

ESCROW AGREEMENT

SOFTWARE SOURCE CODE

THE UNDERSIGNED

1.,
having its place of business at
.....
for the purposes hereof represented by
hereinafter referred to as "**Licensor**",

2.,
having its place of business at
.....
for the purposes hereof represented by
hereinafter referred to as "**Licensee**",

3. **ESCROW Europe (Switzerland) AG**,
having its place of business at Ibelweg 18a,
CH-6300 Zug, Switzerland,
for the purposes hereof represented by Ernst HOFMANN,
hereinafter referred to as "**Escrow Europe**",

WHEREAS:

- I **By** License Agreement dated .././.... Licensor granted to Licensee a License of the program product ("Product") as set out in **Annex I**;

- II **The** source code of the Product and all related technical documentation are the property of Licensor and are of a confidential nature;

- III **The** source code of the Product and the technical documentation relating to them are not required for the general use of the Product under the terms of the License Agreement, but are required for a proper understanding, maintenance, amendment and correction of the Product;

- IV **Licensor** acknowledges that Licensee under certain circumstances and exclusively for Continuity Purposes may require access to the source code of the Product and all related technical documentation;

- V **Licensor** agrees to deposit on behalf of Licensee the source code of the Product and related technical information/documentation with Escrow Europe AG under the conditions specified herein;

HEREBY AGREE:

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1. **DEFINITIONS**

The following expressions used in this escrow agreement and the Annexes shall have the following meaning:

Agreement:

the escrow agreement between Licensor, Licensee and Escrow Europe;

License agreement:

the License agreement between Licensor and Licensee regarding the Product;

Product(s):

the program product(s) as detailed in **Annex I**, licensed to Licensee under the License Agreement, which form the subject of the escrow arrangement;

Technical Documentation:

the technical documentation required to enable Licensee to maintain, amend, correct and/or modify the source code of the Product;

Material:

the **medium (media)**, containing

- (i) the source code of the Product
- (ii) all alterations, updates and/or corrections of the Product, which are made available by Licensor to Licensee within the scope of Licensor's release policy
- (iii) all technical documentation, relevant and necessary for the maintenance of the Product;

Medium:

the data carrier(s) containing the Material;

Maintenance Obligations:

the conditions set out in the License and/or Maintenance Agreement under which Licensor has agreed to maintain the Product;

Continuity Purposes:

the use of the material strictly and solely for the purpose of maintenance, correction modification and/or extension of the Product with due observation to the copyright and confidentiality clauses of the License Agreement;

Licensor: -

Licensee: -

Escrow Europe: - Escrow Europe (Switzerland) AG
Ibelweg 18 a, CH-6300 Zug

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2. DEPOSIT

- 2.1 Within thirty (30) days after the Agreement has come into effect, Licensor shall provide the Material to Escrow Europe.
- 2.2 Licensor shall undertake to do the same for each alteration of the Product(s), within thirty (30) days of having made such alteration available to Licensee within the scope of its release policy.
- 2.3 Escrow Europe will confirm the deposit of the Material in writing to Licensee. If Licensee does not receive the confirmation of deposit prior to or within thirty (30) days after operational implementation, Licensee shall immediately notify Escrow Europe.
- 2.4 Escrow Europe shall hold the two latest deposits of the Material for the term of the Agreement. Older Material (prior to the two latest deposits) shall be destroyed by Escrow Europe unless agreed otherwise in this Agreement.
- 2.5 Escrow Europe shall make no use of the Material other than it is entitled to pursuant to the Agreement.
- 2.6 The transfer referred to under 2.1 and 2.2 above shall not include a transfer to Escrow Europe of any intellectual property rights in the Product. These intellectual property rights shall at all times remain vested in Licensor or such other third party as may be determined from time-to-time.
- 2.7 Licensor hereby grants Escrow Europe the rights to:
- * make a back-up copy of the Material, when necessary
 - * load the Material on a computer system in order to verify the Material
 - * release the Material to Licensee in accordance with article 5 ("Release").

3. BACK-UP

- 3.1 Licensor shall throughout the term of the Agreement hold available a copy of the Material as a back-up.

4. VERIFICATION

- 4.1 With each deposit, Licensor shall provide an **Escrow Specification Form** to Escrow Europe setting out details of the Material, which is deposited on behalf of Licensee. Licensor warrants that the Material contains an accurate and complete reflection of the Product licensed by Licensee at the time of deposit.
- 4.2 Escrow Europe shall execute a level I verification of the Material in order to establish presence and readability of the components as detailed on the Escrow Deposit Specification Form. Escrow Europe shall inform Licensor and Licensee of its findings.
- 4.3 Licensee shall at any time be entitled to request Escrow Europe for extended verification Level II-III). If a level III verification is requested, Licensor is obliged to cooperate with Escrow Europe in the execution of the level III verification in as far as reasonably necessary.

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4.4 The costs of Escrow Europe, Licensor and Licensee, borne by the verification set out under Clause 4.3 above, shall be to the account of Licensee, unless the verification shows that Licensor has materially not met its obligations hereunder, in which case Licensor shall bear the costs.

4.5 If a verification shows that the Material as deposited with Escrow Europe does not correspond with the statement referred to under 4.1 above, then Licensor shall restore the discrepancy within thirty (30) days of the verification.

5. RELEASE

5.1 Provided Licensee has a valid License Agreement, Escrow Europe shall be obliged to release the Material to Licensee if:

- Licensor ceases its business undertaking without validly assigning its Maintenance Obligations and its obligations under the Agreement to a competent third party;
- Licensor suffers bankruptcy.
- Licensor does not comply with its Maintenance Obligations and/or its obligations under the Agreement to such an extent that its failure to comply endangers the continuity of use of the licensed Product by Licensee;
- Licensor does not comply with Clause 11.1 or has been subject to a takeover by a third party that does not accept to continue the Maintenance Obligations or offers them at commercially unreasonable terms.

5.2 If in Licensee's opinion a circumstance defined under Clause 5.1 has occurred and the Licensee requires the release of the Material on the basis thereof, Licensee shall send a notice by registered letter to Licensor and Escrow Europe to this effect and containing within such a notice any reasonable evidence as Licensee may have in its possession to support the opinion.

5.3 Upon receipt of such notice as set out under Clause 5.2 above Escrow Europe shall within seven (7) days serve notice in writing upon Licensor that a request for the release of Material has been received.

Licensor shall have seven (7) days from the date of this notice from Escrow Europe to register any objection to such release. If Licensor fails to register an objection or fails to register an objection within the stated seven (7) days, Escrow Europe shall be entitled to promptly release the Material to Licensee.

5.4 If within the terms set out under Clause 5.3 above Licensor raises an written objection against the said release and supports such an objection with reasonable evidence then Escrow Europe shall submit the question of Licensees right to such release to the Administration of the Zurich Chamber of Commerce, to be resolved in accordance with its Rules of Arbitration.

The decision of the SGOA shall be final and binding on all parties and shall not be subject to appeal to a court in legal proceedings.

5.5 If Licensor suffers bankruptcy then Licensor shall have no right of objection under Clause 5.3 above.

5.6 In case Escrow Europe releases the Material to Licensee pursuant to the provisions in this Article, Licensor grants Licensee the non-exclusive right to use the Material for Continuity Purposes only.

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6. WARRANTIES

- 6.1 Licensor warrants and represents that it is entitled to transfer the Material to Escrow Europe pursuant to the provisions of the Agreement and agrees to indemnify and hold harmless Escrow Europe from and against any claim by a third party in relation to the release of the Material hereunder.
- 6.2 Licensor warrants to Licensee that the Material as deposited with Escrow Europe is sufficient to enable a qualified person to continue the maintenance of the Product.
- 6.3 Licensee warrants and represents that it shall exclusively use any Material, which is made available under this Agreement for Continuity Purposes only and for the use thereof solely in connection with the internal business of Licensee.
Licensee is reminded that certain conditions of the License Agreement continue to apply to the use of the Material, including, but not limited to, the conditions of Confidentiality, Limited Right to Copy, Use and Intellectual Property Rights.
- 6.4 Licensee is explicitly forbidden from making any commercial use of the Material under penalty of a fine of CHF 150.000 immediately due to Licensor.
Licensor reserves the right to pursue other legal remedies in addition to the penalty set out above if Licensee is proven to be in breach of this condition.
- 6.5 If Licensee enters into an agreement with a third party for the maintenance, correction and/or modifications of the Product, Licensee warrants that it shall impose upon third party the obligations as set out in Clause 6.3 and Clause 6.4 above.

7 OBLIGATIONS OF ESCROW EUROPE

- 7.1 Escrow Europe shall safely store and keep the two latest deposits of the Material on deposit in its vaults. Furthermore Escrow Europe shall use its best endeavours to prevent unauthorised third parties from having access to its vaults.
- 7.2 If and as far as any confidential information comes to the attention of Escrow Europe it shall not divulge the same to any third party. This obligation of confidentiality shall also apply to its employees, agents or authorised third parties.
Under confidential information in this article is to be understood:
- the Material on deposit
 - information, disclosed to Escrow Europe under notification of confidentiality.
- 7.3 Escrow Europe shall not disclose or divulge the Material to any third person save such of its employees or agents who need the Material for verification purposes.
Escrow Europe will see to it that immediately after a verification procedure the Material and any copy made will be removed from the computer system used for the verification.
- 7.4 If Escrow Europe holds the Material for several Beneficiaries and subject to the Agreement Escrow Europe is entitled to release the Material to Licensee pursuant to Clause 5 above, then Escrow Europe shall be entitled to copy or arrange to have copied the said Material for the purpose of making a copy available to the Licensee; the cost of such copying shall be for the account of the Licensee.

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- 7.5 If despite the security measures and other precautions taken by Escrow Europe damage is done to, or loss takes place of, the Material, Escrow Europe shall be obliged to promptly notify Licensor of this fact and Licensor shall be obliged to promptly provide a new copy of the relevant material to Escrow Europe.
The costs of providing a new copy shall be to the account of Escrow Europe unless and to the extent that Licensor has not complied with its obligation to keep back-up copies as set out under Article 3 above.

8. LIABILITY

- 8.1 Escrow Europe shall be liable to Licensor and/or Licensee for direct damage to the Material or any other damage arising out of or in connection with the performance of the Agreement, provided such damage is the result of negligence or wilful misconduct of Escrow Europe itself, in which case its obligation to pay damages shall not exceed a sum of CHF 300.000, if so permitted by the law.
- 8.2 Escrow Europe shall not be liable for any indirect damage including, but not limited to, industrial damage, loss of profits and/or other consequential damages.
- 8.3 Escrow Europe shall be responsible for the diligent execution of its verifications.
Escrow Europe is not responsible for the completeness, accuracy, operation, functionality, or effectiveness of the Material as such.
- 8.4 Licensor and, in the event that Escrow Europe has released the Material to Licensee, Licensee shall indemnify Escrow Europe from and against all claims by third parties which arise out of or are otherwise connected with the performance of the Agreement.

9. TERM OF THE AGREEMENT

- 9.1 The Agreement shall commence on the date that the parties have signed the Agreement and shall be entered into for indefinite time.
- 9.2 Licensee may upon three (3) months notice terminate the Agreement by delivery of notice to this effect by recorded delivery to Licensor and Escrow Europe.
- 9.3 Licensor, having deposited the Material on behalf of Licensee, has no right to unilaterally terminate the Agreement without the prior written consent of Licensee being provided to Escrow Europe, other than in the specific circumstances as defined under Clause 9.4 below.
- 9.4 Licensor shall be entitled to terminate the Agreement without condition if Escrow Europe suffers bankruptcy, or if Escrow Europe fails to perform its obligations under the Agreement and fails to correct the default within thirty (30) days of having been notified by Licensor of the default.
In such circumstance, at the request of Licensee, Licensor is obliged to deposit the Material with another Escrow Agent at its choice.

Escrow Europe thereupon is obliged to transfer the Material to either the Escrow Agent designated by Licensor or, in case Licensee decides not to continue the escrow, to Licensor itself.

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9.5 Upon termination of the Agreement Escrow Europe shall destroy the Material or, in case of a request thereto, return the Material to Licensor. Escrow Europe shall have no obligation to destroy or return the Material if the Material is subject to another escrow agreement with Escrow Europe.

10. PAYMENT OF FEES

10.1 For the services to be rendered by Escrow Europe under the Agreement, Licensee shall be due to pay the fees as specified in **Annex II**.

10.2 Escrow Europe shall invoice the initial fee upon finalisation of the Agreement. Escrow Europe shall invoice the yearly fee upon signing of the Agreement and thereafter annually upon the anniversary date.

10.3 In case of extended verification, Escrow Europe shall invoice 50% of the expected verification costs in advance upon signing of the Agreement. Escrow Europe shall invoice the remainder after execution of the verification.

10.4 Payment of invoices rendered by Escrow Europe shall be due within thirty (30) days of the invoice date.
If the invoice is not paid by the due date, Licensee shall be liable for legal interest for the period that payment has been delayed.

10.5 If Licensee has not paid the invoice rendered by Escrow Europe in accordance with its due date, Licensee shall not be entitled to invoke the provisions of Article 5 herein and Escrow Europe shall have no obligation to release the Material and/or New Releases to the Licensee.

10.6 In the event of a premature termination of the Agreement, Escrow Europe shall have no obligation to repay all or part of any fees paid herein under.

11. ASSIGNMENT

11.1 Licensor undertakes to make the terms of the Agreement part of any transfer of the intellectual property rights of the Product(s) to a third party.

11.2 In such a case Licensor shall inform in writing both Licensee and Escrow Europe.

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12. MISCELLANEOUS

- 12.1 The (performance of the) Agreement and all modifications or amendments thereto shall be governed by Swiss law.
The parties shall submit any dispute, which might arise with respect to the performance of the Agreement in the first instance to the jurisdiction of the competent court in Zug.
- 12.2 All costs, both in and out of court, including those of legal assistance, incurred by one party to the Agreement due to the non-performance of a material condition by the other party to the Agreement shall be for the account of the party which has failed to perform its condition.

13. SIGNATURES

- 13.1. Licensor _____
Date: _____ (Name)
- 13.2. Licensee _____
Date: _____ (Name)
- 13.3. Agent: _____
Date: _____ (Name)

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Annex I: Product(s) and Material to be deposited

Licensor declares to deposit with Escrow Europe the following Material concerning the Product as specified below, in accordance with the terms and conditions of the Agreement this Annex is part of.

Product : _____

Modules: _____

Description	Yes	No
Source Codes	<input checked="" type="radio"/>	<input type="radio"/>
Documentation	<input checked="" type="radio"/>	<input type="radio"/>
Others _____	<input type="radio"/>	<input type="radio"/>
Escrow Deposit Specification Form	<input checked="" type="radio"/>	<input type="radio"/>

Number of Updates/year

 Licensor

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