



# Supplementary Terms and Conditions for IBM Enterprise Services

Version: January 2016

## 1. Subject

These Supplementary Terms and Conditions for IBM Enterprise Services (hereinafter referred to as "STC") govern the terms and conditions for the Eligible Machines or Services set out on the Order Form.

The provisions of the Agreement will apply accordingly to Eligible Machines or Services included in the scope of Service after commencement of the Agreement.

The Agreement consists of the Order Form, Statements of Work (SoW) these STC and the "General Terms and Conditions for IBM Services" (GTC Services) or any equivalent terms and conditions agreed upon between the parties.

Unless otherwise agreed upon, Client's rights are valid only in Germany. Except as stated by mandatory law, IBM will not be obliged to provide Services for a Machine that is located outside Germany.

## 2. Definitions

**Authorised Requestors** means the Client's employees who may place Service requests with IBM in accordance with this Agreement. These employees must possess adequate technical skills to enable problem-oriented and purposeful communication between the Client and IBM.

**Installation Location** means a location specified on the Order Form where Eligible Machines are installed (Client installation address).

**Eligible Machine** means a Machine identified on the Order Form or included later in the scope of Service. **Machine** means – unless otherwise described – the Machine itself, including its model conversions, features and elements.

**Charging Period** means a period of twelve successive months, beginning with the starting date of the Agreement.

**Eligible Program** means a Program listed on the Order Form or included later in the scope of Service.

**Order Form** means the Order Form itself – including its Attachments – and/or any associated additional document agreed between the parties.

**Total Service Charge** means the charge specified on the Order Form that is invoiced to the Client for the Services to be provided by IBM during one Charging Period.

**Machine/Service List** means a list contained on the Order Form that lists the Eligible Machines and Services.

**Enterprise** is any legal entity (such as a limited liability company or private company) and the subsidiaries it owns by more than 50 percent. The term "Enterprise" applies only to the portion of the Enterprise located in Germany.

**Contract Year** is the period as of which the contract becomes effective, from 00:00 h (commencement of contract according to order form) until 24:00 h in the subsequent year at the day which in the calendar precedes the starting day.

### **3. Term**

The minimum term of this Agreement – beginning on the date specified on the Order Form – will be one year.

If the parties agree on a fixed minimum term of three, four or five years ("Fixed Agreement Term"), the Client will receive a discount for that fixed term.

At the end of the respective term the Agreement will be automatically renewed by one further year. In case of an automatic renewal of the Service, the Service charges will be charged on the basis of the charges applicable at the time of renewal.

In each case, the remaining term will be agreed for new Machines, products and Services included during the Agreement Term.

### **4. Maintenance Services for Machines**

4.1 Within the scope of the agreed Maintenance Services for Machines, which will be classified in Service types, IBM shall restore the functionality of a Machine in accordance with its specifications. IBM shall notify the Client of the type of Services available for a Machine. IBM will at its discretion (1) repair or replace the Machine and (2) – depending on the type of Services – provide the Services either on the Client's premises or at IBM Service Center.

4.2 If in connection with a Service type a Machine has to be delivered to IBM, the Client agrees to ship it suitably packaged (prepaid unless otherwise specified in the Agreement) to a location IBM designates. Unless otherwise agreed, IBM will repair or replace the Machine and return it to the Client at its expense. IBM is responsible for loss of, or damage to, the Machine while it is (1) in IBM's possession or (2) in transit in those cases where IBM is responsible for the transportation charges.

During the warranty period, IBM will reimburse the Client for the transportation charges for delivery of the failing Machine to IBM and will return it to the Client at its expense.

4.3 Any feature, conversion, or upgrade IBM Services must be installed on a Machine which is (1) the designated, serial-numbered Machine, if applicable, and (2) at an engineering-change level compatible with the feature, conversion, or upgrade.

4.4 IBM manages and installs selected engineering changes that apply to IBM Machines and may also perform preventive Maintenance.

4.5 Maintenance Service after the end of warranty period in compliance with the Statement of Limited Warranty: The Machine will be converted to Maintenance Service with the same type of Service the Client selected for Warranty Service Upgrade during the warranty period in compliance with the Statement of Limited Warranty.

4.6 The Client and IBM agree that

- The Client is solely responsible for the organizational integration of the Service in its operating procedure.
- The Client agrees to provide IBM with sufficient, free, and safe access to its facilities and systems (including remote access) and will support IBM in providing information, personnel and other resources that are necessary for the provision of the Services.

### **5. Replacement of Machines or Machine parts**

5.1 When Service involves the exchange of a part or a Machine, the item IBM replaces becomes its property and the replacement becomes the Client's. The Client represents that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. Before IBM exchanges a Machine or part, the Client agrees to remove all features, parts, options, alterations, and Attachments not under IBM's Service. The Client also agrees to (1) ensure that the item returned to IBM is free of any legal obligations or restrictions that prevent its exchange and (2) transfer ownership and possession of removed parts to IBM.

5.2 Service for some IBM Machines involves IBM providing the Client with an exchange replacement for installation by the Client. Such exchange replacements may be (1) a part of a Machine (called a Client Replaceable Unit, or "CRU," e.g., keyboard, memory, or hard disk drive), or (2) an entire Machine. The Client may request IBM to install the replacement CRU or Machine, however, the Client may be charged for the installation. IBM provides information and replacement instructions with the Client's Machine and at any time on the Client's request. IBM specifies in the materials shipped with a replacement whether the failing CRU or Machine must be returned to IBM. When return is required, return instructions and a container are shipped with the replacement, and the Client may be charged for the replacement if IBM does not receive the failing CRU or Machine within 15 days of the Client's receipt of the replacement.

## **6. Maintenance Coverage**

When the Client orders Maintenance Service for Machines that have not been subject to Maintenance coverage so far, IBM will inform the Client of the date on which Maintenance Service will begin. IBM may inspect the Machine within one month following that date. If the Machine is not in an acceptable condition for Service, the Client may have IBM restore it for a charge or the Client may withdraw its request for Maintenance Service. However, the Client will be charged for any Maintenance Service which IBM has performed at its request.

## **7. Automatic Inclusion of Machines and Programs**

### **7.1. Automatic Inclusion of Machines**

Newly acquired Machines will be included automatically in the Agreement. The following will apply:

- A Machine that the Client acquires directly from IBM will be included on the day after its installation. The Service Type for the respective Machine will correspond to the Service Type for comparable IBM Machine Types at the same location. If no comparable Machines are installed at the location, Maintenance will be provided in compliance with the basic Service type available for the applicable Machine.
- A Machine that the Client acquires from an IBM Business Partner and which is known to IBM will be included in the scope of Service of this Agreement on the day after expiry of the warranty period for the applicable Machine, provided the IBM Business Partner itself has not offered or sold such a Service for this Machine.

The start of the obligation to pay charges is detailed in the "Charges" section.

Automatic inclusion will also refer to separate Machine extensions or upgrades, including additional features, elements and model conversions for an existing Eligible Machine.

The Client can object in writing to chargeable automatic inclusion of a Machine in the scope of Service, but the objection must have been received by IBM at the latest one month after the date of the first invoice for the Maintenance Service.

However, there will be no right to objection for automatic inclusion of Machine extensions or upgrades, including additional features, elements and model conversions for an existing Eligible Machine.

If IBM has already provided Maintenance Services for automatically included Machines at the Client's request, the Client will be obliged to pay for them.

### **7.2. Automatic Inclusion of Programs**

When a software Service Agreement expires that referred at the time of acquisition to an Eligible Program in compliance with this Agreement, it will be included in this Agreement if the software runs on an Eligible Machine. IBM will update the inventory after inclusion of a Program. The Client may object in writing to chargeable automatic inclusion of a Program in the scope of Service. However, the objection must have been received by IBM at the latest one month after the date of the first invoice for the software Service.

There will be no right to object, however, if the Program is only an update, a new feature, a new release or a new version of an existing Eligible Program or a further copy of an existing Eligible Program on an Eligible Machine.

If IBM has already provided Services for automatically included Programs at the Client's request, the Client will be obliged to pay for them.

## **8. Licence for Service Programs**

The following terms and conditions apply to all Programs that IBM provides together with a Service and that is not otherwise accompanied by a separate license agreement. In connection with the provision of the Service IBM grant to the Client a non-exclusive license to use the Service Program on the Eligible Machines defined by IBM to assist in problem determination or other system support in conjunction with the Services under this Agreement.

The Client will not be entitled to

- modify the Program's Machine-readable instructions or merge data into another Program;
- reverse assemble, reverse compile, or otherwise convert the Program, unless such a conversion is provided by a binding legal regulation;
- sublicense, assign, or transfer the license for the Program, or
- distribute the Program to any third parties.

IBM provides the Program without warranties of any kind.

If IBM does not provide a backup copy of the Service Program, the Client has the right to create one copy for backup purposes provided the Client reproduces the copyright information or any other copyright notes on the copy. The backup copy will be subject to the same terms and conditions as the original.

The Client's licence terminates, when

- the Service is terminated, is withdrawn by IBM or the Agreement Term ends and is not renewed;
- the Service Program is no longer required for provision of the Service; or
- the Eligible Machines designated by IBM for the Program is removed from productive use by the Client

IBM may terminate the licence if the Client does not fulfil the Client's contractual obligations or at IBM's own discretion, e.g. if the Program is no longer needed for the Services. Upon termination of the licence, the Client will be obliged to destroy the Service Program including all backup copies received or made by the Client.

## **9. Responsibilities**

### **9.1. Inventory Review**

If the Client or IBM requests a review of the inventory of the Eligible Machines and Programs, the parties will update and mutually exchange the inventory list last created. IBM may change the Total Service Charge for the new Charging Period if a change in the inventory is discovered. If discrepancies are discovered in the inventory, the difference will be credited or charged later according to the section "Adjustment and Recalculation of Charges".

## **9.2. Required Consents**

The Client is responsible for promptly obtaining and providing to IBM all required consents necessary for IBM to provide the Services in compliance with this Agreement, e.g the owner's agreement in case it is not the Client owned Machine. A required consent means any consents or approvals required to give IBM and its subcontractors the right to access, use and/or modify (including creating derivative works) the hardware, software, firmware and other products you use, without infringing the ownership or license rights (including patent and copyright) of the providers or owners of such products.

The Client will indemnify, defend and hold IBM, its affiliates and subcontractors, harmless from and against any and all claims, losses, liabilities and damages (including reasonable attorneys' fees and costs) arising from or in connection with any claims (including patent and copyright infringement) made against IBM that occur as a result of the Client's failure to provide any required consents.

IBM will be relieved of the performance of any obligations that may be affected by the Client's to promptly provide any required consents.

## **9.3. Client Responsibilities**

In performing Services, IBM must rely on the due performance of the Client's obligation. In the event the Client should not meet its obligations in due time and this should lead to delays and/or extra costs, IBM may – notwithstanding any additional right granted by law – request corresponding changes to the time schedule and prices/charges. Moreover IBM is entitled – after granting a reasonable grace period to comply – to terminate the Agreement. However, the mere expiration of any such grace period granted by IBM will not lead to an automatic cancellation of the Agreement.

The Client will

1. pay all communication charges at the Client end in connection with use of the Services, unless otherwise agreed;
2. make sure that all access codes provided by IBM are used exclusively by the designated authorised requestors;
3. provide IBM with the necessary and available diagnostic information (including product or system information) in connection with problems relating to the Eligible Machines and, if applicable, Programs for which support is requested;
4. use the information received within the scope of this Service exclusively for support of the IT requirements within the Client's enterprise;
5. without the prior written consent of IBM, neither cede the described Services nor the Client's rights or obligations within the scope of this Agreement, or otherwise transfer or pass them on. Every attempt in this respect will be void;
6. install on the Client's Eligible Machines the Programs specified by IBM that are needed for the use of electronic tools for remote access;
7. provide IBM with the necessary remote access to the Client's Eligible Machines and grant the necessary authorisations to enable IBM to provide the Services via the remote access;
8. be responsible for reasonable protection of all Programs and data stored on the Eligible Machines during Client-authorized remote access by IBM;
9. provide IBM with sufficient, free, and safe access to its facilities and systems (including remote access) and will support IBM by providing information, personnel and other resources that are necessary for the provision of the Services. This also includes that the Machine is in a safe condition;
10. communicate inventory changes to Machines, processors, parts and Programs within one (1) month.

11. follow the Service instructions that IBM provides (which may include installing Machine Code and other software updates either downloaded from an IBM Internet Web site or copied from other electronic media);
12. before IBM provides Service, where applicable, follow the problem determination, problem analysis, and follow the service request procedures that IBM provides for the Machine;
13. inform IBM of changes in a Machine's location.

## **10. Items not Covered**

Unless otherwise agreed upon, repair and exchange Services do not cover:

1. accessories, supply items, consumables (such as batteries and printer cartridges) and structural parts (such as frames and covers);
2. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper Maintenance by the Client or a third party;
3. Machines with removed or altered Machine or parts identification labels;
4. failures caused by a product for which IBM is not responsible;
5. Service of Machine alterations;
6. Service of a Machine on which the Client is using capacity or capability, other than that authorized by IBM in writing.; or
7. Service outside the agreed Service hours.

To the extent required by the Client, IBM will provide any of the above mentioned Services not covered by Maintenance and will charge the Client for these Services on a time and material basis.

## **11. Charges**

### **11.1. Total Service Charge for one Charging Period**

The Total Service Charge to be paid by the Client is specified on the Order Form. It is based on the inventory of Eligible Machines, the agreed Services, the agreed agreement Term and the method of payment chosen by the Client and, if applicable, the Client's Services (cf. separate "Client Services" document).

Determination of the Total Service Charge will appropriately take into account the warranty period and the charges for any extended warranty Services (Warranty Service Upgrades).

IBM may increase recurring Service charges for Services provided under this Agreement, by giving the Client three (3) months' written notice. An increase applies on the first day of the invoice or Charging Period on or after the effective date IBM specifies in the notice.

For Eligible Machines or Services that are included during the Agreement Term, the charges valid at the time of inclusion will apply.

Unless otherwise specified on the Order Form, IBM will invoice the Total Service Charge to the Client in quarterly amounts in advance. At the end of each Charging Period, IBM will adjust the charges, as detailed in the section "Adjustment and Recalculation of Charges" and will charge or credit arising discrepancies if applicable.

If required by business requirements of the Client, by mutual arrangement invoicing may be split according to the Client's wishes.

## **11.2. Adjustment and Recalculation of Charges**

Changes may arise during a Charging Period that were not considered in the Total Service Charge at the beginning of the respective Charging Period.

At the end of each Charging Period, IBM will compare the actual charges for all Services provided for the Client against the Total Service Charge paid for that Charging Period.

The Total Service Charge paid for the Charging Period will only be adjusted, however, if the inventory changes lead to a discrepancy of 5% or more of the Total Service Charge.

If the actual charge for the Charging Period is above the Total Service Charge by 5% or more, the difference will be invoiced to the Client. If the actual charge for the Charging Period is below the Total Service Charge by 5% or more, the difference will be credited to the Client.

If the Client has not fulfilled its obligations from the "Client Services" document, IBM shall be entitled to also charge the value of the Services later and to take this value into consideration accordingly for the new Charging Period.

Unless otherwise specified on the Order Form, new Machines/Services added to this Agreement will be considered when charging the difference.

## **11.3. Total Service Charge for the Next Charging Period**

Before each Charging Period ends, IBM will promptly notify the Client of the new Total Service Charge for the subsequent Charging Period, which will come into effect as from the date specified in the notification.

If the Total Service Charge for the new Charging Period is not agreed in good time, IBM will charge the same amount for the first quarter of the new Charging Period as applied to the last quarter of the previous Charging Period. This amount will be taken into account against the Total Service Charge for the new Charging Period.

## **11.4. Change of Charges related to Machines and Services**

An increase of charges will only be possible if announced in writing with a period of three months and will not apply to a Charging Period that begins before the effective date of the charge increase.

A price reduction announced by IBM will become effective in the first Charging Period following the effective date of the price reduction specified in IBM's notification.

## **11.5. Obligation to Release Orders**

Services for which the Client prepays must be used within the applicable contract period. Unless otherwise agreed upon, IBM does not give credits or refunds for unused prepaid Services.

## **12. Termination**

1. If the Client or IBM does not wish any automatic renewal as detailed in the "Term" section, the respective party will communicate this to the other party in writing three months before the end of the agreed term.
2. Either party may terminate this Agreement for the first time in writing with a period of notice of three months prior to the end of the agreed Term.
3. The Client may terminate this Agreement in writing within four weeks from communication of a charge increase if IBM increases the charges for a new contract year to such an extent that the Total Service Charge of the next contract year for the same inventory of Eligible Machines, Eligible

Programs and Services rises by more than 8%. In this case, the required contract end can be at the earliest on the last day before the charge increase takes effect.

4. At the end of the agreed term, the Client may terminate the Service for individual Machines, Programs or additional Services (if this has been agreed) for the first time with three (3) months written notice prior to end of the respective contract year.
5. The Client may terminate the Service for individual Machines beforehand in writing if a different Machine is included in an IBM Service/Maintenance Agreement that replaces the terminated one and is comparable to it in terms of its nature and in relation to its function or task.
6. The Client may also terminate additional Services (if such have been agreed) beforehand in writing if the terminated Service is replaced by equivalent Services within an IBM Service/Maintenance Agreement.
7. Regardless of this, the Client may terminate a Service for a Machine in writing with a period of notice of one month prior to the end of a calendar month if use of the Machine within the Client's enterprise is permanently and finally ended and the Machine is not replaced by a Machine that is comparable to it in terms of its nature and in relation to its function or task. By terminating, the Client also confirms the permanent dismantling or rather the final end of the use of the respective Machine within the Client's enterprise. The Client may also terminate a Service in writing if the eligible location, for which the Service is provided, is no longer controlled by the Client, because of closing or sale of the facility.
8. For the Service, IBM also relies on spare parts suppliers for both non-IBM products and its own Machines. If such suppliers terminate spare parts deliveries, IBM may terminate the Service in writing with a period of notice of at least three months.  
In the event that the contractual terms agreed between the respective manufacturer and IBM, or the manufacturer's support policy terms, have been changed, IBM reserves the right to adjust the charges and/or the contract terms and/or the terms and conditions, or to terminate this Agreement without notice. The Client will also have the right to terminate this Agreement without notice, if the Client has not granted its consent to any adjustments made by IBM. Notice of termination must be made in the written form.
9. If the parties are in agreement to change the commitment to an Agreement with Yearly Term after the end of the agreed term, the Client and IBM may then terminate the Agreement in writing by the end of one contractual year with a period of notice of three months prior to the end of the respective contractual year. All other termination possibilities, e.g. for individual Machines, absence of spare parts deliveries or in the event of a price increase, will continue to apply.
10. In the case of a reduction of Machines and Services by more than 20%, IBM has the right to recalculate the Total Service Charge and adjust the discounts accordingly.

## **13. Contact Information**

The Client agrees that IBM Deutschland GmbH, based at IBM-Allee 1, D-71139 Ehningen (Germany) (called "IBM Deutschland" in the following) may collect, process and use the Client's contact information for the purpose of the performance of the contractual relationship and for promoting the business relationship with the Client. "Business Contact Information" is business-related contact information that the Client has disclosed to IBM Deutschland, in particular, names, job titles, business addresses, telephone, and fax numbers as well as e-mail addresses of Client employees or of third parties. The Client also agrees that such Business Contact Information may be disclosed to the IBM companies and IBM Business Partners and their respective subcontractors or that such contact information may be processed and used by these companies in relation to the intended purposes specified in this paragraph of the present GTCs. IBM companies means the International Business Machines Corporation based in Armonk, New York (USA) and their affiliated group companies.

The Client agrees that such Business Contact Information may be transferred to countries outside the European Economic Area in conformity with the intended purposes specified in the two preceding paragraphs, provided that IBM Deutschland will ensure an adequate level of data privacy. Such an adequate level of data privacy may be achieved through the use of standard contractual clauses published by the Commission of the European Union or any other contractual agreement approved by the competent data protection regulatory authority.



## 14. Processing of Client Data by Order

IBM explicitly indicates to the Client that it may be necessary to access the Client's systems from countries outside the EU/EEA (if necessary) for the purpose of the Service provision by IBM. If IBM, or any third party commissioned by IBM, has accessed the Client's systems or other storage media temporarily (e.g. when performing system tests or Maintenance Services), the Client must ensure that the Client's personal data or that of any third party will not be accessed in such a case. The terms of this section will also apply if IBM, or any third party commissioned by IBM, could be able to access the Client's data or the data of any third party otherwise during IBM's Service provision (e.g. if data is transferred by the Client) or in any other cases in which IBM, or any third party commissioned by IBM, processes data by order of the Client (for example, during the disposal of storage media).

The Client will inform IBM in writing if it is unable to fulfill this obligation in any particular case. The Parties will conclude an agreement on the processing of Client data by order in this case, if this is required under applicable law. This will be made by agreeing an Attachment to the "IBM Supplementary Terms and Conditions (STCs) for Processing Client Data by Order according to §11 BDSG" ("STCs for Processing Client Data by Order"). These STCs (as amended) can be found on the Internet at [www.ibm.com/terms/de](http://www.ibm.com/terms/de) or will be provided to the Client by IBM upon request.

The terms set out in the section regarding "Subcontractors" of the STCs for Processing Client Data by Order will apply to those cases described in the preceding paragraph. IBM will agree EU Standard Contract Clauses with all Service providers based outside the EU/EEA in these cases, particularly in accordance with the Client's (written) power of authority prescribed therein, if a reasonable level of data privacy cannot be ensured otherwise.

### IBM's Service Centers

A large number of incidents are handled by IBM's Service Centers (called the "Center(s)" in the following). These Centers are based in different countries worldwide. The reserve capacities of these Centers are such that a trouble-free continued operation of the Centers will be ensured, even in the case of a failure of the public power supply network. These Centers are able to manage all calls from Clients in the case of an incident according to different incident categories and to forward such calls according to competence, in order to find a solution to the incident in question in each particular case. The Incident Management Systems (IMS) used at these Centers will support the respective Client requests, according to the Services required by the respective Client and based on given internal processes. Each incident message received by the Centers will be recorded by means of problem tickets that either already exist or in new tickets and they will be tracked up to the respective solution. A response or an escalation will be triggered, as agreed by contract, if necessary, provided that this has been agreed with the Client.

The problem ticket systems used at the Centers enable easy identification and tracking of existing tickets or of tickets not yet resolved, where the SLA threshold values defined jointly with the Client will be considered in each particular case. All notifications regarding operational malfunctions concerning the contractually agreed product portfolio will be accepted by specially trained staff members (incident reception), and will be classified, analyzed and resolved immediately, if possible. A knowledge-based system will be used for the analysis of errors. Any unresolved problem tickets, for which the Centers are not responsible, will be recorded, prioritized and forwarded to the lower-tier support functions of IBM, of the Client, or to third parties.

All incidents will be processed at a Center in several steps, i.e.

- i) the identification whether a contractual relationship with the caller's company exists will be made by means of the product type and the respective serial number of the Machine in question;
- ii) if an incident (entry of a problem ticket in the IMS system) has been received by a Center for the first time, the caller's contact details and the incident itself will be recorded in the system and will be stored in systems operated worldwide, so that the caller can be identified as quickly as possible if another call is received and all incidents already reported to the respective Center can be tracked, in order to be able to process the incident in question efficiently;

- iii) the incident message will be processed within IBM's worldwide support infrastructure by the respective staff member in charge of the incident in question;
- iv) it may be necessary that the responsible staff member requests the Client to transfer specific data, so that an analysis of such data can be made for a comprehensive incident analysis and in order to eliminate the incident in question, or the responsible staff member will access the affected Machine or the Client's infrastructure remotely, after prior consultation with the Client's responsible staff member.

The Client must ensure that IBM cannot access any other personal data of the Client when performing an incident analysis and the elimination of the incident. More details can be found in the terms of the "STCs for Processing Client Data by Order".

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