independently generated by the Receiving Party's Associates who have not had access to the Confidential Information; or
 - (v) is required to be disclosed by any applicable law, order of a court of competent jurisdiction or order of competent public authority or agency provided that prior to such disclosure the Party required to disclose shall consult with the other as to the proposed form, nature and purpose of the disclosure (if legally possible).
- 16.7 We shall have the right to review and analyze aggregate performance data retrieved from Your Campaigns in combination with aggregate performance data retrieved from campaigns of other of Our customers for trend and statistical purposes and to publish, distribute, make available to any third party and to use for Our internal purposes the results of such analyses, e.g. in form of studies or surveys, provided that any such analysis is based on the performance data of at least three (3) customers (including You) and the results are not broken down on a customer by customer basis. We will not name You in relation with any such publication without your prior written consent. We shall make available to You the results of any such analysis that is based on performance data of Your Campaigns without additional compensation.
- 16.8 The obligations imposed on each Party under this section 16 shall apply during the Term of this Agreement, and shall survive its termination.
- 16.9 During the Term of this Agreement We shall have the right to refer to You as Our Customer, including the right to display you logo (without any modifications), on our Site and in our marketing material on the Performates Software.

17. Governing law; Jurisdiction

- 17.1 This Agreement, any annexes and amendments to this Agreement and any obligations, rights and claims of the Parties arising out of or in connection with this Agreement – irrespective of their legal grounds (e.g. contractual claims, tort) – shall be exclusively governed by the laws of the Federal Republic of Germany (excluding the 1980 UN Convention on the International Sales of Products).
- 17.2 The place of jurisdiction for all legal disputes, actions or proceedings (including any preliminary measures) arising under or in connection with this Agreement and/or any annexes and amendments to this Agreement – irrespective of their legal grounds (e.g. contract claims, tort) – including any question regarding its validity or termination, shall be, at Performates' option, Performates registered office or Customer's registered office; however, for any claims of, or actions or proceedings initiated by Customer, the exclusive place of jurisdiction shall be Performates' registered office, provided that Customer is a merchant within the meaning of the German Commercial Code (*Handelsgesetzbuch – HGB*) or is seated outside of Germany.

18. Miscellaneous

- 18.1 **Headings.** All headings in the Agreement have been inserted for ease of reference only and do not affect the meaning or interpretation of the Agreement. Any references as to sections and subsections in these Terms of Use are references to sections and subsections of these Terms of Use unless expressly otherwise provided for herein.

- 18.2 **Entire Agreement.** The Agreement concluded between Us and You as set out in section 2.3 above, including these Terms of Use, the applicable technical specifications and any individual arrangements the Agreement may contain which deviate from these Terms of Use or the technical specifications, fully reflect all agreements between Us and You regarding the subject matter of the Agreement. Further verbal or written agreements, arrangements, or commitments with respect to the subject matter of the Agreement do not exist. With the exception of Our representative managing directors, authorized signatories (*Prokuristen*), and other persons authorized to represent Performates, who are named as Our authorized representatives with respect to the corresponding business relationship with the Customer, Our employees are not authorized to enter into verbal or written agreements with the Customer or make verbal or written commitments which deviate from Our Agreement.
- 18.3 **Notifications.** Notifications of the Parties regarding the termination of the Agreement, a breach of the warranties of the Parties set out in sections 11 and 12, a fee increase under section 9.4 and an amendment or an objection under section 19 shall be made in writing to be valid. Any other notifications of the Parties regarding the performance of the Agreement (e.g. notifications of defects, delays, etc.) can be submitted to the other Party in text form by email to the email address communicated by the other Party for this purpose. An email notification is deemed to have been received by the addressee when it can be retrieved in its email inbox under normal circumstances. For the purposes of this Agreement “in writing” or “written” shall have the meaning specified in Sec. 126 German Civil Code; however, this written form requirement shall be deemed fulfilled when the respective Party transmits to the other Party a pdf-copy of a written and signed declaration by email to the email address communicated by the other Party for this purpose.
- 18.4 **Severability.** If any provision of the Agreement is or becomes wholly or partly void or unenforceable or if the Agreement contains any omissions, the validity and enforceability of the remaining provisions of the Agreement shall remain unaffected. The Parties shall replace any invalid or unenforceable provision and remove any omission by a valid and enforceable provision that the Parties would have agreed on in good faith and taking into consideration the purpose of the Agreement if they had been aware of the invalid or unenforceable provision or the omission when entering into the Agreement.

19. Amendment of these Terms of Use

We shall have the right to amend these Terms of Use from time to time with effect for the future. In this event We will notify You of the amendments at least eight (8) weeks prior to the effective date of the amended Terms of Use. If You do not agree with such amendments, You shall have the right to object to them by written notice to Us within four (4) weeks upon Your receipt of Our notification. **If You do not object to them in due time, Your continuance of the Agreement shall be deemed as Your consent to the amended Terms of Use which shall then become an integral part of the Agreement on the notified effective date. We will also inform You of these consequences in Our respective amendment notification. In case of Your objection, We are entitled to terminate the Agreement with You upon four (4) weeks written notice to You.**
