

TestPlant Terms & Conditions for the licencing of eggPlant Performance Free Edition

1 Definitions

1.1 In this licence the following words and phrases have the following meanings

“Confidential Information” means in respect of TestPlant any and all information relating to the trade secrets, operations, processes, plans, intentions, products, product information, prices, know-how, designs, customer lists, market opportunities, transactions, affairs and/or business of TestPlant and/or to its customers, suppliers, clients or affiliated companies in or on any medium or format; “Customer” means the party downloading the Licenced Software from TestPlant;

“Effective Date” means the date on which a Licence Key made available to be downloaded via TestPlant’s website to the Customer;

“Intellectual Property Rights” means patents, rights to inventions, copyright and related rights, trademarks, trade names and domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications (and rights to apply) for, and renewals or extensions of, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist, now or in the future, in any part of the world;

“Licence Key” means the numeric code, generated by TestPlant based on information provided to TestPlant by the Customer, required in order to use the Licenced Software;

“Licence Period” means one year;

“Licenced Software” means eggPlant Performance Free Edition;

1.2 Unless the context otherwise requires, references to TestPlant and the Customer include their permitted successors and assigns.

1.3 The headings contained in this Agreement are for convenience of reference only and shall not affect its interpretation or construction.

1.4 Unless the context otherwise requires words denoting the singular shall include the plural and vice versa, references to any gender shall include all other genders and references to persons shall include natural persons, bodies corporate, unincorporated associations, governments, states, trusts and partnerships, in each case whether or not having a separate legal personality.

1.5 References to any statute, enactment, order, regulation or other similar instrument shall be construed as references to the same as amended by or as contained in any subsequent re-enactment, modification or statutory extension thereof.

2 FORMATION OF AGREEMENT

2.1 By clicking “I Agree”, the Customer agrees to be bound by these Terms & Conditions.

3 LICENCE

3.1 Subject to the provisions of this Agreement, TestPlant grants to the Customer a non-exclusive, non-transferable licence to use the Licenced Software for the Licence Period. TestPlant reserves any rights not expressly granted in this Agreement.

3.2 For the purposes of clause 3.1, use of the Licenced Software shall be restricted to use in object code form only, and solely for use by the Customer for the testing of, or automation of commands in respect of, software or systems:

3.2.1 supplied to or being developed by or on behalf of the Customer or its Affiliates for use in the course of its normal internal business purposes; or

3.2.2 being developed and/or tested by the Customer in the course of services for one of its own customers, provided that such services are not

(a) supplied by the Customer in the capacity of application service provider or service bureau; and/or

(b) in so doing the Licenced Software is not itself used or operated by, or supplied or in any other way made available to, that customer.

3.3 Except as expressly authorised by TestPlant, the Customer:

3.3.1 may not copy any Licenced Software or Documentation except where such copying is incidental to normal use of the Licenced Software or where it is necessary for the purpose of back-up or operational security;

3.3.2 may not rent, lease, sub-license, loan, translate, merge, adapt, vary or modify the Licenced Software or Documentation;

3.3.3 may not make alterations to, or modifications of, the whole or any part of the Licenced Software nor permit the Licenced Software or any part of it to be combined with, or become incorporated in, any other programs;

3.3.4 may not to disassemble, de-compile, reverse engineer or create derivative works based on the whole or any part of the Licenced Software nor attempt to do any such things except to the extent that such actions cannot be prohibited because they are essential for the purpose of achieving inter-operability of the Licenced Software with another software program, and provided that the information obtained by you during such activities:

(c) is used only for the purpose of achieving inter-operability of the Licenced Software with another software program;

(d) is not disclosed or communicated without the TestPlant’s prior written consent to any third party to whom it is not necessary to disclose or communicate it; and

(e) is not used to create any software which is substantially similar to the Licenced Software;

3.3.5 may not remove, delete or alter any trademarks, copyright notices or other Intellectual Property Rights notices of TestPlant or its Affiliates;

3.3.6 may not use the Licenced Software for the purposes of competitive analysis, the development of competing software product or any other purpose that is disadvantageous to TestPlant;

3.3.7 shall keep all copies of the Licenced Software secure and to maintain accurate and up-to-date records of the number and locations of all copies of the Licenced Software and shall take all reasonable measures to prevent unauthorised copying;

3.3.8 shall supervise and control use of the Licenced Software and ensure that the Licenced Software is used by your employees and representatives in accordance with these terms;

4 LICENCE KEYS

4.1 Subject to the terms of this Agreement, TestPlant shall provide Customer with a Licence Key to access the Licenced Software for a period of time. For clarification, Customer shall have no right to use the Licenced Software with the Licence Key or otherwise after the Licence Period has ended.

5 CUSTOMER’S OBLIGATIONS

5.1 The Customer shall not and shall not allow the Licenced Software to be used in any of the following ways:

5.1.1 for any purpose other than the testing of software without the prior written permission of TestPlant;

5.1.2 in breach of any reasonable instruction given by TestPlant, or

5.1.3 that causes TestPlant to be subject to any criminal prosecution, enforcement action, civil claim or other action or liability.

6 SUPPORT AND MAINTENANCE

6.1 The Customer will not be entitled to technical support.

7 WARRANTIES

7.1 TestPlant warrants

7.1.1 that it has the right to grant the Customer a licence to use the Licensed Software in accordance with this Agreement; and

7.2 TestPlant does not warrant that the use of the Licensed Software will be uninterrupted or error-free.

7.3 The Customer acknowledges that the Licensed Software has not been produced to meet the Customer's individual requirements, and accepts responsibility for the selection of the Licensed Software to achieve its intended results.

7.4 The warranties set out in this clause 7 are in lieu of and exclude all other terms, conditions or warranties which might have effect between the parties or be implied or incorporated into this Agreement or any collateral contract, whether by statute, common law or otherwise to the fullest extent permitted by law. The actions set out in this clause 7 shall be the Customer's sole remedy in respect of all warranties under this Agreement.

8 INTELLECTUAL PROPERTY RIGHTS

8.1 The Customer acknowledges that all Intellectual Property Rights in the Licensed Software, and in the Documentation belong and shall remain with TestPlant, and the Customer shall have no rights in or to the Licensed Software, Deliverables or the Documentation other than the right to use the same in accordance with the terms of this Agreement.

9 DURATION AND TERMINATION

9.1 The Customer is only entitled to use the Licensed Software for the Licence Period.

9.2 THE LICENSED SOFTWARE INCLUDES DIGITAL RIGHTS MANAGEMENT PROTECTION, AND THE CUSTOMER IS ON NOTICE THAT FOLLOWING EXPIRY OF ANY LICENCE PERIOD THE LICENSED SOFTWARE MAY BECOME ENCRYPTED OR UNUSABLE AND THE CUSTOMER SHALL HAVE NO RIGHTS OR REDRESS.

9.3 TestPlant reserves the right to suspend the provision of the Licensed Software to the Customer with immediate effect upon notice to the Customer in the event that:

9.3.1 the Customer is in material breach of any of its obligations under this Agreement

9.4 Termination by either party in accordance with the rights contained in this 8 shall be without prejudice to any other rights or remedies of that party accrued prior to termination.

9.5 On termination for any reason:

9.5.1 all rights granted to the Customer under this Agreement shall cease;

9.5.2 the Customer shall cease all activities authorised by this Agreement;

9.5.3 the Customer shall immediately destroy or return to TestPlant (at TestPlant's option) all copies of the Licensed Software and Documentation then in its possession, custody or control and, in the case of destruction, certify to TestPlant that it has done so.

10 CONFIDENTIALITY

10.1 The provisions of this clause 10 shall remain in full force and effect notwithstanding termination of this Agreement for any reason.

10.2 Customer shall treat in confidence TestPlant's Confidential Information, and shall not disclose any of TestPlant's Confidential Information to any other person other than its own employees under conditions of confidentiality and then only to the extent required for proper performance of its obligations under this Agreement.

10.3 Nothing in this Agreement shall be construed to impose a confidentiality obligation on a party in respect of:

10.3.1 any matter appearing in public literature or otherwise within the public domain, unless the information is in the public domain as a result of a breach of a Contract by that party; or

10.3.2 any information or knowledge possessed by that party prior to disclosure to it by the other or rightfully acquired from sources other than the other party; or

10.3.3 any information or knowledge acquired in a bona fide arm's length transaction by the party making the disclosure; or

10.3.4 information which is required by law or a court of competent jurisdiction to be publicly released.

10.4 In protecting Confidential Information received from the TestPlant, Customer shall employ a reasonable standard of care, which shall be no less than the standard of care employed in protecting its own Confidential Information. Customer will establish and maintain such security measures and procedures as are reasonably practicable to provide for the safe custody of TestPlant's Confidential Information in its possession and to prevent unauthorised access thereto or use thereof.

10.5 Upon any termination of this Agreement, Customer shall cause all Confidential Information belonging TestPlant in whatever medium the same is recorded or held to be returned, deleted or destroyed according to the written instructions of the other party.

10.6 This obligations set out in this clause 10 will survive the termination of this Agreement for a period of five (5) years or until such earlier time as the Confidential Information concerned reaches the public domain other than through the receiving party's own default.

11 LIMITATION OF LIABILITY

11.1 TestPlant accepts unlimited liability for:

11.1.1 death or personal injury caused by its negligence;

11.2 Subject to clause 11.1 TestPlant's entire liability to the Customer in respect of the provision of the Licensed Software and/or Services and all losses arising out of or in connection with TestPlant's performance or non-performance of its obligations under this Agreement;

11.2.1 in respect of damage to property (both real and personal) shall be limited to £100 (one hundred pounds) for each event or series of connected events; and

11.2.2 in respect of all other claims, losses or damages, whether arising from tort (including negligence), breach of contract or otherwise under or in connection with this Agreement shall in no circumstances exceed a sum equal £100 (one hundred pounds).

11.3 Subject to clause 11.1, TestPlant shall not be liable to the Customer, whether in contract, tort (including negligence) or otherwise for loss of revenue, loss of profit, loss of goodwill, loss of reputation, loss of anticipated savings, loss of business, loss, corruption or destruction of data, loss of contracts or any indirect, special or consequential loss, even though TestPlant was aware of the circumstances in which such indirect or special damage could arise.

11.4 The Customer agrees that, in entering into this licence, either it did not rely on any representations (whether written or oral) of any kind or of any person other than those expressly set out in this licence or (if it did rely on any representations, whether written or oral, not expressly set out in this licence) that it shall have no remedy in respect of such representations and (in either case) TestPlant shall have no liability otherwise than pursuant to the express terms of this licence.

12 WAIVER

12.1 No forbearance or delay by either party in enforcing its rights shall prejudice or restrict the rights of that party, and no waiver of any such rights or of any breach of any contractual terms shall be deemed to be a waiver of any other right or of any later breach

13 SEVERABILITY

- 13.1 If any provision of this agreement (or part of a provision) is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.
- 13.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

14 AMENDMENTS

- 14.1 No amendment, waiver or variation of this Agreement shall be binding on the parties unless set out in writing, expressed to amend this Agreement and signed by or on behalf of each of the parties.

15 THIRD PARTY RIGHTS

- 15.1 Unless otherwise expressed to the contrary in this Agreement, nothing in this Agreement confers or purports to confer on any person who is not a party to it any right to enforce any of its terms.

16 GENERAL

- 16.1 This Agreement and any document referred to in it constitute the whole and only agreement and understanding between the parties relating to its subject matter and supersedes and extinguishes any drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing, between the parties in connection with the subject matter of this Agreement whether existing prior to or at the same time as this Agreement. The express terms of this Agreement are instead of all warranties, conditions, terms, undertakings and obligations implied by statute, common law, custom, trade usage, course of dealing or otherwise, all of which are hereby excluded to the fullest extent permitted by law.

17 GOVERNING LAW AND JURISDICTION

- 17.1 This Agreement shall be governed by and construed in accordance with English law and, the parties irrevocably agree that the courts of England shall have exclusive jurisdiction over any claim or matter or to settle any dispute which may arise out of or in connection with this Agreement and that accordingly any proceedings may be brought in such courts.