



Advanced E-Mail-Marketing Technologies

## General Terms and Conditions

### 1. General

1.1 These general terms and conditions of XQueue GmbH (hereinafter „XQueue“) apply to any business relationship with entrepreneurs (Section 14 BGB), public law entities or special funds under public law (hereinafter „contracting partner“). Deviating provisions of the contracting partner or supplementary provisions shall only become valid if and insofar XQueue has expressly agreed with their validity.

1.2 The relevant latest version of XQueue’s general terms and conditions is applicable. The contracting partner will be informed about amendments or additions within an appropriate period of notice of at least four weeks. Such modifications will be effectively involved according to the announcement if the contracting partner does not object within four weeks after receipt.

If the contracting partner objects within the time limit XQueue is entitled to terminate the contract with a notice period of four weeks. XQueue will indicate this in the announcement.

1.3 The general terms and conditions under consideration also apply to all future business relations with the contracting partner, even if they are not agreed upon again explicitly.

### 2. Specification of Services

2.1 As far as XQueue provides ASP services (i.e. use of software on XQueue servers via a web interface), the demarcation point for the contractual services will be the router output of the XQueue computer center. Provision and maintenance of connection to the internet as well as acquisition and provision of the required hardware and software are the responsibility of the contract partner. XQueue does not guarantee successful delivery of emails.

2.2 The exact scope of performance results from the respective product specification in the version which is valid at the time of contract conclusion. XQueue will make the effective product specification available to the contracting partner at any time. XQueue is entitled to have the contract entirely or partially performed by qualified third parties (like for example the internet connection of its computer center).

2.3 As far as the contracting partner transports data - regardless in which kind of form - to XQueue, the contracting partner will produce backup files of this data onto own storage media. XQueue will back up its servers regularly and protect these against encroachments of unauthorised persons with reasonable technical and economical effort. In the event that data is nevertheless lost, the contracting partner will transfer the relevant data onto the XQueue servers again free of charge. As far as data is created by the XQueue system for the first time (particularly reporting data), XQueue will save this data according to the current technical standard once every workday. The backup takes place automatically onto storage media which are not allowed to be deleted or newly recorded onto during the following seven days. Backup data older than seven days will not be available.

2.4 Delivery times and times of performance are extended to a reasonable extent if XQueue is prevented from fulfilling its duties due to force majeure or other unforeseeable and extraordinary events that, despite reasonable diligence, cannot be avoided. An event in terms of sentence 1 are in particular war, rebellion, strike, lock out, fire, flooding and other not foreseeable interruptions of operations.

### 3. Conclusion of contract

3.1 XQueue reserves the right to accept or decline bookings and orders at its own discretion. Orders and requests will be considered accepted latest with the beginning of the provision of services (e.g. submission of access data for the ASP services).

### 4. Obligations/duties to co-operate of the contracting partner/ contents

4.1 The contracting partner is expressly obliged to ensure compliance with the national legal provisions in the recipient country and – in case XQueue IP addresses are used – preservation of whitelists and sender reputation when using contractual products (for testing purposes as well). The contracting partner is particularly obliged to ensure that:

- Written consent to submission and analysis of electronic messages is at hand for each email recipient
- The sender responsible for the content is clearly recognizable and the emails include easily identifiable legal details with the required information
- The possibility to withdraw consent to newsletter submission has been implemented according to the present legal requirements and
- No illegitimate tracking as specified in the present regulations and provisions (in particular single user tracking) is taking place

4.2 The contracting partner will appoint a contact person for complaints including the person’s telephone number and email address. The response time for requests addressed to this contact person will be 24 h maximum on workdays.

4.3 Furthermore, the contracting partner undertakes to render the cooperation measures required for execution of orders. The contracting partner is aware that XQueue is dependent on the contracting partner’s cooperation, in particular provision of data in suitable form and quality, in order to realize message delivery via electronic channels.

4.4

On discovering defects and faults the contracting partner is obliged to immediately inform XQueue of these, specifying a concrete error description in writing. In such a case the contracting partner provides XQueue with all paperwork and information required for analysis and removal of faults. Should a check of a reported incident prove that the fault did not occur within XQueue's area of responsibility, XQueue can bill the contracting partner for checking the error message at the current price.

4.5  
When transferring any data to the XQueue system, the contracting partner ensures by using suitable tools, especially by using virus scanners or firewalls, that unauthorized access of the data of the contracting partner and the transmission of damaging data is prevented or stopped.

4.6  
When using the services covered by the contract, the contracting partner will comply with all applicable laws and other legal provisions. In particular, it is prohibited to send or put data (also address data) and contents online that infringe against provisions of law or offend common decency, external industrial property rights or copyrights, or other rights of third parties. The contracting partner is responsible for the provided data and contents. The contracting parties agree that XQueue is merely a technical service provider and transmitter of the emails, and in so far as is not obliged to check the data or contents, neither from legal, factual nor other points of view; XQueue, however, reserves the right to carry out such checks at any time.

4.7  
Upon infringement of the contract partner's duties mentioned in this section (4), XQueue is entitled to entirely or temporarily block data of the contract partner or to discontinue contractual performance in some other way. Is the contracting partner responsible for the infringement, they will recompense XQueue the incurred damage and insofar will keep XQueue indemnified against possible claims of third parties.

4.8  
XQueue can amend the service covered by the contract at any time, at a rate reasonable for the contracting partner and considering that the performance characteristics in accordance with the agreed service description are continued to be substantially met. The amendment is reasonable if it is required for an important reason. This is the case e.g. with disturbances of the service provision by a sub-contractor or if the range of services has to be amended or supplemented on the grounds of technical or legally related changes.

4.9  
In cases where the contractual partner's acceptance is obligatory (in particular programming services rendered as work performance for configuration, amendments or other purposes), it must take place immediately on the acceptance date, alternatively one week after the notification of readiness has been announced by the provider. When no acceptance or repudiation of the acceptance has been provided during this period, the service is considered accepted. In any case the acceptance shall be deemed to have taken place if the service is used without reservation.

## 5. Rights of Use/ Usage Data

5.1  
When XQueue provides ASP services for the contracting partner, XQueue grants the contracting partner, for the duration of the contract, the non-gratuitous, non-exclusive, non-transferable, non-sublicensable right to use the application on the XQueue systems (at the XQueue data processing centre). The application will not be allocated to the contracting partner. As far as XQueue provides new versions, updates and upgrades of the application during the duration of the contract, the aforementioned right of use also applies.

5.2  
When XQueue provides the contracting partner with software to install on own computer systems, XQueue will confer the contracting partner (unless otherwise regulated in a separate license agreement) the non-gratuitous, non-exclusive and non-sublicensable right to use the application on one of their own computer systems (single-user license).

5.3  
If XQueue provides the contracting partner with user documentation, the contracting partner is entitled to print and copy it exclusively for the purpose defined in the relevant contract. In any case the documentation may only be altered after coordination with XQueue (including removal of existing trademark indication and removal of references to the origin of the XQueue documentation). In all events, copyright to the documentation remains with XQueue.

5.4  
Unless otherwise regulated in a separate license agreement the contractual partner is not entitled to use, copy, or download the application or make it available to third parties outside the stipulated user circle over, and beyond the contractually agreed purpose or for any other than their own files. The use of XQueue technology is solely permitted for own purposes.

5.4  
Transfer of rights of use and other rights shall be excluded to the extent permitted by law. Ownership of the software and the appertaining documentation remains entirely with XQueue. More detailed regulations for use will be stipulated in the individual contract of use.

5.5  
In case XQueue places a company or product logo and/or any other reference to XQueue in the GUI, other software components or the appertaining documentation, the contracting partner will leave the relevant markings unchanged, even if the XQueue product is deployed as a "white label agency solution".

5.6  
XQueue provides the contracting partner with a login and a password (access data) for the use of the XQueue technology. The contracting partner will change the initial password into a new one only known to him immediately at his first log-in. The contracting partner will make the access data available to entitled members of his organisation only. Apart from this the access data will be kept secret. The contracting

partner undertakes to commit his employees to handle the access data confidentially. The contracting partner will inform XQueue immediately if it is suspected that the access data could have become known to unauthorised persons.

## 6. Remuneration; Payment; Maturity

- 6.1  
The prices that were individually agreed and confirmed in writing shall apply. If no prices have been agreed XQueue's list prices will apply.
- 6.2  
If the agreed prices are based on the contractor's list prices and the contractual performance is due more than four months after conclusion of the contract, the list prices effective at the time of performance of the contractual service shall apply (less an agreed percentage or fixed discount as appropriate).
- 6.3  
All prices are understood plus the legal value added tax valid at the time.
- 6.4  
As far as nothing else is agreed, payments are due immediately after delivery and/or service and billing without any trade discount or other deductions.
- 6.5  
If arrears of more than four weeks occur, all granted deductibles, early payment discounts or other agreements that reduce the remuneration become obsolete. In this case, the original price that was calculated without deductibles or early payment discounts and/or other agreements that reduce the remuneration, is valid. Furthermore, should arrears of more than four weeks occur, XQueue has the right to terminate provision of services to the contracting partner, including services from other contractual relationships.
- 6.6  
XQueue is entitled to execute pending deliveries or services only against advanced payment or security deposit if, after conclusion of contract, circumstances become known which are of a nature to considerably reduce the contract partner's creditworthiness and to jeopardize payment of XQueue's outstanding demands from the relevant contractual relationship.
- 6.7  
Monthly or annual costs are each invoiced in advance.
- 6.8  
XQueue reserves the right to adjust prices - however, earliest six months after the conclusion of the contract. The contracting partner will be informed of this in writing, at least six weeks before taking effect. A notice via email is equivalent to a written notice. In case of a price increase, the contracting partner has the right to terminate the contract at the time of the price alignment coming into effect.

## 7. Compensation; Retention; Delegation

- 7.1  
The contracting partner can offset claims arising from this contract only against undisputed or legally determined claims arising from this contract; any right of retention may only be enforced from such claims that are based on the same contractual relationship and are also either legally recognised or indisputable.
- 7.2  
The contracting partner may assign his claims deriving from the contract to third parties only with the written consent of XQueue.

## 8. Warranty

- 8.1  
The contracting partner shall perform a functional test of the contractual services in the prospectively relevant system environment without delay upon receipt or upon disclosure of the access data. XQueue shall be informed of defects occurring within one week after receipt of the services or disclosure of the access data. Likewise XQueue must be informed without delay about any defects occurring subsequently. Assertion of any warranty claims shall be excluded if the contracting partner fails to notify XQueue accordingly.
- 8.2  
XQueue ensures system availability (access to ASP services, email dispatch within stipulated time etc.) of 98% per calendar year. This does not include time spent on care and maintenance work (updates etc.) about which the **customer (contracting partner?)** has been informed beforehand and which shall not exceed 5 hours per month.
- 8.3  
XQueue staff is principally not authorised to make promises concerning the features of the products, the extent of the service or other facts concerning the products. These only apply as far as such commitment is confirmed by the XQueue management in writing.
- 8.4

XQueue is entitled to make the owed subsequent performance dependent on the contracting partner effecting the due payment. However, the contracting partner is entitled to retain a portion of the purchase price appropriate in relation to the defect.

8.5

Claims for compensation become time-barred after 12 months from provision of services or, if acceptance is required, 12 months from acceptance. Claims for damages will, however, always become time-barred within the periods stipulated by law.

## 9. Liability

9.1

XQueue is – on whatever legal grounds - liable for damages only:

- in the case of intent,
- in the case of gross negligence on the part of corporate agents or executive staff,
- in the event of culpable injury to life, body and health,
- in the event of defects which have been maliciously concealed,
- when guarantee has been assumed by XQueue and
- for claims arising from the German Product Liability Act (Produkthaftungsgesetz)

9.2

In the case of culpable breach of fundamental contractual obligations XQueue shall also be held liable for gross negligence on the part of non-executive employees, and for minor negligence, in the latter case, however, limited to reasonably foreseeable damage that is typical of the contract. Fundamental contractual obligations are such obligations that protect essential contractual legal positions of the purchaser, which the contract must guarantee in view of its content and purpose; furthermore, fundamental contractual obligations are duties the fulfilment whereof is subject to the proper execution of a contract and the observance of which the purchaser regularly relies on and may rely on. Any further claims for damages are excluded.

9.3

For financial loss damages XQueue's liability is, in any case and irrespective of the legal grounds, restricted to EUR 25,000 per year and case of loss, in the event of damage to data storage media the obligation to indemnify does not include the expense for recovering lost data.

9.4

If the contracting partner claims for loss of data he has to prove that he has attended his duty to safeguard own data against deficit or other loss as common in trade.

9.5

Insofar as liability for damages towards XQueue is excluded or limited this shall also apply in view of the personal liability of XQueue's clerks, employees, personnel, legal representatives and agents.

## 10. Contract; Amendment; Termination

Unless otherwise agreed existing contractual relationships with XQueue are valid for an indefinite period and can be terminated by either side giving 6 months' notice to the end of the month. The right to terminate for good cause remains untouched. In case of an ordinary termination by the contracting partner existing prepaid volumes will expire at the time the termination takes effect. In case the termination is effected by XQueue, the prepaid credit will expire at the time the termination takes effect insofar as the contracting partner is responsible for the grounds for the termination. If the termination on the side of XQueue is effected for grounds where the contracting partner is not responsible, XQueue will perform a pro rata refund of the prepaid credit existing at the time when the termination is effected to the contracting partner.

## 11. Transfer and Use of Data

11.1

If the contracting partner uses data of third parties or transmits data of third parties to XQueue for processing he is obliged to care for the adherence to the legal stipulations concerning data protection and has to guarantee that this data is allowed to be further processed, exempt from rights of third parties and respectively with the consent of the concerned third party.

11.2

Should XQueue, in this context, be made responsible for any kind of infringement of the contracting partner, the contracting partner shall indemnify XQueue from such claims and undertakes to bear all costs deriving from this. This also includes the costs that are connected with a reasonable defensiveness of these claims.

## 12. Confidentiality, Mentioning as Reference

12.1

The parties agree to treat the contents of the concluded agreements and all business and company secrets of the other party as confidential and not provide these to any third parties.

12.2

The obligation to confidential treatment shall exclude information that is generally known or that has been shared by third parties without violation of a confidentiality obligation, or information the disclosing party is obligated to divulge by law or official order.

12.3

XQueue is entitled to mention the contracting partner as a reference customer (on the website, in advertising material etc.), to publish a press communiqué about the collaboration and to use the contracting partner's logo in this context. The contracting partner can interdict being named and being mentioned as reference customer at any time in written form.

**13. Information and Technical Advice**

13.1

Information and recommendations given by XQueue are noncommittal and exclude any liability unless XQueue has undertaken expressly and in written form to provide information and recommendations. The contracting partner will perform own tests as to whether a product suits even special applications of the contracting partner. Advice and information from XQueue do not constitute a basis for promised characteristics of XQueue's products.

**14. Place of Performance, Court of Venue, Choice of Law**

14.1

Place of Performance for all obligations of the contracting partner and XQueue is Offenbach am Main unless otherwise agreed or another place of performance results from the nature of the obligation.

14.2

Offenbach am Main shall be agreed as the exclusive venue of jurisdiction. XQueue shall in addition have the option to proceed against the contracting partner at his legal domicile.

14.3

German law shall apply under exclusion of the UN sales law (CISG).