General Sales Terms

1. GENERAL SECTION
2. DEFINITIONS
   1. *Agreement*: agreement of which the General Terms and Conditions are an integral part.
   2. *Acceptance Test*: a test that enables Client to determine whether the Services meet the agreed Functional specifications.
   3. *API*: application programming interface, functionality of software which can be used through the internet by Apps, Software and/or Websites.
   4. *Apps*: software to be delivered by Merkle which is specifically developed to be used on mobile devices (e.g. smartphones, tablets, and wearables).
   5. *Availability*: the percentage of time during Working hours in which Client can make use of a Service.
   6. *Client*: Merkle’s other party in an Agreement.
   7. *Content Creation*: A service consisting completely or partially of developing photo’s, illustrations, video’s, copy, with the purpose to share those in the context of Community Management on social media and/or online platforms.
   8. *Community Management*: a Service consisting completely or partially of, whether together or not with Client, rendering activities for a brand or company of Client, with the purpose of presenting the brand or company on several social networks and/or online platforms.
   9. *Data enhancement*: Service consisting of verifying and improving data files based on agreed rules.
   10. *Defect*: an imperfection in the goods, Software, Website, Hosting or MSP service due to which this does not meet the agreed Functional specifications, or which occurs during the use thereof.
   11. *Delivery Ready for operation*: completion of the full Implementation.
   12. *Delivery*: the actual provision of goods and/or Software and/or Services via a medium, including the internet and/or a WAN-connection.
   13. *Discontinuity*: status in which one of the parties finds itself, either a petition for bankruptcy filed in good faith by the relevant party and/or another party, or being bankrupt, or a situation of a petition for suspension of payment filed in good faith, either by the relevant party and/or another party, or a suspension of payment, or a situation of attachment of the objects, Software, and/or software underlying (the) MSP service(s) involved in the execution of the Agreement or the termination of relevant business operations by the relevant party.
   14. *Functional specifications*: the written specifications included in a document which describes the functions and details that are to have been included in the Software and/or which the Software and/or corresponding Services are to meet.
   15. *General section*: the present general section of the General Terms and Conditions.
   16. *General Terms and Conditions*: these general terms and conditions of delivery of Merkle including the applicable addenda between parties.
   17. *Group*: the group of entities of which the user of these General Terms and Conditions is a member, pursuant to article 2:24b of the Dutch Civil Code.
   18. *Hosting*: Service consisting of making Software, data (e.g. .images), API’s and/ or Websites accessible to Client from another location, through the internet, by Implementing these on a centrally located physical or virtual server, not including MSP services.
   19. *Implementation*: Service consisting of implementing, rendering operational, structuring, adjusting, parametrising, and preparing the Software and/or Websites to be put into operation and familiarizing the user with the functionality - which is not a Training.
   20. *MSP service*: (Managed Service Providing) Service that provides Client or third parties on behalf of Client with specific functionality from another location, through the internet.
   21. *Merkle*: name for the other party of Client, namely Merkle Netherlands Group B.V. or an operating company that is part of the group such as Merkle Nederland CRM B.V., Merkle Nederland DMA B.V., Merkle Nederland CX B.V., that uses these General Terms and Conditions.
   22. *Product Owner*: role within SCRUM, is responsible to Client for decisions regarding functionality.
   23. *Requirements*: a set of requirements issued by Client to Merkle in advance, at the conclusion of the Agreement, the agreed upon work must meet the requirements.
   24. *Samples*: copies or examples of (a part of the) items to be developed by Merkle, including, but not limited to proofs and/or types, test files and/or prototypes of websites and/or CD-ROM that enable Client to check if that which has been or will be manufactured by Merkle or by a third party called in by Merkle meets the agreements made by parties in respect thereto.
   25. *Scope*: a set of User Stories describing the agreed upon work the moment the Agreement was concluded., parties can continuously change the scope during the project in accordance with article 24 of these General Terms and Conditions.
   26. *SCRUM*: an iterative, incremental, and agile development method.
   27. *SEA (search engine advertising) SA (social advertising) and/or link building.*
   28. *Search Engine Marketing*: A Service consisting completely or partially of SEO (search engine optimisation).
   29. *Service*: activities to be performed by Merkle for Client in the context of this Agreement.
   30. *SLA (Service Level Agreement)*: document in which arrangements can be made between parties on the contents and quality of the service(s) to be provided, also including the arrangements on how such a service is to be managed. An SLA will function as an Appendix to an Agreement.
   31. *Software*: the computer software to be supplied to Client for the Services of Merkle or to be made accessible by means of Hosting.
   32. *Sprint*: a collection of User Stories which are fulfilled by Merkle within a certain time frame, every sprint results in a product ready for operation.
   33. *Third party supplier*: a supplier with whom Client enters or has entered into an agreement related to establishing Services and/or Software.
   34. *Training*: form of knowledge transfer to be organized by Merkle aimed at using items, Software, Websites and/or (MSP-)Service to be provided or supplied by Merkle.
   35. *Website*: a location and/or functionalities on the internet, whether protected or otherwise, accessible via a URL, belonging to Client, which is not offered by Merkle as an MSP service.
   36. *Workdays*: calendar days save weekends and Dutch public holidays, on the understanding that every year the 5th of May counts as a workday.
   37. *Working hours*: the hours between 9 AM and 5 PM on workdays, or - in case of interim services, eight consecutive hours between 8 AM and 6 PM.
   38. *User Story*: one or more Requirements of Client converted into a (functional) description, in accordance with SCRUM methodology.
3. APPLICABILITY OF THE TERMS AND CONDITIONS OF SALE
   1. The Terms and Conditions of Sale apply to all of Merkle’s Offers, as well as to all Agreements and any ensuing Agreements between Merkle and Client under which Merkle provides Services to Client.
   2. Applicability of the Client’s general purchase, delivery, and payment conditions or any other general or special terms and conditions of Client are explicitly excluded. Each individual stipulation to the contrary will only be valid if and to the extent that Merkle has accepted such stipulation to the contrary in writing.
   3. If any provision of these Terms and Conditions of Sale is null and void or is voided, the other provisions of these Terms and Conditions of Sale remain in full force. Merkle and Client will in such cases consult with each other to agree on new provisions replacing void or voided provisions.
4. FORMATION OF THE AGREEMENT
   1. Unless Merkle stated otherwise in writing, all Offers made by Merkle are without obligation. If the Offer states a term, the term only regards the validity of the Offer and does not affect its lack of obligation.
   2. Client guarantees that the information provided by them or on their behalf to Merkle and based on which Merkle has made its offer is correct and complete.
   3. An Agreement between Merkle and Client will be concluded if and to the extent that Client accepts an offer in writing. An offer may among others be accepted by signing an Offer or Agreement.
   4. A deviating order confirmation of an Offer constitutes an invitation to Merkle to submit a new offer. Such a new offer may be accepted by Client in the same manner as set out in article 3.3.
   5. An Agreement may also be concluded if both parties sign a document drawn up by Merkle which specifies which items, Software and/or Services will be purchased by Client and at what prices and rates, as well as any other details.
   6. Verbal promises or agreements by or with Merkle’s staff will not be binding on Merkle until and to the extent that they have been recorded in writing and validly signed by Merkle.
5. PRICES AND HOURLY RATES
   1. The prices and hourly rates related to items and/or Services as referred to in an Offer apply for the validity period of the relevant offer.
   2. If an Agreement is drawn up for the execution of Services, the prices and hourly rates agreed upon will explicitly be included therein. Such prices will only serve as indications. Invoicing will always be based on actual costs, unless explicitly agreed otherwise.
   3. All prices and rates are given in euro, excluding VAT, and excluding government levies.
   4. Travel expenses as well as any accommodation expenses will be invoiced separately.
   5. Cost for royalties, licenses and/or (user) fees regarding images, fonts, and such, will be invoiced separately. In such cases, the terms of the Third-Party supplier of those materials apply in respect to the Client. It is the Client’s responsibility to (periodically) check whether those terms are still complied with. Client indemnifies Merkle for claims from Client or the Third-Party supplier of the aforementioned materials, regarding non-compliance with the terms connected to using the material.
   6. Unless agreed otherwise in writing by the Parties, the execution of Services or other activities outside of Work Hours will be subject to the surcharge as laid down in the Agreement and/or offer.
   7. Merkle is entitled to raise the agreed prices and rates annually by a percentage which, at the time Merkle determines the price increase, at least equals the most recent price index “Cao-lonen, contractuele loonkosten en arbeidsduur (2010 = 100)” of the previous year as published by Statistics Netherlands (CBS). Prices and rates will be changed only as of January 1st and Merkle will inform Client of such changes in writing one (1) month before the effective date at the latest. For those parts of the service agreed on that Merkle acquires from other suppliers and resells to Client, Merkle has the right to charge on the increase of the prices and rates of those suppliers to Client.
   8. If, according to the Agreement concluded between the parties, Client consists of several natural persons and/or legal entities, each of these natural persons and/or legal entities is jointly and severally liable towards Merkle for performance of the Agreement.
6. INVOICING AND PAYMENt
   1. In principle, Services are invoiced in arrears, with the exception of Services resulting from agreements having a transaction value exceeding € 100,000 (in words: one hundred thousand euro), for which, at Merkle’s discretion, a part of up to 50 % (fifty percent) at the most may be invoiced in advance.
   2. Execution of extra Services not foreseen or agreed upon in the original assignment, will constitute additional work and, following Merkle’s reporting such to Client, will be delivered or carried out in accordance with Merkle’s applicable rates at that point. Client accepts that delivery or execution of additional work may affect delivery periods, completion time and/or costs.
   3. All invoices are to be paid by Client without any form of setoff within fourteen (14) days of invoice date unless Parties agreed otherwise in writing.
   4. Client is in default by the mere expiry of a payment term. In that case, all claims of Merkle are immediately due and payable.
   5. If Client fails to or does not timely pay Merkle the amounts due, Client will owe Merkle, without a warning or notice of default being required, the then applicable statutory interest for trade agreements on all amounts that were not paid on the last day of the payment term as from that day, plus two percent (2%) of the invoice amount.
   6. Interim reminders or overviews of outstanding invoices sent to Client expressed in principal sums never entail the forfeiture of rights with regard to default interest and/or costs, not even if the principal sums of the invoices have been paid and no longer occur as such in the said reminders or overviews.
   7. If Client continues to default in payment of the amount due, even after warning or notice of default, Merkle may refer Client’s debt for collection. In that case Client will, in addition to the overall amount due at that point, also be obliged to pay all judicial and extrajudicial costs, including all costs charged by external experts. The amount of the extrajudicial costs is set as at least fifteen percent (15%) of the overall principal sum due with a minimum of € 500.00 (five hundred euro). All this will have no effect on the other legal and contractual rights Merkle has.
   8. Any complaints based on allegedly incorrect invoices or (alleged) defects in the execution of Services must be received by Merkle in writing within five (5) days of invoice date or execution, failing which the right to complain in respect of the invoice concerned will lapse.
   9. Without Merkle’s prior written consent, Client will not be allowed to assign or pledge or transfer in ownership their claims to a third party in part or in full.
   10. Merkle is at all times entitled to pledge or assign or transfer in ownership to a third party/third parties any amount the Client owes Merkle in relation to the execution of services by Merkle.
   11. Merkle is at all times entitled to request Client to provide sufficient security for meeting its payment obligations and to suspend the execution or further execution of the Agreement(s) until the requested security has been provided.
   12. Merkle may decide to take out a credit insurance in the name of Client. If Merkle decides to do so, Client is obliged to provide all cooperation to execute said credit insurance. This includes providing additional (financial) information at the request of Merkle. The Agreement will only be executed if the credit insurance is approved. If the credit insurance is refused or dos not fully cover the stipulated costs, among others because Client does not appear to have sufficient credit, Merkle and Client will engage into talks to make other arrangements regarding the method of invoicing and the payment term.
7. DURATION, SUSPENSION AND TERMINATION
   1. An Agreement will be entered into for the duration as stated therein.
   2. If no specific duration was agreed to in an Agreement, it is considered to have been entered into for an indefinite period of time unless the nature of the Agreement dictates otherwise. In the latter case it will become apparent from the Agreement itself when it ends.
   3. If an Agreement was entered into for an indefinite period of time, Client and Merkle will be entitled to terminate such by registered letter to the other party and subject to three (3) months’ notice. Notice of termination cannot be given until the Agreement has been in effect for a period of at least one (1) year.
   4. If an Agreement regarding services of a continuous nature has been entered into for a period of one (1) year or longer, such Agreement may be terminated by registered letter to the other party and subject to three (3) months’ notice. If notice of termination is not given, the Agreement will, after the expiry of the (initial) duration, be renewed by operation of law for a period of one (1) year each time under the same terms and conditions, however, subject to the provisions set forth in this article.
   5. It is only possible to give a notice of termination taking effect from the end of a calendar month.
   6. Apart from what is set forth elsewhere in these Terms and Conditions of Sale or in the relevant Agreement, each of the parties is entitled, without a warning or notice of default being required, to terminate the Agreement out of court in whole or in part by registered letter with immediate effect:

a) if the other party fails in the fulfilment of their obligation and persists therein even after having been given notice of default, in which notice a reasonable term was set to meet the obligations, unless a strict deadline has been exceeded as a result of which the other party is in default by operation of law and the one party can terminate the Agreement immediately in accordance with this provision once the non-fulfilment occurs;

b) if one of the Parties is in a state of Discontinuation.

* 1. Without prejudice to what is stipulated in the Agreement, Merkle is entitled to terminate the Agreement in whole or in part with immediate effect by means of a written statement and without prior notice of default or notification:

a) if it is likely to Merkle that Client is not or will not be able or willing to meet its obligations;

b) if Client has applied for or is granted suspension of payment, has filed a petition in bankruptcy, is bankrupt, the company goes into process of liquidation or ceases its activities or is found to be insolvent in any way;

c) if the cooperation with Client results in Merkle’s image suffering damage, or further cooperation with Client will result in foreseeable damage to Merkle’s image;

d) if major changes occur in the type of ownership or control of Client, including mergers and acquisitions.

* 1. If at the time of termination of an Agreement, the Parties have already carried out and received services in execution thereof, such services and the related payment obligations will not be the object of reversal.
  2. If Client fails to fulfil or is late in fulfilling any obligation arising from an Agreement, or if there is a valid ground to fear that Client will be unable to fulfil any obligation arising from the Agreement, Merkle will be entitled to suspend the execution of the Agreement, without Merkle being obliged to pay any compensation. Suspension will not be enforced until Merkle has informed Client thereof in writing and Client has been granted a reasonable term to fulfil its obligations after all.
  3. Within fifteen (15) days of termination of an Agreement, parties will return to the rightful owner all confidential information in their possession, irrespective of the form.
  4. Obligations which, by their nature, are meant to continue even after termination of the assignment, will remain in full force. The termination of the assignment explicitly will not release parties from the provisions in respect of: confidentiality, prohibition of taking over personnel, intellectual property, applicable law and competent court.

1. INTELLECTUAL PROPERTY RIGHTS
   1. All intellectual property rights, including copyrights, database rights, trademark rights and patent rights to the Software belong to Merkle, its licensers or Third-Party Suppliers. Client will acquire only those rights of use that are explicitly set out in the Agreement, or in separate licensing agreement(s) with a Third-Party Supplier.
   2. All intellectual property rights to the works, software, websites, data files, equipment, training material, or other materials such as analyses, designs, documentation, reports and offers, including its preliminary materials, developed or made available to Client under the Agreement are vested exclusively in Merkle, its licensor(s) or its supplier(s). Client will only obtain a right of use explicitly specified in the Agreement, in the absence of which applies that the right will mean that the Client will only be allowed to take actions with regard to the above-mentioned works, if and to the extent that in fairness such is necessary for the purpose agreed on. A right accorded to Client is non-exclusive and may not be transferred, pledged, or sublicensed.
   3. Client is not entitled to remove or change information regarding intellectual property rights, including information concerning the confidential nature of the works.
   4. Even if not expressly provided for in the Agreement, Merkle is always permitted to take technical measures to protect equipment, data files, websites, software made available, software to which Client is granted (direct or indirect) access and the like in connection with an agreed limitation in terms of the content or duration of the right of use of these items. Client may not remove or bypass such technical measures or have such technical measures removed or bypassed.
   5. If Merkle is prepared to undertake to transfer an intellectual property right, such a commitment may only be undertaken expressly and in writing. If the parties agree in writing that an intellectual property right with respect to software, websites, data files, equipment or other materials specifically developed for Client, will be transferred to Client, this will be without prejudice to Merkle’s right or option to use and/or operate, either for itself or for third parties and without any restriction, the parts, general principles, ideas, designs, algorithms, documentation, works, programming languages, protocols, standards and the like on which the developments referred to are based for other purposes. Nor will the transfer of an intellectual property right affect Merkle’s right to complete developments, either for itself or for a third party, that are like or derived from developments that were or are being completed for Client.
   6. If and to the extent that in the framework of the activities to be carried out, Client makes works available to Merkle, Client warrants that it owns the intellectual property right in such works, or has at least obtained such a license in those works as to permit Merkle in the framework of the Agreement to carry out activities in relation to these works. Client indemnifies Merkle against any third-party claim relating to infringements of the intellectual property rights referred to above.
   7. Client warrants that there are no third-party rights that bar equipment, software, materials and/or designs for websites being made available Merkle for the purpose of use, maintenance, editing, installation, or integration. Client indemnifies Merkle against any third- party claim based on the allegation that such making available, use, maintenance, editing, installation, or integration infringes any right of said third party.
2. LIABILITY
   1. The liability of a party on account of attributable breach of the Agreement will in all cases only arise if the one party gives the negligent party proper notice of default forthwith in writing, in which a reasonable term to remedy the breach is set, and the negligent party continues to fail attributably to fulfil its obligations even after such term. This also applies when exceeding deadlines, regardless of whether the deadlines were strict. The notice of default must contain an as complete and as detailed description as possible of the failure(s), so that the negligent party is able to respond effectively.
   2. Merkle’s overall liability due to an attributable breach of the Agreement, including the breach of warranty obligations agreed on or any other breach, such as a wrongful or unlawful act, is limited to the compensation of direct financial loss to a maximum of the amount of payments (excluding VAT) as received from Client in respect of such Agreement in connection with the execution of Services by Merkle, reduced by the amounts Merkle paid to third party suppliers in the framework of the performance of the Agreement. The overall liability of Merkle will never exceed the amount of € 1,000,000 (one million euro).
   3. If the Agreement predominantly is a continuing performance contract with a term of one (1) year or longer, liability will be limited to compensation of direct financial loss to the maximum amount (excluding VAT) as received from Client in the twelve (12) months preceding the loss event in consideration of the performance of such continuing performance contract in respect of the relevant Service performed by Merkle, reduced by the amounts Merkle paid to third party suppliers in the framework of the performance of the Agreement. This overall liability will never exceed the amount of € 1,000,000 (one million euro). If and to the extent that Client entered into separate Agreements with several companies within the Group, the total aggregated liability - in case there are multiple claims for damages against various entities within the Group - is limited to an amount of € 1,000,000 (one million euro) per calendar year.
   4. Direct financial loss as specified in this article will only refer to the following:

a) Reasonable costs which Client would have to incur in order to have Merkle’s performance meet the Agreement; losses not related to the aforementioned will not be compensated, however, if the relevant Agreement is or has been terminated by or on the demand of Client;

b) Reasonable costs which Client has incurred on in order to keep its old system or systems and related facilities operational for a longer time needed as Merkle did not deliver on a final delivery date that was binding for Merkle, minus any savings that are the result of the delayed delivery;

c) Reasonable costs incurred to determine the cause and extent of the damage, insofar as the determination relates to direct loss within the meaning of this article;

d) Reasonable costs incurred to prevent or limit damage, insofar as Client demonstrates that such costs have resulted in limitation of direct loss within the meaning of this article;

e) Only in the case of MSP service, the reasonable costs incurred to recover data files will be compensated.

* 1. Liability on the part of Merkle in respect of all forms of damage other than those set out in article 8.4 is excluded, explicitly including consequential damage, loss of profit, loss of savings, diminished goodwill, business interruption, corruption, destruction or loss of data files and damage relating to calling in Third Party Suppliers or suppliers Merkle was prescribed by Client.
  2. The limitation of liability pursuant to article 8.5 ceases to apply:

a) in the event of intent or deliberate recklessness on the part of the management of the party causing the damage;

b) in the event of third-party claims for compensation due to death or injury.

* 1. For the right to compensation to arise, it is required that the party incurring damage always reports the damage in writing to the party causing the damage as soon as possible after it arose.
  2. Any claim for damages against Merkle will expire three (3) months after the issuing of such damage or sooner by virtue of law.
  3. If and insofar such damage suffered by Client (fully) relates to a breach of an Agreement of a Third Party Supplier with whom Merkle has not or hardly been able to negotiate, including but not limited to a party such as Facebook, Google, Adobe or IBM, then Merkle’s liability is limited to what Merkle has actually been able to recover from the relevant Third Party Supplier. Immediately on request, Merkle will give its assistance in assigning (if and in so far possible) the claims against the aforementioned Third-Party Suppliers.

1. NO POACHING CLAUSE
   1. For the duration of the Agreement, as well as within one year of termination thereof, Client and its affiliated companies will refrain from making offers to and/or employing and/or entering into a cooperation of any kind with (an) employee(s) of Merkle, under penalty of an immediately payable fine of twelve (12) times the highest gross monthly salary paid by Merkle to the employee(s) concerned, which is set at least at € 70,000 (seventy thousand euro), or in the event that the employee concerned is not a Merkle employee, the total of the payments that were made/due on the last 12 months in which the employee has/employees have performed work for Merkle. This fine is without prejudice to Merkle’s right to claim compensation for damage suffered and to be suffered.
2. COOPERATION AND PRO- VISION OF SERVICES
3. OBLIGATION TO PROVIDE INFORMATION
   1. To enable Merkle to properly execute an Agreement, Client is to provide Merkle in a timely fashion and free of charge with all information and data required for the execution of the Agreement, in any case including but not limited to technical data, applications, files, documentation, test data, work descriptions and/or other relevant information.
   2. Client guarantees the correctness and completeness of the data Client provides to Merkle. Client is responsible for and accepts the risk of possible problems arising from mistakes, inaccuracies, incompleteness, and inconsistencies of all such data, materials and information provided by Client.
   3. For the sake of continuity, Client will appoint a contact person or contact persons who, for the duration of Merkle’s activities will act as such. The Client’s contact persons will have the requisite experience, specific knowledge of the subject matter and understanding of the objectives the client seeks.
   4. Merkle is only required to provide Client with periodic information regarding the execution of the work through the contact person designated by Client.
4. COOPERATION
   1. Parties acknowledge that proper communication is an essential condition for proper cooperation. Client will always give the assistance Merkle in fairness requires in a timely fashion and will also pay the due fees on time.
   2. Both Client and Merkle will mutually to the maximum extent make efforts to have the Agreement executed by or under the responsibility and supervision of one permanent contact person (and if so required a substitute contact person) who has the power to represent the respective party regarding the execution of the Agreement(s). The names of the contact person(s) as well as the scope of their power(s) will be set out in the Agreement. The contact persons will at least ensure the mutual communication and the supervision of the progress of the execution of the Agreement.
   3. Merkle will comply with Client’s procedures, regulations and working methods, provided that Merkle has been notified beforehand in writing of such in a timely fashion and that these procedures, regulations and working methods are not unreasonable and do not hinder Merkle in the delivery of items, Software and/or the rendering of Services.
   4. Client will ensure suitable personnel of sufficient quality as to be involved in the execution of the Agreement. If Merkle finds that Client’s personnel lack sufficient quality, it will report this to Client. Client is obliged to raise the knowledge level of this personnel to an adequate level as soon as possible. In this connection, the execution of the relevant Agreement may be suspended by Merkle without Merkle being obliged to any compensation towards Client.
   5. If one party finds that the other party does not commit itself sufficiently, such party will inform the other party about this in writing.
   6. If Client fails to fulfil its obligations in any way whatsoever, Merkle will have the right to suspend the fulfilment of its obligations without being obliged to compensate Client for damages. Merkle is entitled to charge Client for any additional costs incurred in this connection.
   7. If so agreed on in the Agreement, parties will consult each other at regular intervals, to be further established, on the progress of the execution of the Agreement.
5. SERVICE LEVEL AGREEMENT
   1. Any arrangements concerning a service level (Service Level Agreements - SLA) will be agreed on in writing only. Client will always inform Merkle without delay about any circumstances that affect or that could affect the service level and its availability.
   2. If arrangements about a service level have been made, the availability of software, systems and related services will always be measured such that unavailability due to preventive, corrective or adaptive maintenance or other forms of service announced by Merkle in advance, as well as circumstances beyond Merkle’s control, are not taken into account. The availability measured by Merkle will count as conclusive evidence, subject to evidence to the contrary produced by Client.
6. TERMS AND PLANNING
   1. Merkle will, to the greatest extent possible, make a reasonable effort to observe the terms and delivery periods and/or dates and delivery dates Merkle has specified or that have been agreed on between the parties, irrespective of whether such deadlines and/or dates are firm. The interim (delivery) dates specified by Merkle or agreed on between the parties will always apply as target dates, do not bind Merkle and are never strict.
   2. If the progress of the activities threatens to be delayed or has been delayed, Merkle will notify Client thereof as soon as possible stating the cause of the delay and if possible state to what extent this is likely to affect the approximate delivery period.
   3. If a delay is caused by changes in the working conditions stated and/or by the materials of the Client’s and/or Third Party Suppliers used by Merkle not being delivered on time, Merkle and Client will consult with each other and the delivery period will be extended as far as required.
   4. If the delay is due to Client’s acts or omissions, e.g. giving insufficient assistance, Client will be required to compensate the idle hours of Merkle’s employees. At Client’s request and insofar as possible, Merkle will endeavour to remedy the delay, such if possible, by making additional capacity available and the deploying additional employees. Client will compensate Merkle for all costs involved in this.
   5. If it has been agreed on that the work under the agreement is to be performed in stages, Merkle is entitled to postpone the start of the work that is part of a stage until Client has approved the results of the preceding stage in writing.
   6. Merkle is not bound by a date or delivery date or term or delivery period, whether or not strict, if the parties have agreed on an amendment to the content or scope of the Agreement (additional work, a change of specifications and so on) or a change in approach with respect to execution of the Agreement, or if Client fails to fulfil its obligations arising from the Agreement or fails to do so on time or in full. The need for or occurrence of additional work during the execution of the Agreement will never constitute a reason for the Agreement to be terminated or cancelled by Client.
7. GUARANTEE
   1. Merkle provides no guarantees other than those given in these Terms and Conditions of Sale.
   2. In respect of Services and Training, Merkle guarantees that:

a) Merkle is qualified to carry them out;

b) They will be carried out competently;

c) The results thereof meet the agreed qualifications;

d) Appropriately qualified employees of Merkle will remain available to carry out the agreed Services for the duration of the current Agreement.

* 1. Client will always strictly observe any preconditions included in an SLA at the risk of forfeiting any claim on fulfilment by Merkle of any obligation of Merkle included in such an SLA.
  2. Merkle cannot guarantee more than what Third-Party Suppliers have guaranteed Merkle. Furthermore, Merkle can never and will never give any guarantees regarding the products and services of Third-Party Suppliers, even if directing Third-Party Suppliers is part of an Agreement.
  3. Merkle does not guarantee that an App will always be admitted to the Appstore of the respective manufacturers of mobile devices and/or suppliers of operating systems.
  4. After acceptance as referred to in article 34 or in the absence thereof, Turnkey Delivery, Merkle guarantees continued support of what has been delivered for a period of twelve (12) months, at any rate to the extent that in case Client requests a modification, the request will be responded to by an offer. However, Merkle cannot guarantee that in case what has been delivered is an App, the modified App will be accepted by an Appstore, in some cases it may for instance be required to modify the App further, to have the App comply with the current quality criteria as pursued by the App stores.

1. FORCE MAJEURE
   1. None of the parties is obliged to fulfil any obligation if it is prevented from doing so due to force majeure. Parties can only rely on force majeure towards each other if the party relying on force majeure informs the other party thereof in writing as soon as possible, submitting the necessary supporting documents.
   2. Force majeure is in any case understood to include Merkle failing to properly fulfil its obligations due to:

a) (long-term) illness of its personnel;

b) government measures;

c) strikes;

d) calamities (e.g. a fire);

e) exceptional weather conditions;

f) electricity outage, internet outage, outage of data network facilities or telecommunication facilities; and/or

g) the defective condition and/or unsuitability of items, equipment, software or materials (of third parties) the use of which has been prescribed to Merkle by Client, and Third Party Suppliers or suppliers failing to fulfil their obligations, whether attributable or not, towards Merkle.

* 1. In addition to the examples set out in article 15.2, Parties may include other situations of force majeure in an Agreement and/or SLA.
  2. If a situation of force majeure lasted for more than sixty (60) days, Parties have the right to terminate the Agreement with immediate effect out of court by means of registered letter, without Parties being obliged to any compensation. All that has already been performed under the Agreement will then be settled pro rata.

1. TRANSFER AND SUBCONTRACTING
   1. Client is not entitled to transfer rights and obligations to a third party without Merkle’s prior written consent. This consent will not be withheld on unreasonable grounds, but Merkle may attach conditions to the consent.
   2. In the execution of the assignment, Merkle is entitled to make use of third parties, irrespective of whether that is based on subcontracting or of hiring of personnel. This does not affect Merkle’s responsibility and liability in respect of the fulfilment of its obligations under the Agreement(s), as well as its obligations arising from tax legislation and social security legislation.
   3. In the relationship with Third-Party Suppliers, Merkle acts in the capacity of coordinator, which implies that Client can contact Merkle for questions and for information concerning the Software or Services, and Merkle will in turn contact the relevant Third-Party Supplier. Merkle will never be responsible or accountable for the execution and fulfilment of obligations of Third-Party Suppliers under their Agreement(s) with Client.
2. CONFIDENTIALITY
3. CONFIDENTIALITY AND SECURITY
   1. Information is confidential if it has either been deemed to be such by the one party or if the other party otherwise knows or should presume that such information is confidential.
   2. Parties will use confidential information obtained from or made available by the other party only in accordance with the provisions in the Agreement, and will not provide third parties with such information either directly or indirectly or give permission to do so without the other party’s prior written consent. Parties will furthermore take all necessary precautions to protect such information against unauthorized use and disclosure.
   3. The provisions in this article do not apply if a party is required to disclose confidential information by virtue of a judgement or a decision by a public authority.
   4. Client is obliged to take measures to prevent unauthorized persons from having access to or from being able to access the Services and data. Merkle cannot be held liable for damage suffered by Client due to third parties making unauthorized or unlawful use of the Software and/or Service(s).
   5. Merkle guarantees that it will secure its systems properly, taking the state of the art into consideration.
   6. Parties will make every reasonable effort to properly secure the data or information provided to them by the other party. Parties undertake to use information obtained from the other party for no other purpose or in no other way than for the purpose for which and the way in which the information was provided or has become known to the other party in the execution of the Agreement.
4. PRIVACY AND PROCESSING PERSONAL DATA
   1. Parties mutually undertake to act in accordance with the General Data Protection Regulation (GDPR) and all other privacy-related laws and regulations.
   2. If and to the extent that personal data will be processed by the Parties, Parties will enter into a data processing agreement. For that purpose, Merkle will provide Client with its standard processing agreement.
   3. Merkle cannot vouch for the way in which a third party with which Client maintains a relationship, processes personal data, and with which third party Merkle must work (together). Merkle advises Client to take note of the privacy policies and/or terms of those third parties regarding the processing of personal data. This regards third parties like Facebook, Twitter, LinkedIn and Google.
5. DELIVERY OF SERVICES AND GOODS
6. CAMPAIGN SUPPORT AND MANAGEMENT
   1. If and insofar as agreed Merkle will assist Client in the execution of its marketing campaigns and will conduct the management of such campaign based on the specification included in the relevant SLA.
   2. The intensity of the campaign support and management depends upon the service package selected by Client. Upgrades in the service package, e.g. from silver to gold, are possible at all times and that as of a date to be determined by mutual agreement between parties, from which Client will be charged the rate pertaining to the comprehensive services. Downgrades, e.g. from gold to silver are - unless explicitly agreed otherwise in writing - subject to an application term of at least six months, after which as of the date to be determined by mutual agreement between parties Client will be charged the rate for the less comprehensive services. Applications for upgrades and downgrades are to be communicated in writing or digitally to Merkle in accordance with the provisions in this article.
   3. Management by Merkle shall never imply responsibility on the part of Merkle for activities to be carried out in the marketing campaign by suppliers other than Merkle. In the event that Merkle has indicated an expected completion time for a marketing campaign - whereby such completion time should be construed as a term, Merkle shall not be liable for any damage as a result of delay in the execution of the campaign that results directly or indirectly from acts or omissions on the part of Client or a supplier of Client.
7. TRAINING
   1. If and insofar there is an agreement about the provision of a Training, the Training to be provided will be specified in the Agreement, as well as the location of the Training, at what rate and if necessary, according to which implementation schedule.
   2. Merkle guarantees that the instructors have sufficient knowledge of the subject and sufficient didactic skills for proper implementation of the Training course.
   3. Merkle will provide each participant with adequate course material for personal use. The copyright on the course material will not pass to Client. Merkle will grant a revocable, non-exclusive, and non-transferable license to Client for personal use of the course material.
   4. Client has the right to cancel a Training before its start without being obliged for any related costs. However, if Client cancels the Course within two (2) weeks before the start of the Training, Client shall fully owe the costs charged or to be charged to Client for the relevant Course.
   5. No reimbursements will be involved if Merkle cancels the Course up to two (2) weeks before the start at the latest. Any amounts already paid by Client will be refunded forthwith.
8. DEVELOPMENT, WEBSITES, SOFTWARE, API’S AND APPS
   1. In case a Website, Software, API or App is developed with the use of open source software and/or frameworks, the relevant open source license(s) do apply for Client. In case the open source license conflicts with what is stated in the General Terms and Conditions or Agreement regarding intellectual property, the open source license prevails. In the Agreement is stated which open source software will be used. Merkle is never responsible for patching, upgrading and/ or updating the open source software and/ or frameworks, in case Client did not enter into a maintenance agreement and/or SLA with Merkle, which agreement and/ or SLA explicitly covers patches, upgrades and/or updates. Merkle is, except for wilful intent or gross negligence of the top-level management of Merkle, not liable for claims of third parties regarding infringement of intellectual property rights regarding the open source software and/ or frameworks Merkle used. Therefore, taking the nature of open source into consideration, Merkle cannot guarantee that the used open source software and/ or frameworks do not infringe intellectual property rights of third parties.
   2. Merkle cannot guarantee that a Website or App will work as intended in every browser or on every device. In case of a Website, the Agreement states in which browsers the Website will work as intended, in case this is not stated in the Agreement, Client can assume that the Website will work as intended in the two (2) browsers which were used most in the Netherlands at the Delivery Ready for operation. In case of an App the Agreement states for which operation systems (including versions) the App will be developed. Merkle cannot guarantee that the App will always work as intended on a non-prevailing device on which a version of an operating system installed for which the App is developed.
   3. In case Merkle uses API’s of third parties for functionality of a Website, Software or App, the (user) terms of the API also apply for Client. In the Agreement is stated which third party API’s are used. For third party API’s Merkle cannot guarantee, unless explicitly agreed upon otherwise, the availability.
   4. In case of development of a Website, Software, Apps and API’s, what is stated in article 34 of this section regarding Acceptance, applies mutatis mutandis.
   5. For Apps and/or API’s in case a maintenance agreement and/or SLA is not agreed upon, a standard maintenance agreement applies. This maintenance agreement enters into force after Acceptance. This standard maintenance agreement encompasses that Client has three hours per calendar month at its disposal, which hours can be used to improve the App and/or API upon request of Client, or to fix Defects outside the defects liability work period as stipulated in article 35. The number of hours is stated in the Offer. In case more hours are used in a calendar month, than agreed upon, the surplus is charged to Client based on time and material. Hours which are not used, lapse at the end of the calendar month. In case there is no standard maintenance agreement, request are followed up at the basis of time and materials. Merkle is not obliged to follow up those requests (immediately).
9. SUPPORT IN THE USE OF SOFTWARE, WEBSITES AND APPS
   1. If Client concludes an Agreement pertaining to the support of Software, Websites and/or Apps, it will be entitled to support as referred to in this article. The Agreement will specify what rights Client has to which components, under which conditions and at what prices and rates.
   2. Support may include the following:

a) the provision of telephone or e-mail assistance or information concerning the use of, or with regard to technical problems with the Software, Websites and/or Apps;

b) the analysis, verification and if possible, repair of a Defect via the telephone and/or internet following notification by Client.

* 1. If possible, after notification of a Defect to the help desk, Merkle will carry out distance activities. If Software and/or Website(s) are used by Client on site, Client will ensure an adequate connection to Merkle so that Merkle can carry out its activities. By signing the Agreement to that effect Client grants Merkle permission to execute support via connection(s). Merkle is to comply with regulations to be prescribed by Client in respect of the nature and the use of the connection.
  2. If a decision is made after mutual consultation for Merkle to carry out on-site support for Client. Execution of on-site activities for Client will be implemented on the basis of actual costs at the then applicable rates.
  3. If and to what extent the activities are to be carried out outside of Working hours will be determined in mutual consultation. Article 4 will apply mutatis mutandis.
  4. Applications for support can be submitted during Working hours by Client’s employees who were trained for that purpose and/or designated in the Agreement. The report will be filed in accordance with the applicable procedure, as laid down in the Agreement. Client acts as first-line support, and Merkle as second- line support, in case of an App. Therefore, Client will never let an end user invoke the agreed upon support, unless parties explicitly agreed upon otherwise, or unless Merkle in the course of tracking down technical problems or Defects, in a specific case, grants its permission.
  5. If a request for support constitutes the report of a Defect, this report will be dealt with by Merkle only if the Defect is demonstrable and reproducible.
  6. Parties can conclude an additional Service Level Agreement (SLA) for support and designate personnel in such an SLA that are authorized to change the contents of the SLA. By definition, an SLA contains an operationalization of the performances to be provided. Provisions pertaining to liabilities, indemnities, guarantee periods, intellectual property rights and the like are out of order in an SLA and therefore null and void.
  7. If there is no SLA, Merkle will make every effort to provide a temporary solution to the problem, including programmed bypasses or problem-avoiding restrictions, if a first diagnosis shows that a Defect cannot be solved within one (1) Working day (Priority 1), two (2) Working days (Priority 2) or eight (8) Working days (Priority 3).
  8. Merkle will forward a report of a Defect to the Third-party Supplier if the Defect can be attributed to Software that was not licensed by Merkle itself. The provisions in this article do not apply to Software as referred to above regarding support.
  9. Defects in the Software and/or Website(s) that were caused by:

a) improper use by Client or users of Client;

b) gross negligence by Client or users of Client;

c) use not in accordance with the intended purpose;

d) causes in systems and/or software, website(s) not supplied and maintained by Merkle;

e) working with durable and non-durable items of property which do not meet the specifications approved in advance by Merkle;

f) changes made to or repairs carried out on the Software and/or Websites by Client or third parties without Merkle’s prior permission, are not covered by Merkle’s maintenance obligation or support obligation. Said Defects will, if carried out by Merkle, be repaired based on Merkle’s then applicable rates.

* 1. Recovery of corrupted or lost data is not covered by either Merkle’s maintenance or support obligation.
  2. Client will provide Merkle free of charge sufficient consecutive hours access to the Software, Websites and/or data files that are required for maintenance and support.
  3. Client will take appropriate measures to prevent damage to Software, Websites and/or data files that may arise as a result of activities to be performed by Merkle, e.g. by making regular back-ups, unless this latter obligation rests with Merkle pursuant to an Agreement.
  4. At least one (1) expert and employee of Client are to be present during the on-site activities.
  5. Client will ensure that the level of knowledge of its users and managers is and remains at an adequate level. If Merkle believes that this level of knowledge is inadequate, Client will be obliged to have users and/or managers follow certain Training at the prices and conditions valid at that time. Client’s failure to fulfil such obligation may be a reason for Merkle to suspend the Services or - provided that such would be reasonable - to dissolve the Agreement.

1. SCRUM
   1. The following paragraphs of this article apply in case explicitly agreed upon that what is agreed upon should be developed based on SCRUM.
   2. After every Sprint Client approves the work in accordance with the principles of SCRUM. After this approval that specific Sprint is deemed to be accepted as stipulated in article 35.
   3. By using the SCRUM development method, parties acknowledge that changes during the development of software are common. Client is therefore entitled during the project to request Scope changes. Client acknowledges that changes can affect any estimated delivery terms.
   4. After a request is placed as set out in previous paragraph, Merkle issues an estimation after receipt of the request. After that, Client can choose at its option to swap the change for unrealized User Stories or Requirements which have a similar extent, or to add the change to the Scope, without swapping, in which case Client accepts the additional costs.
   5. Client makes sure there is a Product Owner, this Product Owner should have adequate knowledge regarding, and experience with, SCRUM. Merkle assumes that the Product Owner can bind Client. In case Client does not make a Product Owner available, Merkle is willing to put a Product Owner at the disposal of Client, in which case the Product Owner will be charged to Client on the basis of time and material.
   6. A SCRUM project is rendered based on time and materials. In case a proposal or project letter defines a number of Sprints, this amount is a mere indication.
2. CONSULTANCY
   1. Pursuant to an Agreement, Merkle may carry out consultancy activities for Client.
   2. Execution of the activities referred to in this article may, at Merkle’s discretion, be performed at its own location or at Client’s location. In the latter case Client will ensure an adequate and safe workplace for the Employee in accordance with the applicable regulations and legislation in respect of health and safety.
   3. Merkle will decide which consultant will be deployed for the execution of the Agreement. If Client makes a request for the deployment of a certain consultant, Merkle may meet such a request, but such at Merkle’s discretion.
   4. During the term of the Agreement Merkle is entitled, without being obliged to any compensation and/or contribution to costs, to replace one consultant with another.
   5. Client has the right to ask for a consultant to be replaced if based on solid reasons. The costs for training replacement personnel shall be borne by Client unless, the request for replacement was based on the non-functioning or inadequate functioning of the consultant in question.
   6. Consultancy will be charged per hour in arrears. Cancellation of scheduled consultancy half-days within two (2) days before the scheduled date is fully due.
   7. Article 9 applies in full to personnel of Merkle deployed as consultant.
3. MSP-SERVICE
   1. If an Agreement is made for such, Merkle will provide Client with MSP services. In the Agreement parties will determine which functionality Merkle will provide Client as MSP service. The level of an MSP service will be laid down in an SLA to the Agreement.
   2. In case for an MSP service a license or a SaaS service is acquired by Merkle, which license or SaaS service is an essential part of the MSP service, Merkle is not obliged (including any availability, penalties, service credits, liability for damages due to an attributable shortcoming in the performance of the Agreement related to the delivery of the SaaS service and/or delivery of the functionality of the licensed software), to more than vendor is obliged to pursuant to the agreement with Merkle. The relevant documentation (including any service level agreement) is available at the offices of Merkle for consideration.
   3. Merkle guarantees that it is has the right to provide Client with the functionality of MSP service and indemnifies Client against claims of third parties in that regard.
   4. As soon as Merkle has completed installation of the functionality, Merkle will inform Client thereof and report its completion, that the MSP service has commenced and that the functionality is ready for use by Client. Client may carry out an Acceptance Test in the manner provided for in article 35.
   5. Merkle will inform Client in due time of adjustments of functionality and Merkle will provide information concerning the consequences of the intended adjustments or changes. Parties will decide in mutual consultation whether Client will be provided with the adjusted functionality.
   6. Adjustments to functionality are communicated in a timely manner by Merkle to Client and Merkle provides information regarding the consequences of the intended adjustments and/or changes. The Parties will decide in consultation whether the adapted functionality will be made available to Client.
4. HOSTING
   1. Pursuant to an Agreement, Merkle may carry out Hosting for Client. The contents of the Hosting and the rates will be set out in the relevant Agreement.
   2. Merkle will Host the software, Software and/or Website(s) referred to in the SLA on one of its servers or the server of a third party. In the absence of an SLA Merkle does not guarantee that the Software and/ or Website(s) will always be available for Client, but Merkle aims at an Availability of 99.5% per year. If non-Availability does not exceed four (4) consecutive hours, the Service will be considered full and uninterrupted.
   3. Client guarantees that all the material, data and/or instructions made available by Client for the Hosting are correct and complete and that all data and data storage devices meet the specifications issued by Merkle.
   4. In principle, Merkle ensures that the data of Client will not be stored outside a member state of the European Union. However, it may occur that the data of Client will be stored with American companies. In that case Merkle will ensure that the storage will only takes place with American companies willing to work with the EU model clauses, and/or are Privacy Shield certified.
5. USE OF MSP-SERVICE OR HOSTING
   1. Insofar as Client needs telecommunication facilities for the use of the Services, Client will be responsible for the timely selection and acquisition of an appropriate facility/ facilities. Client will ensure that it will obtain any necessary permission(s) and it will adhere to all conditions of suppliers of telecommunication facilities related thereto and any other third parties in this connection.
   2. Within the context of acquiring the MSP service or Hosting Client will act as a professional user and will at any rate:

a) not make any improper, unauthorized, unlawful or objectionable use or use not in accordance with the intended purpose of Merkle’s MSP service or Hosting;

b) not place any data on Merkle’s servers that are in breach of the rights, including the intellectual property rights of Merkle or third parties;

c) not infringe on the intellectual property rights of Merkle or third parties;

d) not disseminate any viruses;

e) not make use of hardware other than the hardware recommended by Merkle and otherwise follow Merkle’s instructions with reference to preconditions for the use, as included in the SLA;

f) not permit third parties to make use of the MSP service or Hosting without Merkle’s prior explicit written consent

g) not further organize or parameterize the MSP service or Hosting, including software, Software and/or Website(s), in such a manner that the system load is substantially increased or the stability of the functionality reduced;

h) not cause any disruption of the functioning of Merkle’s ICT infrastructure, the infrastructure of third parties and/or links between infrastructures due to (the content or intensity of) the data traffic or due to the Client’s acts and/or omissions.

1. FEES FOR MSP SERVICE AND HOSTING
   1. Notwithstanding the provisions in article 5, fees for maintenance and support with regard to MSP service and/or Hosting will be due by payment in advance for four (4) weeks and for the first time on the effective date set out in the Agreement. Interim maintenance and support of a functionality added to the Agreement for an MSP service and/or additional Software within the context of Hosting will be invoiced pro rata from the moment of the addition until the next date of invoice.
   2. Provision of added functionality to an MSP service and/or additional Software within the context of Hosting and/or the execution of additional corresponding Services, that were not foreseen or agreed to at the time of the original order, will be considered extra work and will be supplied to or executed for Client following Merkle’s notice in accordance with Merkle’s applicable rates at that time.
2. TERMINATION OF MSP SERVICE AND HOSTING
   1. To assure continuity of the provision of information of Client, parties will, in the event of termination of the MSP service or Hosting, enter into consultation as soon as possible on the transfer of data, the provision of services and/or other management measures, required for an uninterrupted use by Client of its data, Software and/or MSP service.
   2. As part of Hosting Merkle will enable Client to bring about any transfer to another party or environment. Merkle can, however, only bring about the transfer to a party that has an infrastructure or can offer an infrastructure that is identical to Merkle’s. Merkle shall not be liable for any damage as a result of such a transfer.
   3. All activities performed by Merkle under this article will be charged based on actual costs at the then applicable rates.
3. CONTINUITY CLIENT
   1. Upon first request of Client, Merkle transfers the source code of Software, developed by Merkle, to Client. Client is in that case granted a non-exclusive, non- transferrable, non-sub-licensable, license which does not entail more than what it can use and adapt the source code for its own business continuity purposes. The aforementioned license does not entail, under no circumstances, that Client can make the source code publicly available and/or use it commercially. In case Client would like a third party to work with the source code, this is only allowed when the third party entered into a non-disclosure agreement regarding the source code with Client. The transfer may be subject to additional conditions.
   2. The costs involved with the transfer are borne by Client.
4. E-(MAIL)MARKETING, CAMPAIGN MANAGEMENT, LOYALTY PROGRAM MANAGEMENT AND DATA PROCESSING
   1. Client guarantees the accuracy of data provided by Client under Agreements in respect of e-marketing, campaign management and/or loyalty program management and/or the Data Enhancement arising therefrom. Client indemnifies Merkle against all claims of third parties in respect thereto, including but not limited to, claims concerning unsolicited e-mail and/or text messages and/or push notifications.
   2. Client is aware of the fact that the quality of Merkle’s Services also depends on the quality of the data provided by Client, including the conformity with specifications agreed on in advance, and that consequently the omission or limited execution of Data Enhancement at the request of Client may have a negative influence on the quality of Merkle’s Services.
   3. The provisions of article 10 apply mutatis mutandis to the provision of Services referred to in the present article.
   4. Client guarantees to act in accordance with the relevant legislation and/or sector guidelines at all times, including but not limited to the Dutch Code of Conduct SMS Services (“Gedragscode SMS-Dienstverlening”) and the Dutch Telecommunications Act, in particular Section 11 of this act, and indemnifies Merkle against damage as a result of acts in breach of this legislation and these guidelines.
5. SEARCH ENGINE MARKETING
   1. Client acknowledges that activities regarding Search Engine Marketing, are always rendered based on a best effort obligation (“ïnspanningsverplichting”). Since Merkle depends for the rendering of the activities on external factors, such as continuously changing algorithms of search engines, Merkle cannot warrant to achieve a certain result.
   2. In deviation of what is stated in article 8, Merkle doesn’t accept any liability for damages in case it becomes apparent that the methods Merkle used in the context of Search Engine Marketing led to a detrimental result and/or a search engine penalty, except in case of wilful intent or gross negligence of Merkle’s top level management.
   3. In case the Service consists of search engine advertising or social advertising, Client hereby grants Merkle the authorization to place the ads on behalf of Client. The scope of the authorization is stated in the Agreement and covers at least the therein summed up activities. Client is responsible for the advertising budget and maintaining it.
6. CONTENT CREATION AND COMMUNITY MANAGEMENT
   1. Merkle will notify Client in due time, in case images are used during Content Creation, which involve rights or third parties, such as stock photo’s, stock video’s or stock music. Article 4 applies mutatis mutandis.
   2. Hereby Client grants Merkle an authorization to act on behalf of Client on social networks for which the Agreement was entered into. The authorization is revocable, not exclusive and for the duration of the Agreement.
   3. Hereby Client acknowledges that placing content on social media and/or online platforms is irreversible, especially when it comes to any positive or negative consequences.
   4. Client indemnifies Merkle for all claims of third parties regarding Community Management. In deviation of what is agreed upon in article 8, Merkle does not accept any liability for damages related to the execution of Community Management, except in case of wilful misconduct or gross negligence of Merkle’s top level management. Therefore, Merkle is not liable for any damage of reputation.
   5. Client recognizes and acknowledges that social media and/or online platforms use their own terms of use when it comes to sharing content. Client hereby states that it will take notice of any terms (of use) and states to be bound to those terms (of use). In the Agreement is stated which social media and/or online platforms are used to share or place social media.
   6. Client realizes and acknowledges that social media and online platforms apply its own terms and conditions when it comes to sharing content. Client hereby declares to be aware of any (user) conditions in time and furthermore declares to be bound by those conditions. The Agreement shows on which social media and / or online platforms the content is shared or placed.
7. ACCEPTANCE TEST
   1. If parties agree that, after the date of Delivery Ready for operation of the Services, Client will carry out an Acceptance Test, such Acceptance Test will be affected within ten (10) Working days after the date of Delivery Ready for operation.
   2. The Acceptance Test may relate to the Services, hereinafter referred to as the object of acceptance.
   3. During the Acceptance Test Merkle will assist Client at its request at the then applicable rates.
   4. Within five (5) Working days after the Acceptance Test has taken place, Client will send Merkle a signed and dated report of the Acceptance Test. Any Defects found will be recorded in this report and a statement will be made as to whether everything is functioning properly. A statement will also be made as to whether the Services have been accepted or not. If upon expiry of this term Merkle has not received the results of the Acceptance Test, Merkle will consider the Services accepted.
   5. Minor Defects, including Defects which by their nature and/or number do not reasonably stand in the way of commercial operation, will not constitute reason for withholding acceptance, without prejudicing Merkle’s obligation to repair such Defects, as much as possible, as referred to in the next paragraph.
   6. If and insofar as possible Merkle will to the best of its ability repair the Defects laid down in this report within twenty (20) Working days after receipt of the report referred to in this article. If the Agreement has been concluded based on a fixed price, this repair will be implemented free of charge; in all other cases these activities will be charged on the basis of actual costs.
   7. What applies in respect of Services of a Third-Party Supplier is that Merkle will immediately pass on any Defects found during the Acceptance Test to such Third-Party Supplier, who will subsequently deal with such Defects on the basis of the applicable conditions. If possible Merkle will make every effort to supply a workaround for the problem during the time that the Third-Party Supplier needs to repair the Defect. Client will be charged for said workaround of the problem based on actual costs.
   8. If Client has not accepted the Services after the execution of the Acceptance Test, the Acceptance Test will be repeated in accordance with the provisions in this article, at the latest within ten (10) Working days after the Defects that were found were repaired.
   9. If the Services are accepted by Client, the date on which the relevant report was signed by Client will apply as the date of acceptance.
   10. If at Client’s option no Acceptance Test or only a partial Acceptance Test is carried out and/or Client puts the completed operational Services in use, the date of Delivery ready for operation will apply as the date of acceptance.
   11. Provided agreement was reached in this regard, Client will have the right to subject parts of Services already provided to a preliminary Acceptance Test in the manner as set out in this article, on the understanding that the date of Delivery ready for Operation completion is to be read as the date on which the partial completion took place. Client reserves at all times the right to carry out a full Acceptance Test after preliminary Acceptance Tests.
   12. In case the subject of acceptance is an App or API, during a period of four (4) weeks after Acceptance, Defects in the App or API are remedied by Merkle without additional costs. After that, Defects are remedied under a maintenance agreement and/or SLA.
8. DELIVERY OF GOODS, STORAGE GOODS AND RETENTION OF TITLE
   1. If and insofar as goods pertaining to the services are delivered, such delivery will be effected under retention of title until Client has fulfilled everything to which it is obliged under the Agreement and/or other agreements with Merkle, including interest and costs.
   2. Delivery of the goods referred to in the previous paragraph by Merkle in the Netherlands will be realized carriage paid. Delivery in locations other than those referred to above will be realized “ex works” in accordance with the valid Incoterms.
   3. Acceptance of delivery by Merkle, or by a party or parties called in by Merkle of goods made or processed by Client and/or by a transporter called in by Client will be considered evidence that such goods were visibly in good order, unless the contrary is evidenced by the transport document or receipt.
   4. After delivery Client is obliged to inspect whether Merkle has properly fulfilled the Agreement and Client is furthermore obliged to notify Merkle in writing as soon as the contrary is evidenced.
   5. Client is required to carry out the inspection referred to in the previous paragraph of this article, the relevant notification and the return shipment of corrections with due speed, yet at the latest within three (3) days following delivery. On the expiry of the above- mentioned term the goods delivered will be deemed in order. The goods will furthermore be deemed in order if and insofar as the goods were wholly or partially put into use and/or processed by Client.
   6. In case storing goods by Merkle and working duties rendered on the basis of a price per item is explicitly agreed upon, than Client is obliged to acquire the stored goods against the agreed upon price per item, within a time frame of 30 (thirty) days, in case the agreed upon Service is terminated. After payment by Client, Merkle transfers ownership of the goods to Client. This also applies in case Client wishes to change the specifications for the assembled end product, and as result unused stock remains.
   7. Merkle will not be charged for the storage of the goods to be delivered unless storage was explicitly agreed. If storage does take place, such will be brought about at the expense and risk of Client, unless explicitly agreed otherwise in which case Client will take out adequate insurance for similar goods for fire, theft, etc.
9. TESTS AND DEVIATIONS
   1. Approval of Tests by Client will be considered acknowledgement of the fact that Merkle has correctly carried out the activities that preceded the Tests. Approval will also lead to the discharge in respect of the above-mentioned activities.
   2. Deviations between goods delivered by Merkle and the Test/Tests shall not constitute any reason for rejection, discount and/or dissolution of the Agreement and/or compensation if such deviations are only of minor significance. Deviations of minor significance as referred to above include deviations that do not substantially affect the practical value and/ or options of use of the goods delivered.
   3. In assessing whether deviations in the overall goods delivered by Merkle are to be deemed minor or not, Merkle will make a representative random check of the goods, unless the nature of the goods makes a check of each separate item reasonably possible and useful, such at Merkle’s discretion.
   4. Upward or downward variations in respect of the agreed number of goods is permitted if the deviation percentage exceeds or falls short of the number of agreed goods by a maximum of 10%. The prices due for upward or downward variations in the number of goods delivered will always be charged or set off against amounts already paid.
   5. In case fixed prices per item are agreed upon, and increasing prices of the raw materials put pressure on the fixed price per item, parties enter in discussion to jointly determine whether the increasing raw material prices will be (temporarily) charged with Client in the fixed price per item, or if parties will revert to another (raw) material.
10. SECONDMENT
11. SECONDMENT SERVICES
    1. If Merkle provides Client with one or more Employees to carry out certain activities for Client under the management and supervision of Client during a period to be agreed upon, an Agreement to that effect will be concluded between Parties. A specification will in any event be drawn up as to which Employee(s) will be made available, during which period the activities will be carried out and at what hourly rate.
    2. Parties never intend to execute an employment relationship between Client and an Employee who is made available.
    3. Client is not allowed to second the Employee, who is made available, to a third party to be working under the management and supervision of said third party, unless such is agreed upon in writing between Parties.
    4. Merkle disclaims any liability for the quality of the results of the activities that have been performed under the supervision and management of Client.
12. OTHER PROVISIONS
13. APPLICABLE LAW AND DISPUTES
    1. Dutch law applies to all offers, Agreements and Agreements ensuing from Agreements.
    2. In the event of a dispute, either party will inform the other party in writing that there is a dispute, as well as provide a summary statement of what, in the opinion of such party, the subject of the dispute is.
    3. If a dispute cannot be settled in joint consultation, the Court of Amsterdam (the Netherlands) has exclusive jurisdiction to hear all disputes ensuing from or related to the Framework Agreement.
14. MISCELLANEOUS
    1. Amendments or adjustments to the Agreement will only be valid to the extent that they have been agreed on in writing.
    2. Notifications under these Terms and Conditions of Sale or an Agreement that Parties send to each other in writing may, unless the relevant provision explicitly requires it to be set out in writing, also be sent digitally, i.e. by fax or by e-mail, provided always that the party choosing to use an electronic medium bears the burden of proof if according to the other party a notification did not arrive or did not duly arrive.
    3. A party’s failure to demand fulfilment of any provision within a term set out in the Agreement or these Terms and Conditions of Sale will not affect the right to demand fulfilment as yet, unless the relevant party has explicitly agreed to the non-fulfilment in writing and to the extent that no more than twelve (12) months have passed after the expiry of this term.
    4. In the event of any conflict whatsoever between the provisions in the Agreement and the provisions in these Terms and Conditions of Sale the provisions in the Agreement will prevail.
    5. The Agreement will at all times prevail over any Appendix thereto. Prevalence of Appendices to an Agreement may be laid down in the Agreement itself, in the absence of such a prevalence provision the Appendix with the lowest number will prevail, i.e. Appendix 1 prevails over Appendix 2, Appendix 2 prevails over Appendix 3, etc.
    6. If one of the provisions of these Terms and Conditions of Sale is null or nullified, the other provisions of these Terms and Conditions of Sale will remain in effect and Parties will consult with each other to agree on a replacement provision, the purport of the former provision and of these Terms and Conditions of Sale as a whole being preserved as much as possible.
    7. Parties will consult with each other as soon as possible regarding cases not provided for by these Terms and Conditions of Sale or by the Agreement.