

CLOUD PLATFORM SOFTWARE AS A SERVICE

Service Agreement

Issued: 01 June 2024

This Service Agreement becomes effective upon receipt of applicable Service Fees by Cybermerc Pty. Ltd. ("Cybermerc") for Managed Instances in the Cybermerc Cloud (Software As A Service) related to both open source and enterprise edition pieces of software acquired by the Customer. This Service Level Agreement will govern the rights and obligations of Cybermerc and Customer in relation to the Cloud Services (Software As A Service) described in any related Order Form(s), Statement(s) of Work, Contract(s) or other document(s) between Cybermerc and Customer.



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1 DEFINITIONS

- 1.1 **Customer** means the person or entity whose authorised agent has ordered Cloud Services from Cybermerc or from an authorised distributor or reseller.
- 1.2 **Documentation** means the official user or operator documentation for the Software generally made available to all Software users, as may be updated from time to time by the maintainers. Such Documentation will identify the specific product features and functionality of the Software (and each component thereof).
- 1.3 **End User** means a user authorised to access or use the Product(s).
- 1.4 **Maintenance Services** means the provision of Maintenance Releases, Minor Releases and Major Releases (each defined below), if any, to the Software, as well as corresponding Documentation, to Customer.
- 1.4.1 **Maintenance Release** means a generally available release of the Software that typically provides maintenance corrections or fixes only, designated by the maintainers by means of a change in the digit to the right of the second decimal point (e.g. Software 1.0.1 >> Software 1.0.2).
- 1.4.2 **Minor Release** means a generally available release of the Software that (i) introduces a limited number of new features and functionality, and (ii) is designated by maintainers by means of a change in the digit to the right of the decimal point (e.g., Software 1.0 >> Software 1.1).
- 1.4.3 **Major Release** means a generally available release of the Software that (i) contains functional enhancements or extensions, and (ii) is designated by maintainers by means of a change in the digit to the left of the first decimal point (e.g., Software 1.0 >> Software 2.0).
- 1.5 **Modified Code** means any modification, addition and/or development of code scripts deviating from the predefined product code tree(s)/modules developed by maintainers and/or Cybermerc for production deployment or use. Configuration of Software options which are intended to be altered is not considered a modification of the Software.
- 1.6 **Non-Conformity or Non-Conformities** means a failure in the Software to operate substantially in accordance with the applicable product documentation (**Documentation**).
- 1.7 **Service Fees** means the fees for Cloud Services specified in a corresponding Cybermerc or reseller invoice.
- 1.8 **Service Level** means the Cloud Services package purchased by Customer.
- 1.9 **Services Period** means the period for which Customer has purchased the Cloud Services and any subsequent renewal periods and will commence: (a) for Software Licenses for which Cloud Services are mandatory, on the date the applicable Software License Key(s) are made available for download; and (b) for perpetual Software Licenses for which Cloud Services are optional, on the date of purchase of the Cloud Services.
- 1.10 **Service Request** means any written or electronically written request for any Cloud Services by a Customer.
- 1.11 **Severity** is a measure of the impact a Non-Conformity or issue, as reported in a Service Request, has on the use of the Software, as determined by Cybermerc. The following Severity levels apply to all Software:
- 1.11.1 **Severity One or Severity-1** means Customer's production server or other mission critical system(s) are down and no workaround is immediately available and (i) all or a substantial portion of Customer's mission critical data is at a significant risk of loss or corruption; or (ii) Customer has had a substantial loss of service.
- 1.11.2 **Severity Two or Severity-2** means that major functionality is severely impaired such that: (i) operations can continue in a restricted fashion, although long-term productivity might be adversely



affected and a temporary workaround is available; or (ii) a major milestone is at risk, ongoing and incremental installations are affected, and a temporary workaround is available.

1.11.3 **Severity Three or Severity-3** means a partial, non-critical loss of functionality of the software such that: (i) the operation of some component(s) is impaired but allows the user to continue using the Software; or (ii) initial installation milestones are at minimal risk.

1.11.4 **Severity Four or Severity-4** means (i) general usage questions and cosmetic issues, including errors in the Documentation, and (ii) cases opened via email for Cybermerc Software.

1.12 **Software** means software supported by Cybermerc to Customer, and all components delivered with the Software.

1.13 **Cloud Services** means Software As A Service, Cloud Hosting, Hosted Products and Managed Instances.

1.14 **Technical Support** means the provision of telephone or web-based technical assistance by Cybermerc to Customer's technical contact(s) with respect to service requests, at the corresponding Service Level purchased by Customer.

1.15 **Third Party Products** means any software or hardware that (i) is manufactured by a party other than Cybermerc and/or maintainers and (ii) has not been incorporated into the Software by Cybermerc and/or maintainers.

2 SERVICE TERMS

2.1 **Provision of Cloud Services** Subject to the terms of this Agreement, Cybermerc will, during the Services Period, provide Customer with Cloud Services at the applicable Service Level purchased.

2.2 **Perimeter and Services** Cybermerc will provide to the Customer with a fully managed instance of the purchased Products. Cybermerc guarantees an overall **availability SLA of 99.98%** of cloud tenants. Non respect of those SLA may result in penalties due to the customers. In all cases, the penalties cannot exceed the total amount paid by the Customer for the Cloud Service:

SLA	Penalties
From 98% to 99.98%	10%
From 95% to 98%	25%
From 80% to 95%	50%
Below 80%	100%

2.3 **Purchase Requirements** means a user authorised to access or use the Product(s):

2.3.1 Except as otherwise provided by Cybermerc, Customer may purchase initial Cloud Services only for the most current, generally available Minor release or the most current Major release of the Software.

2.3.2 Except as otherwise provided in the applicable price list, the **minimum term for any Cloud Services offering is one (1) year.**

2.3.3 These Terms and Conditions will automatically update to Cybermerc's then- current Cloud Services terms and conditions set forth at the Cybermerc Cloud Services website upon any renewal of Cloud Services.

2.4 Exclusions

2.4.1 Cloud Services SLA shall not be applied in the event of a problem caused by the following: (i) improper usage, modification; operation of the Software with other media not in accordance with the manufacturer's specifications; or causes other than ordinary use; (ii) improper installation by Customer or use of the Software that deviates from any operating procedures as specified in the Documentation; (iii) Third Party Products, other than the interface of the Software with the Third



Party Products; (iv) Modified Code; (vi) any customised deliverables created by Cybermerc specifically for Customer as part of consulting services; or (viii) use of the Software with unsupported tools (e.g., NodeJS unsupported version, Python unsupported version, APIs, interfaces, or data formats other than those included with the Software and supported as set forth in the Documentation; or (vii) any issue not covered by Technical Support. Customer may request assistance from Cybermerc for such problems, for an additional fee.

2.4.2 If Cybermerc suspects that a reported problem may be related to Modified Code, Cybermerc, may, in its sole discretion: (i) request that the Modified Code be removed; and/or (ii) inform Customer that additional assistance may be obtained by Customer directly from various product discussion forums or by engaging Cybermerc's consulting services group for an additional fee.

2.5 **Customer Responsibilities** Cybermerc's obligations regarding Cloud Services are subject to the following:

2.5.1 Customer will promptly report to Cybermerc all problems with the Cloud Service. Cybermerc will implement any corrective procedures reasonably promptly upon receipt of the request.

2.5.2 Customer will provide Cybermerc with all information, access, and full good faith cooperation reasonably necessary to facilitate the provision of the Cloud Services and will do anything that is identified in the relevant Order Form or Statement of Work as the Customer's responsibility. Customer's failure or delay in its performance of any of the foregoing relieves Cybermerc of its obligations under this Agreement to the extent that such obligations are dependent upon Customer's performance.

2.5.3 Customer will provide Cybermerc a list of contacts (including name, email address, and phone number) of those individuals authorised to open Service Requests on Customer's behalf. These authorised contacts must have the access and authority to administer or configure the Software as required by the nature of the Service Request. Cybermerc does not provide support directly to the end users of the Software.

2.5.4 Customer is solely responsible for the use of the Software by its personnel and will properly train its personnel in the use and application of the Software.

2.5.5 For Severity One service requests, Customer will have dedicated resources available to work during business hours of their time zone or 24x7 depending on their subscription.

3 CLOUD SERVICES OFFERINGS AND FEES

3.1 Services Fee Terms

3.1.1 Services Fees are payable on the Effective Date or, in the case of a renewal term, no later than the date of commencement of the applicable Services Period. Services Fees are non-refundable.

3.1.2 If a Customer purchases Cloud Services but wish to migrate from an already installed on-premise platform, Cybermerc can help with the migration for additional fees. In this situation, the Customer must move to the then-current Minor Release or current Major Release of the Software.

3.2 **Cloud Services Notice** During any Services Period, Customer will be entitled to: (a) reasonable notice from Cybermerc of any Maintenance or Major Modification of Cloud Services at least one week before it occurs; and (b) reasonable notice from Cybermerc about any Major Changes like key features and functionality of the Software.

3.3 **Advanced and Complimentary Offerings** Certain Cloud Services may require that Customer also purchase a base level of support. Cybermerc may offer complimentary Support Services, as more fully described on the Cybermerc website such as the provision of Enterprise Edition to Customer (subject to additional subscription).

3.4 **Payment Terms** Services Fees are exclusive of any taxes, duties, or similar charges imposed by any government. Customer will pay or reimburse Cybermerc for all federal, state, dominion, provincial, or local sales, use, personal property, excise, value added, withholding or other taxes, fees, or duties relating to the



transactions contemplated by this Agreement (other than taxes on Cybermerc's net income). All invoices issued hereunder by Cybermerc are due and payable within **thirty (30) days of the date of the invoice**. Amounts not paid on time are subject to a **late charge equal to the lesser of one and one-half percent (1.5%) per month** or the maximum amount allowed by applicable law. If payment of any Services Fee is overdue, Cybermerc may also suspend performance until the delinquency is corrected.

4 TERM AND TERMINATION

- 4.1 At least **fifteen (15) days prior to expiration of the initial Service Period**, Customer may renew for a **one (1) year term** unless one party provides the other party with written notice of termination more than **thirty (30) days prior to the expiration of the then current Service Period**. Subsequent annual Service Fees shall be charged at Cybermerc's then current standard rates. Within **sixty (60) days prior to the expiration of the then current Service Period**, Cybermerc shall provide Customer with written notice (which may be in the form of an invoice) detailing the annual Service Fee for the subsequent renewal of such Service Period. If Customer does not renew prior to expiration of the initial Service Period, all Cloud Services will be terminated.
- 4.2 If Cloud Services have been terminated by Customer, Customer may reinstate such Cloud Services upon payment of the annual Service Fee in effect at the time, plus all unpaid annual Service Fees for periods subsequent to the date of termination or such alternate reinstatement fee, if any, as the parties mutually agree to accept in writing at the time of reinstatement.
- 4.3 Cloud Services may be terminated by Cybermerc prior to the expiration of the Service Period upon the occurrence of any of the following events of default and the failure of Customer to cure such default within **thirty (30) days after written notice of such default has been given by Cybermerc to Customer**: (a) if any undisputed sum of money owed by Customer is not paid when due; (b) if any breach occurs under any confidentiality provisions; or (c) if any material breach by Customer occurs as to any other term hereof or any other agreement between Cybermerc and Customer.
- 4.4 In the event of any such default and the continuance thereof beyond the applicable cure period, Cybermerc shall have the option to terminate Cloud Services by giving written notice of termination to Customer. Upon such termination, all amounts owed by Customer and unpaid as of the date of such termination shall become immediately due and payable to Cybermerc.
- 4.5 If either party goes into receivership, bankruptcy, or insolvency, or makes an assignment for the benefit of creditors, or ceases to operate its business, Cloud Services shall be immediately terminable by the other party by written notice, but without prejudice to any rights of the terminating party hereunder, such termination to be effective as of **one day prior to such event**.
- 4.6 Cloud Services may be terminated by Customer prior to the expiration of the Services Period in the event of a breach by Cybermerc of any warranty expressly set forth herein or a material breach by Cybermerc of any other term or condition hereof and Cybermerc fails to cure such breach within **thirty (30) days after written notice of such breach is given by Customer to Cybermerc**. In the event of any such default, Customer shall have the option to terminate Cloud Services by giving notice of termination to Cybermerc immediately and receive a refund of any prepaid Cloud Fees for that portion of the Services Period after such termination.
- 4.7 Customer's payment obligations and any other provision hereof, which by its terms is intended to so survive, shall survive any expiration or termination of Cloud Services for any reason.

5 WARRANTIES, DISCLAIMERS, AND EXCLUSIVE REMEDIES

- 5.1 Cybermerc warrants that Cloud Services will be provided in a professional manner consistent with industry standards. Customer must notify Cybermerc of any service deficiencies within **thirty (30) days from performance of the defective services**. CYBERMERC DOES NOT GUARANTEE THAT THE SOFTWARE WILL PERFORM ERROR-FREE OR UNINTERRUPTED OR THAT CYBERMERC WILL CORRECT ALL SOFTWARE ERRORS.
- 5.2 FOR ANY BREACH OF THE ABOVE WARRANTIES, CUSTOMER'S EXCLUSIVE REMEDY AND CYBERMERC'S ENTIRE LIABILITY SHALL BE: (A) THE CORRECTION OF SOFTWARE ERRORS THAT CAUSE BREACH OF THE WARRANTY; OR, IF CYBERMERC CANNOT SUBSTANTIALLY CORRECT SUCH BREACH IN A COMMERCIALY REASONABLE MANNER, CUSTOMER MAY END THE SERVICES PERIOD AND RECOVER



A PRORATED PORTION OF ANY MAINTENANCE FEES PREPAID TO CYBERMERC; OR (B) THE REPERFORMANCE OF THE DEFICIENT CLOUD SERVICES. TO THE EXTENT PERMITTED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

6 MISCELLANEOUS PROVISIONS

- 6.1 **Confidentiality** Neither party will disclose any Cloud Services-related terms, conditions, and/or fee amounts to any third party, unless required to do so by order of any court or governmental authority of competent jurisdiction.
- 6.2 **Binding. No Assignment.** This agreement shall be binding upon and inure to the benefit of the parties and their successors, permitted assigns, and legal representatives. Customer may not assign, sublicense, or otherwise transfer the Cloud Services unless in conjunction with a transfer of the Software.
- 6.3 **Language** This Agreement has been agreed to only in the English language. This English language version will control regardless of whether any translations of this Agreement have been prepared or exchanged. Customer acknowledges and represents that it has carefully reviewed this Agreement with the involvement and assistance of your employees, advisors, and/or legal counsel fluent in the English language, that it has consulted with local legal counsel and counsel competent to render advice with respect to transactions governed by the law applicable to this Agreement, that it has no questions regarding the meaning or effect of any of this Agreement's terms, and that it has obtained high quality translations of this Agreement for use by Customer or any of Customer's team who are not fluent in the English language, with the understanding that Customer alone will bear the risk of any misunderstandings that may arise as a result of such translation. All communications in connection with this Agreement will be in the English language.
- 6.4 **Notices to Cybermerc** Any notices to Cybermerc under this Agreement must be in writing and either delivered in person, sent by email, or sent by air courier to the address set forth below. Notices will be considered to have been given at the time of actual delivery in person, **five (5) business days** after deposit in the mail, or **two business (2) days** after delivery to an air courier service or confirmation of email receipt:

CYBERMERC PTY. LTD.
SUITE 2, 31/37 TOWNSHEND ST,
PHILLIP, ACT, 2606
AUSTRALIA
info@cybermerc.com

- 6.5 **Choice of Law; Jurisdiction; Jury Waiver** This agreement shall be governed by and construed and enforced in accordance with the laws of Australia. This agreement shall be interpreted in accordance with the commonly understood meaning of the words and phrases in Australia. All judicial proceedings regarding any dispute and/or controversy relating to Maintenance shall be initiated in Courts sitting in the Australian Capital Territory, and each party irrevocably submits to the jurisdiction and venue of any such court in any such proceeding. BOTH PARTIES WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT.
- 6.6 **Attorney's Fees** In the event of any legal action, arbitration, or proceeding brought by either party against the other arising out of this agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs incurred in such action and such amount shall be included in any judgment or arbitration decision rendered in such proceeding.
- 6.7 **Severability** If any of the parties' obligations under this agreement are found by a court of competent jurisdiction to be illegal or unenforceable in any respect, such illegality or unenforceability will be interpreted to accomplish the objectives of such provision to the greatest extent possible under applicable law but shall not affect the other provisions of this agreement, all of which shall remain enforceable in accordance with their terms.



- 6.8 **No Waiver** The parties shall not be deemed to waive any of their rights or remedies under this agreement unless such waiver is in writing and signed by the party to be bound. No delay or omission on the part of either party in exercising any right or remedy under this agreement will be construed to be a waiver thereof. A waiver of any right or remedy on any one occasion shall not be construed as a bar to or waiver of such right or remedy or any other right or remedy on any future occasion.
- 6.9 **Data Protection** Customer acknowledges that correspondence and log files generated in conjunction with a request for Cloud Services may contain sensitive, confidential, or personal information. Customer is solely responsible for taking the steps it considers necessary to protect the data, including obfuscating the logs or otherwise guarding the information before sending it to Cybermerc.
- 6.10 **Force Majeure** In no event shall a party be liable to the other party for any delay or failure to perform its obligations under this agreement (other than a failure to pay amounts owed), which delay or failure to perform is attributable to an event of force majeure or other causes beyond the control of such party and without the fault or negligence of the party claiming excusable delay.
- 6.11 **Construction** The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement. Unless the context of this Agreement clearly requires otherwise: (a) references to the plural include the singular and the singular the plural; (b) "or" has the inclusive meaning frequently identified with the phrase "and/or" and (c) "including" has the inclusive meaning frequently identified with the phrase "including but not limited to" or "including without limitation." Any reference in this Agreement to any statute, rule, regulation, or agreement, including this Agreement, will be deemed to include such statute, rule, regulation, or agreement as it may be modified, varied, amended, or supplemented from time to time.
- 6.12 **Modifications to the Agreement** Cybermerc may modify this Agreement (including anything in Cybermerc's Cloud Services Program) at any time by posting a revised version on the Cybermerc website. The modified terms will become effective upon posting. By continuing to use the Cloud Services after the effective date of any modifications to this Agreement, you agree to be bound by the modified terms. It is your responsibility to check the Cybermerc website regularly for modifications to this Agreement. Cybermerc last modified this Agreement on the date listed at the beginning of this Agreement.
- 6.13 **Entire Agreement** This agreement supersedes and terminates all prior written and oral agreements, proposals, promises, and representations of the parties with respect to the services covered by this agreement. The terms of this agreement shall not be amended or changed by the terms of any purchase order or acknowledgement of Customer, even though Cybermerc may have accepted or signed such document. Any terms or conditions in any amendment, addenda, or written order form that vary from, or add to, the terms and conditions of this agreement shall be of no force and effect. This agreement has been written in the English language and each party waives any rights that it may have under applicable law to be written in the language of the country of that party's domicile or incorporation.