

# XAD spoteffects GmbH Terms & Conditions for the use of spoteffects

## 1. Services of XAD spoteffects GmbH

(1) XAD spoteffects GmbH (XAD spoteffects) develops and operates spoteffects, a software solution for the measurement of the impact of TV advertisement to websites and digital offerings of all kinds (spoteffects). The object of this agreement is the provision of spoteffects for the use by the customer as Software as a Service (rental) including operation, maintenance and customer support.

(2) spoteffects remains on servers of XAD spoteffects throughout the use by the customer. Clients of XAD spoteffects can access spoteffects via the internet (application service providing ASP). The point of transfer of data transmitted to the customer is the exit of the router of the computing centre used by XAD spoteffects.

## 2. Subject of Change

(1) XAD spoteffects has the right to communicate changes to these terms & conditions to the customer no later than six weeks before their entry into force. The approval of the customer is considered to be granted if the customer has not declared his rejection of these changes in written form. XAD spoteffects will indicate this to the customer in such a communication.

(2) XAD spoteffects has the right to modify and update her services technically, provided that this is done in a reasonable way considering the interests of both parties. XAD spoteffects will inform the customer regarding all changes or upgrades in due time via email, at least two weeks beforehand.

## 3. Obligations to co-operate

(1) The customer is subject to the following obligations to co-operate:

a. In order to establish a data connection to the data centre used by XAD spoteffects, the customer requires an information technology infrastructure corresponding to the state of the technology with a sufficiently dimensioned internet access. For the access of spoteffects, an up-to-date web browser (e.g. Internet Explorer, Chrome, Firefox) is required. The customer is responsible for the installation and operation of this infrastructure.

b. The customer appoints the users designated to use spoteffects, and their rights. The customer is bound to inform XAD spoteffects about every change that requires a modification of these rights. The customer will keep his credentials (username and password) confidential, and will prevent third parties from gaining access to these credentials.

c. The customer is bound to use all features made accessible to him via spoteffects exclusively in accordance with their designated use and for own purposes only.

d. The customer is bound to report to XAD spoteffects all deficiencies or defects which could impair

the security or the operation of spoteffects. The customer will take all reasonable measures that facilitate the determination of these deficiencies or defects and their reasons, and their elimination.

(2) The customer is responsible for the verification of the accuracy and completeness of the data provided by himself and/or his service providers to XAD spoteffects. XAD spoteffects does not verify the data provided to XAD spoteffects.

(3) The customer is not permitted to use spoteffects in a way

- prohibited by laws, regulations or regulatory instructions
- that infringes rights of third parties (e.g. trade marks or copyrights)
- that impairs other services or their use through other parties, or
- in which a failure or error of any kind can lead to death, severe physical injury or severe loss of property or environmental damage (high risk areas).

(4) The customer is responsible for his compliance with record retention periods following fiscal and commercial laws.

(5) The customer is bound to omit any unauthorised attempt to retrieve data, in person or via unauthorised third parties, or to interfere in an unauthorised way with applications operated by XAD spoteffects or to intrude into data networks without authorisation.

(6) The customer is bound to communicate any and every change in his trade name, address and all other circumstances substantial for the contractual relationship.

(7) The customer is required to safeguard the data transmitted to XAD spoteffects and to generate regular archival backup copies in order to ensure the reconstruction in case of a loss of data.

(8) The customer grants XAD spoteffects the right to use the provided data in any form required for the provision of the services that she is bound to provide under this contract. XAD spoteffects has the right to store the data in more than one data centre in Germany and to make changes to the structure and format of the data.

## 4. Suspension in case of abusive use of services of XAD spoteffects

XAD spoteffects has the right to suspend the customer's access in case of a considerable violation of one of his primary duties defined in these terms & conditions by himself or one of the users named by him, after a preceding effectless written warning. XAD spoteffects is bound to restore the customer's access as soon as the violation of the primary duty has been eliminated permanently or the risk of a repetition has been eliminated through the delivery of an appropriate declaration to cease and desist with a penalty clause. In this case, the customer remains obliged to pay the agreed charges.

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Any claims of webeffectst in excess thereof remain unaffected.

## 5. Property rights

- (1) Unless explicitly stated otherwise in these terms & conditions, all patents and intellectual and industrial property rights regarding spoteffects remain with XAD spoteffects at any time. XAD spoteffects reserves all property rights regarding all graphics, service specifications, diagrams, calculations and other documents regarding spoteffects. The customer must obtain the explicit written consent of XAD spoteffects before transmitting any of these to a third party. This is also applicable to all quotes of XAD spoteffects and any other document marked explicitly as confidential.
- (2) Commercial notes of any kind, especially calculations, sketches, diagrams, documents and copies thereof, as well as data storage mediums remain property of the party who provided them. These must be returned to the proprietor upon requisition. Electronic files must be deleted, and their deletion is to be confirmed in written upon request, without any right of retention.

## 6. Confidentiality commitment

- (1) Confidential information as defined by this regulation shall comprise all financial, technical and legal documents and all informations regarding the economic activity, the employees, the management or other information including data, documents, know-how such as data collections, software, inventions, algorithms and procedures, which relate to one of the parties or their affiliated companies, and was made accessible to the other party directly or indirectly during the fulfillment of the contractual services or came to their knowledge in any other way.
- (2) It is irrelevant for this regulation if and how this information is captured on a medium; verbal information are explicitly included in this regulation.
- (3) Both parties commit to keep all confidential information, which they receive in this context, strictly confidential, and to refrain from using them for their own benefit or the benefit of third parties or to transmit them to any third party. Excluded hereof are only those informations, whose transmission are required for the fulfillment of duties or permitted explicitly in written by the revealing party. Under these conditions, the parties are authorised to reveal confidential information to employees, freelancers or service providers. The parties are bound to inform these individuals about the confidentiality obligations resulting from this agreement before revealing confidential informations, and to bind them accordingly. The respective party holds responsible for the compliance of these individuals regarding this agreement. All recordings of confidential information are to be treated with care and to be kept so carefully that they cannot become accessible to unauthorised persons.
- (4) This obligation remains applicable during 5 years after the termination of this contract and includes the arrangements included in the corresponding order form as well as the corresponding terms & conditions.

## 7. Rights and terms of use

- (1) The user is granted the right to access spoteffects via the internet and to use the features of spoteffects in accordance with the regulations of this contract. This right is limited to the duration of this contract. It is not exclusive, not sublicensable and not transferrable.
- (2) The scope of the customer's use of spoteffects depends on the type and number of acquired user licenses and the activated functionalities according to the individual provision of spoteffects to the customer.
- (3) The customer is not authorized to use spoteffects or to give third parties access to spoteffects beyond the scope defined by this contract and his individual order. It is especially prohibited to copy spoteffects or parts of it, to make screenshots (except for internal training purposes) and to sell or provide them to third parties, or to lend or rent out their access to spoteffects to third parties.
- (4) The customer is not authorized to remove or bypass the existing protective mechanisms of spoteffects against unauthorized uses, except if this is required to achieve a failure-free use of spoteffects.
- (5) The customer is not authorised to retranslate spoteffects into other code forms, to reverse engineer it into software modules, to modify or analyse it or to reconstruct or rebuild the various elements of this software in any other way or to uncover the source code or to adopt the underlying ideas or algorithms of the software. These activities are not authorized either to achieve a failure-free use of spoteffects.
- (6) In case of an unauthorized surrender of use of spoteffects by the customer to a third party, the customer is bound to provide to XAD spoteffects immediately all informations required by XAD spoteffects to assert her claims against the third party, especially their names and addresses.

## 8. Warranty

- (1) The customer has the right to withdraw from the contract only after setting an appropriate deadline to XAD spoteffects to provide her services, and that he does not wish to continue to make use of her services in case that the deadline expires without results.
- (2) The fault-based accountability of XAD spoteffects regarding damage compensation is excluded regarding deficits that existed at the moment of the conclusion of the contract.
- (3) Other legal damage compensation claims remain unaffected and can be enforced by the customer. The limitation of liability of figure 14 is applicable.
- (4) The customer is bound to communicate any deficit to XAD spoteffects immediately. Claims are subject to a limitation period of one year after the beginning of the use of spoteffects.
- (5) It is not a deficit of spoteffects if the underlying algorithms of spoteffects do not correspond to the experiences, expectations or preferences of the customer.

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- (6) It is not a deficit of spoteffects if the data provided to spoteffects by the customer and/or his service providers are erroneous or incomplete.
- (7) If an asserted deficit is not subject to a liability for deficits of XAD spoteffects after an appropriate examination, XAD spoteffects can charge to the customer the accrued expenses for verifications and corrections based on the effective rates.

## 9. Compensation and settlement

- (1) The amount of compensation is defined in the order form or the offer.
- (2) All prices are plus VAT if applicable.
- (3) The customer is bound to pay latest within 14 days after receipt of an invoice without deductions. In case of a non-cash payment, the receipt of the payment on the bank account of XAD spoteffects is relevant for the timeliness of the payment. The customer bears any payment costs.
- (4) Objections by the customer against the correctness of an invoice provided by XAD spoteffects must be communicated to XAD spoteffects in written form within 30 days after receipt of the invoice. The timely expedition of the objection is sufficient for the compliance with this deadline. The invoice is considered to be accepted upon expiration of this deadline. XAD spoteffects will indicate this explicitly in the invoice. The customer can request the correction of an invoice also after expiration of this deadline. Then however he must prove that the invoice was incorrect or incomplete.
- (5) The customer bears all fees, charges and taxes that result from this contract and the customer's use of spoteffects at the expense of the customer
- (6) XAD spoteffects has the right to suspend the customer's access to spoteffects in case of a delay of payment of more than 30 days. XAD spoteffects will indicate this consequence of this delay to the customer in written form. The customer remains liable to pay the agreed charges also for the period of suspension.
- (7) In case of a delay of payment XAD spoteffects has the right to charge to the customer default interests of 8% above the effective base rate of the German Federal Bank as well as all other costs that are required for the enforcement of the payment.

## 10. Duration and cancellation

- (1) The contract is concluded indefinitely unless noted otherwise in the order form.
- (2) Notice periods are defined in the order form or the offer.
- (3) If the customer orders additional services, these conditions regarding duration and cancellation also apply to these services.
- (4) The right of dismissal for cause remains unaffected for both parties. A cause that entitles XAD spoteffects to a dismissal without notice exists especially if the customer
  - is in delay of payment for two consecutive months regarding all or a significant part of his charges

- is in delay of payment regarding an amount that corresponds to the charges for two months, but refers to a period longer than two months

- (5) Every cancellation must be made in written form.

## 11. Privacy

- (1) XAD spoteffects and her employees, freelancers and service providers are required to comply with the German Federal Data Protection Act.
- (2) In case that the customer collects, processes or uses personal data himself or through XAD spoteffects, he is responsible for his compliance with privacy laws in this regard and holds XAD spoteffects harmless from claims of third parties in case of a violation.
- (3) Should it become necessary in the course of the cooperation that employees, freelancers or service providers of XAD spoteffects obtain access to customer's personal data, the parties will sign a commissioned data processing contract in due time.

## 12. Non-solicitation

During the validity of the contract and for a period of one year after the termination of the contract the customer shall abstain from, directly or indirectly via any company owned or controlled by the customer enticing away, soliciting or interfering with any personnel or freelancers from XAD spoteffects that were involved in the cooperation, for himself or third parties.

## 13. Contractual penalties

- (1) A contractual penalty of EUR 10.000 is agreed for deliberate violations of the confidentiality clause, unless otherwise agreed in the order form.
- (2) A contractual penalty is agreed for every single case of a deliberate violation of the non-solicitation clause, amounting to 25% of the newly agreed gross annual salary of the corresponding employee, with a minimum of EUR 15.000, unless otherwise agreed in the order form.
- (3) The payment of the contractual penalty from paragraph 1 and 2 shall not exclude the enforcement of cease and desist claims or additional damage compensations in case that corresponding evidences are provided. A paid contractual penalty is to be deducted from any damage compensation.

## 14. Limitation of liability

- (1) The parties guarantee with unlimited liability in cases of malicious intent or gross negligence. For damages following violations of essential contractual duties with ordinary negligence, i.e. duties that render possible the fulfillment of this contract and on who's compliance the other party can and may rely regularly, the liability for the violating party is limited to the amount of the predictable risk that is typical for this contract.
- (2) The liability of the parties is excluded for damages due to ordinary negligence regarding non-essential contractual duties.

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- (3) These regulations regarding limitations and exclusions of liability are not applicable in case of personal injuries (injury of life, body or health), in case of issued guarantees and in case of bad faith.
- (4) XAD spoteffects is bound to provide a level of diligence that is in line with the industry standard. Upon determination of a guiltiness of XAD spoteffects it must be taken into consideration that software cannot be produced without errors from a technical point of view.
- (5) XAD spoteffects is not liable for any loss of data and/or applications inasmuch as the customer has failed to create archival backups that allow the recovery of data with reasonable effort, unless the creation of archival backups is the duty of XAD spoteffects according to the regulations of this contract.
- (6) XAD spoteffects does not assume liability for investment decisions that the customer makes based on the evaluation of the results that spoteffects generates. Provision, evaluation and analysis of the data are in the responsibility of the customer.
- (7) These regulations also apply in favour of the freelancers and service providers of XAD spoteffects.

## 15. Release from liability

Both parties are bound to hold the other party harmless from all claims of third parties that result from an illegal use of spoteffects by the former party or occur with her approval, or that result from disputes related to privacy or copyright or other laws related to the use of spoteffects. When one party identifies or must identify that such a violation impends, she is bound to inform webeffectst immediately.

## 16. Involvement of subcontractors

XAD spoteffects has the right to involve subcontractors in the fulfillment of this contract. XAD spoteffects is bound to transfer the obligations from number 6 and 11 regarding confidentiality and privacy to the subcontractors.

## 17. Publications

Publications of any kind that are related to the business of the customer or XAD spoteffects, in any form such as text, picture, audio or video require the prior written approval of the other party.

## 18. Final clauses

- (1) No ancillary verbal agreements have been made. Ancillary agreements, changes and additions to these terms and conditions must be made in written form. This shall also apply to the requirement of written form itself.
- (2) Should any regulation of this contract be or become fully or partially ineffective, the effectiveness of the other regulations shall not be impaired by this. The parties agree already now for this case that the invalid regulation shall be replaced by a valid regulation as close as possible to the intended purpose. The same applies to any missing regulations.
- (3) The law of the Federal Republic of Germany is applicable.
- (4) The only place of jurisdiction for all litigations related to this contract is the domiciliation of XAD spoteffects.

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