

## NP.50.70.109 – Appendix

### Terms and Conditions for the use of Free & Open Source Software in non-production material:

#### 1. Scope of application

- 1.1. These Terms and Conditions supplement contractual provisions for the creation and/or delivery of non-production material, in particular software products in the areas of enterprise IT and mobile apps ("Main Contract") between the Contractor and Daimler Truck AG or its affiliated companies within the meaning of Section 15 German Stock Corporation Act (AktG) ("Principal") for the use of so-called "Free Software" or "Open Source Software" (together "FOSS"). For products purchased for use in vehicles ("Production Material") the Principal's Terms and Conditions applicable to Production Material shall apply instead of these Terms and Conditions. Subject to this provision, the scope of application of these Terms and Conditions includes (1) the purchase of software not specifically created for the Principal and generally offered on the open market ("Standard Software"), as well as (2) software specifically developed or customized for the Principal ("Individual Software"), in each case irrespective of whether the software is delivered to the Principal as a separate product or as part of another product (for example, hardware, production facilities). For FOSS, these Terms and Conditions take precedence over the Main Contract. Individual deviations from these Terms and Conditions shall be agreed in writing and expressly reference the regulations affected.
- 1.2. The term FOSS in this document includes any software that is generally available free of charge and is subject to a license or other contractual arrangement ("FOSS License") that contains at least one of the following conditions as a requirement for the modification and/or distribution of the software and/or any software associated with or derived from this software ("FOSS Derivative"):
  - a) the source code of such software and/or a FOSS Derivative must be made available to third parties; and/or
  - b) third parties must be permitted to create derivative works from such software and/or a FOSS Derivative; and/or
  - c) third parties must be provided with authorization keys necessary for the installation of such software; and/or
  - d) certain references or certain documents, such as a license text, must be included in the associated product documentation and/or other supplied materials, and/or must be agreed upon with recipients.

#### 2. Approval of the Principal to use FOSS or FOSS Derivatives

- 2.1. All deliveries and services by the Contractor may only contain FOSS insofar as the Contractor has obtained the approval of the Principal ("Permitted FOSS"), correctly using the document "Approval and Disclosure of the Use of Free Software and Open Source Software (FOSS) in Non-Production Material (NP.50.70.108)" ("FOSS-DD<sup>1</sup>") in the latest version provided by the Principal.

The Contractor must submit the fully and properly completed FOSS-DD to the Principal for the first time with the offer for the deliveries or services concerned at the latest, so that this can be taken into account accordingly for a purchase order by Principal. For the purpose of transmitting the FOSS-DD, the Contractor may, after prior consultation with the Principal, use electronic means of communication that allow adequate documentation of the approval (for example, by means of a Disclosure Portal solution, storage in the source code repository, etc.).
- 2.2. Insofar as the Contractor's delivery or service contains Standard Software, the approval of the Principal to the use of FOSS in the Standard Software is deemed to be granted to the extent that the Contractor has disclosed the FOSS by completely and properly completing the FOSS-DD (in accordance with Clause 2.a. and Clause 3.a. of the FOSS-DD). A separate approval by the Principal is not required in this case, deviating from the aforementioned.
- 2.3. Insofar as the Contractor wishes to use FOSS in Individual Software, the Contractor must apply for and obtain the prior approval of the Principal by properly completing the FOSS-DD (Clause 2.b and Clauses 3.b. to 3.d. of the FOSS-DD). The Principal decides at his own discretion on the use of FOSS in Individual Software. The Contractor shall answer any queries without undue delay.

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<sup>1</sup> For "FOSS Disclosure Document"

2.3.1 (*Approval in individual cases*): Approval of the use of FOSS in the product or sub-product to be delivered must be requested by providing a complete list of the respective software components to be used that contain FOSS ("FOSS Components") (Clause 2.b and Clause 3.b of the FOSS-DD).

2.3.2 (*Acceptance of allow lists and deny lists*): The Principal may, without being obliged to do so, provide the Contractor with one or more lists of FOSS Components and/or FOSS Licenses for which the approval for use in the development of Individual Software in the specific product or in a specific sub-product is deemed to be granted ("Allow List") or denied ("Deny List") by the Principal. Insofar as an Allow List or Deny List contains a specific FOSS License, it may define individual FOSS Components under that FOSS License to which the approval or denial does not extend. To the extent that an Allow List approves the use of FOSS, a separate approval pursuant to Clause 2.3.1 is not required. Acceptance of and compliance with the provided Allow Lists and Deny Lists must be confirmed by the Contractor in accordance with Clause 2.b and Clause 3.c of the FOSS-DD. If a Deny List denies the use of a FOSS Component whose FOSS License is included on an applicable Allow List, the Deny List shall take precedence.

2.3.3 (*Agile development*): If the development of Individual Software for the Principal is to be carried out using an agile development method, the Contractor can, in agreement with the Principal, choose the option of the "agile development path" (Clause 2.b and 3.c of the FOSS-DD). In this case the Contractor may use FOSS Components during development at his own discretion. However, this use is subject to subsequent written approval by the Principal.

The subsequent approval may be granted at the sole discretion of the Principal at any stage of development, for example, after the respective "Sprint" or as part of a "Sprint Review". The approval is at the free discretion of the Principal. If the Principal refuses approval, the Contractor is obliged to, at his own expense, remove the refused FOSS and replace it without restriction of function. Approvals granted in advance in accordance with Clause 2.3.1 or a previously accepted Allow List in accordance with Clause 2.3.2 shall remain unaffected. For clarification: If a used FOSS Component is already covered by an approval in 1 For "FOSS Disclosure Document" Terms and Conditions for the use of Free & Open Source Software in non-production material accordance with Clause 2.3.1 or an accepted Allow List in accordance with Clause 2.3.2, a renewed approval under this Clause 2.3.3 is not required.

2.3.4 (*Declaration of conformity*): For final acceptance of the Individual Software, the Contractor shall make a declaration by means of the FOSS-DD (Clauses 2.b and 3.c of the FOSS-DD) that the product exclusively contains FOSS, which is covered by approvals granted by the Principal. If and to the extent that the Contractor has accepted an Allow List and/or Deny List from Principal, the Contractor shall also confirm compliance with the respective list to the same extent. All contained FOSS must be accordingly declared in the FOSS-DD as part of the declaration of compliance. This is a mandatory prerequisite for a complete and contractual acceptance as defined in the Main Contract.

- 2.4. Insofar as an approval is required, such approval is, with the exception of Clause 2.2, only given expressly and in writing. Silence on the part of the Principal with regard to the FOSS-DD shall not constitute approval. In this case, the Principal will inform the Contractor of the decision regarding the requested use of FOSS either in writing or by attaching the approving FOSS-DD to the purchase order for the product containing FOSS. This decision can be a rejection or an approval. Even a complete rejection of the requested use of FOSS shall not affect the obligations of the Contractor, particularly with regard to the fulfilment of all existing contractual obligations towards the Principal. For the purpose of this written approval, the Principal may use electronic means of communication which allow adequate documentation of the approval (for example by means of a Disclosure Portal solution, storage in the source code repository, FOSS License Assessment Tool, or similar).

### **3. Obligations of the Contractor**

- 3.1. Both for FOSS contained in Standard Software and FOSS contained in Individual Software, approval is given by the Principal under the condition and corresponding obligation of the Contractor,
- a) to comply with the applicable FOSS licensing and usage terms for the FOSS Component, and ensure compatibility with other FOSS included and/or other software included;
  - b) to fully inform the Principal about the obligations from the respective applicable FOSS licensing and usage terms that are to be fulfilled, and to enable the Principal to fulfil these obligations himself, particularly in the case of a distribution of the Standard Software and/or Individual Software; and
  - c) to integrate the respectively used FOSS Components into the Standard Software and/or Individual Software in such a way that the FOSS licensing terms do not extend to the proprietary parts and/or other parts of the software as a

whole or in parts ("Copyleft Effect"), and that excludes the obligation to grant patent licenses at the expense of the Principal.

For clarification: If the Contractor does not comply with the aforementioned conditions for approval to use FOSS in Standard Software and/or Individual Software, the corresponding approval of the Principal for the affected FOSS Component and/or FOSS Derivative is deemed not to be granted.

- 3.2. For the delivery of Individual Software, the following obligations apply in addition to the obligations set out in Clause 3.1:
- 3.2.1 The Contractor shall fulfil all obligations arising from the use of FOSS and FOSS Derivatives, including for their modification and distribution, for the Principal in his place and on his behalf, except where this is not permitted under the respective FOSS License.
- 3.2.2 The Contractor shall design and structure his deliveries or services, in particular also the software architecture and development, in compliance with the specifications of Principal and in such a way that the respective FOSS Licenses do not conflict with the digital signature, authentication information, cryptographic keys or other information of the hardware used for or by the Principal. This presupposes, in particular, that this information does not have to be disclosed either in whole or in part by the Principal.
- 3.2.3 Approved FOSS and FOSS Derivatives must be technically incorporated into deliveries or services in such a way that they can be removed and replaced by another product.
- 3.2.4 The Contractor shall hand over all FOSS License texts, notes to be reproduced in the documentation, and other components required by the Principal for the creation and use of an executable version of the approved FOSS (such as adapted build scripts) upon the handover of the deliveries or services at the latest, including the source code of the FOSS and FOSS Derivatives, if any.
- 3.2.5 If required under the relevant FOSS Licenses or if the Principal so wishes, the Contractor shall make available the FOSS Derivatives the Contractor created to the respective FOSS projects. This is always done subject to prior consultation with the Principal and only if there are no contradicting patents or other contradicting legal reasons. Insofar as the Principal requests that they be made available, this will only take place if the FOSS Derivatives are non-differentiating and can be assigned to the "commodity" area, and no confidentiality agreements conflict with this. In cases of doubt the Principal shall decide.

#### **4. Examination and Monitoring**

- 4.1. Before each (new) delivery of software, in particular new versions, releases, updates, bug fixes and patches, the Contractor shall examine whether
- a) FOSS contained therein has been published under a new or modified FOSS License;
  - b) FOSS contained therein is used in accordance with the relevant FOSS Licenses, and in the case of Individual Software, also in accordance with the FOSS-DD and the Principal's requirements; and
  - c) corrections, patches or new versions are available for the FOSS contained therein and, in the case of Individual Software, lets the Principal decide on its use by means of the FOSS-DD.
- 4.2. The Contractor shall provide the Principal with all items necessary to prove that the obligations assumed by the Contractor have been duly fulfilled.
- 4.3. The Contractor is obliged to keep up to date with respect to the FOSS contained in deliveries and services and to inform the Principal about safety risks.

#### **5. Amendments**

- 5.1. Modifications to FOSS or FOSS Derivatives previously approved require the prior approval of the Principal. The procedure for the first-time use of FOSS shall apply accordingly. This procedure applies also if the FOSS or FOSS Derivation is merely a new version, and each time the purpose of use agreed to or approved by the Principle is changed. The Contractor shall obtain approval for modifications with sufficient advance notice, stating the planned time of inclusion of the modifications in the Terms and Conditions for the use of Free & Open Source Software in non-production material delivery or service. For any additional effects of modifications of the FOSS on the deliveries or services under the Main Contract, the change procedure of the Main Contract shall apply.

- 5.2. The Principal may at any time until delivery or acceptance of the respective delivery or service, in particular of Individual Software, demand reasonable modifications and additions to the use of FOSS at his reasonable discretion, taking into account the interests of the Contractor.
- 5.3. Insofar as Standard Software is concerned, the Contractor can alternatively to Clause 5.1, in the event of a change in the FOSS contained in the Standard Software, with prior agreement with the Principal, effect an update of the disclosure (in accordance with Clause 3.1 a. FOSS-DD) by communicating the license information necessary for the disclosure in permanently storable electronic form.

## **6. Liability and Warranty**

- 6.1. These Terms and Conditions do not create any responsibility on the part of the Contractor for FOSS as such, except as permitted by the applicable FOSS License. However, the Contractor is obliged to provide warranty and is liable for the provision of the deliveries and services in accordance with the Main Contract, also if FOSS or FOSS Derivatives are used.
- 6.2. Without limitation of the Contractor's obligations under Clause 3, and except where this is not permitted under the respective FOSS License, the Contractor assumes, within the scope of the warranty and at his own expense, also the maintenance of FOSS and FOSS Derivatives used in accordance with the Main Contract, in particular the removal of defects. This also includes inspecting the FOSS and FOSS Derivatives before their use and then continuously for potential errors and their correction, especially if they are relevant to safety. The incorporation of the corrections into the deliveries or services shall take place if the Principal agrees.
- 6.3. If the Contractor violates any obligation set forth herein, the Contractor shall indemnify and hold harmless the Principal and its affiliated companies as well as sales partners, distributors and clients from any claims, damages, losses and costs caused thereby and shall defend them against third-party claims. The Principal can also assume the defense himself. The costs of judicial and extrajudicial defense, including reasonable lawyer's fees, shall be borne by the Contractor, even in the event of defense against a claim that is merely alleged.

## **7. Obligation of Sub-contractors**

- 7.1. For the use of sub-contractors, the Main Contract shall apply. The use of sub-contractors does not affect the Contractor's responsibility towards the Principal for the provision of the ordered deliveries or services, in particular for the granting of rights of use in work results.
- 7.2. The Contractor must diligently select and monitor sub-contractors for the requirements described herein and integrate them into his information and work processes for FOSS. This must be proven by submitting suitable documents, such as extracts from contracts. The Principal may clarify questions about FOSS directly with sub-contractors. The Contractor will be informed thereof and shall not be released from his obligations under the Main Contract and these Terms and Conditions.
- 7.3. Upon request, the Contractor shall not further use sub-contractors with respect to FOSS, where the Principal has reasonable doubts about their reliability and willingness to cooperate with respect to the Principal's requirements for the use of FOSS. Any costs arising from this shall be borne by the Contractor.

## **8. General Regulations**

- 8.1. The contact person responsible for technical questions at the Contractor is also the contact person for all questions relating to the use of FOSS, unless the Contractor has designated another person as being responsible for FOSS in writing.
- 8.2. The provisions of the Main Contract regarding property rights and rights of use for deliveries or services shall also apply to the share of FOSS modified specifically for the Principal.
- 8.3. Upon request, Contractor shall take all measures that the Principal would have to take in order to be able to grant rights to third parties (such as clients) under the relevant FOSS Licenses, in particular the provision of source codes. This also includes the preparation and publication of documentation, archiving and version management of the respective FOSS and FOSS Derivatives, their clear assignment to individual deliveries or services and, if necessary, the provision and transfer of the FOSS and FOSS Derivatives to third parties in accordance with the respective FOSS Licenses, for the Principal.

- 8.4. The Contractor shall provide the requested information on the FOSS covered by these Terms and Conditions. The type and scope of the information shall be agreed with the Principal.
- 8.5. The approved FOSS and FOSS Derivatives shall be provided without additional remuneration. The remuneration under the Main Contract shall remain unaffected and includes the remuneration for the obligations, procedures and their fulfilment set forth in these Terms and Conditions.
- 8.6. The law of the People's Republic of China shall apply exclusively to these Terms and Conditions, excluding the UN Convention on Contracts for the International Sale of Goods (CISG).