

## Terms and Conditions

### 1. General Terms

These general terms apply to any TMSe Marketing Services Austria service purchased, licensed or subscribed to for example ClipFlip Video engagement booster (<http://clipflip.video/>).

#### 1.1. Definitions

**“Affiliate”** means any entity which directly or indirectly controls, is controlled by, or is under common control with the subject entity. “Control”, for purposes of this definition, means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

**“Ad Banner”, “Ad”, “Video Tag”, “VAST” or “Advertising”** shall mean a promotional message (including any code embedded therein) that may consist of text, graphics, audio and/or video or any combination thereof and that is displayed on online media inventory for the purpose of publicizing an Advertiser’s products or services.

**“Customer Data”** means all electronic data, information or creative work submitted by Customer to the Services, whether that data, information or creative work is submitted by Customer, Users, or general Public Users of the Network.

**“Network”** means the network of websites or web services operated by Customer, and Customer’s Users, and used in connection with the Services, including but not limited to the Customer’s own website, or web services, and third party web sites or web services that directly or indirectly are using the Services.

**“Order Form”** means the ordering documents for purchases hereunder that are entered into between Customer and TMSe Marketing Services Austria from time to time. Order Forms shall be deemed incorporated herein by reference.

**“Royalty Report”** means a report generated by TMSe Marketing Services Austria from Customer’s traffic and click-through data that include total numbers for a given time period and any aggregated calculations on revenue or conversion data.

**“Services”** means the online, web-based applications and/or platform provided by TMSe Marketing Services Austria “<https://app.clipflip.video>” and/or other designated websites as described in the User Training, that are ordered by Customer under the Agreement, including any associated offline components.

**“User Training”** means the online user walkthrough and training for the Services, which will be updated from time to time.

**“Users”** means individuals or entities that are authorized by Customer to use the Services, for whom subscriptions to a Service have been purchased, and who have been supplied user identifications and passwords by Customer (or by TMSe Marketing Services Austria at Customer’s request). Users may include but are not limited to third parties with which Customer transacts business and/or has a contractual relationship.

**“Public Users”** means individuals/consumers that consume and/or are customers of the Customer’s services.

**“Effective Date”** means the contract’s effective start date as it is specified in the Order Form. This is the date from which invoicing will commence.

**“Force Majeure”** means unavailability caused by circumstances beyond TMSe Marketing Services Austria’s reasonable control, including without limitation events such as acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes, or other labor problems (other than those involving TMSe Marketing Services Austria employees), Internet service provider failures or delays, or legal restrictions in accordance with applicable laws and government regulations.

## **1.2. Services**

**1.2.1 Provision of Services.** TMSe Marketing Services Austria shall provide the non-exclusive, non-sub-licensable and non-transferable right to access and use the Services pursuant to this Agreement and the relevant Order Forms during the subscription term.

**1.2.2 Subscriptions.** Unless otherwise specified in the applicable Order Form, Services are purchased as subscriptions and the Services are limited to the specified capacity as described in the Order Form.

## **1.3. Customer Responsibilities**

**1.3.1 Customer data.** Customer is responsible for (a) Customer’s and Users’ use of the TMSe Marketing Services Austria Services, and (b) the appropriateness and legality of all Customer Data. Customer acknowledges that TMSe Marketing Services Austria acts as a mere technological carrier and is not responsible for the content of the Customer Data or for evaluating the appropriateness of the Customer Data in relation to the environment where they are disclosed or published.

**1.3.2 Privacy.** Customer will have and abide by an appropriate privacy policy and will comply with all applicable laws relating to the collection of information from visitors to the Service. Customer must post a privacy policy on its site(s) and that policy must include sufficient notice of its use of cookies that collect anonymous traffic data, and that these data can be shared with third parties for personalization, marketing, and advertising purposes. The policy must also include a clear opt out for Public Users.

## **1.4. Fees and Payments**

**1.4.1 Fees.** Customer shall pay all fees specified in all Order Forms hereunder in consideration for TMSe Marketing Services Austria' provision of the Services. Customer must pay to TMSe Marketing Services Austria all fees that are owed under this Agreement even if the Customer has not received payment outstanding from the transactions utilizing the Services. Except as otherwise specified in this Agreement or in an Order Form, (i) fees are quoted and payable in Euro and or USD\$, (ii) fees are payable based on services purchased and actual usage, (iii) payment obligations are non-cancelable and fees paid are non-refundable, and (iv) the amount of subscriptions purchased cannot be decreased during the relevant subscription term stated on the Order Form. If fees owed to TMSe Marketing Services Austria are based on revenue share, TMSe Marketing Services Austria will issue to Customer a Royalty Report on a monthly basis. Customer will have five (5) business days after receipt of the Royalty Report to dispute any amounts owed to TMSe Marketing Services Austria. If Customer fails to dispute a Royalty Report within such time period, the Customer is deemed to have agreed to the amount owed to TMSe Marketing Services Austria.

**1.4.2. Invoicing and Payment.** Unless otherwise stated in the Order Form, invoiced charges are due net 15 days from the invoice date.

**1.4.3. Overdue Charges.** If any charges are not received from Customer by the due date, then at TMSe Marketing Services Austria' discretion, (a) such charges may accrue late interest at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid, and/or (b) charge a 100 EURO fee for invoice reminders sent on the 30, 45, and 60 day anniversary of the due date, and/or (c) charge a fee of 1000 EURO for reestablishing suspended services following a 70 day reminder, and/or (c) TMSe Marketing Services Austria may condition future subscription renewals and Order Forms on payment terms shorter than those specified in Clause 1.4.2, and/or (d) TMSe Marketing Services Austria may charge Customer for any legal fees and/or collection costs incurred by TMSe Marketing Services Austria in collecting any amounts due from Customer.

**1.4.4. Suspension of Services and Acceleration.** If any amount owed by Customer under this or any other agreement for the Services is 30 or more days overdue, TMSe Marketing Services Austria may, without limiting TMSe Marketing Services Austria' other rights and remedies under this Agreement and/or applicable laws, accelerate Customer's unpaid fee obligations under such agreements so that all such obligations become immediately due and payable, and suspend the Services to Customer until the fees are paid in full.

**1.4.5. Taxes.** Unless otherwise stated on invoices, the TMSe Marketing Services Austria fees do not include any taxes, levies, duties or similar governmental assessments of any

nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively "Taxes"). Customer is responsible for paying all Taxes associated with Customer's purchases hereunder. If TMSe Marketing Services Austria has the legal obligation to pay or collect Taxes for which Customer is responsible under this clause, the appropriate amount shall be invoiced to and paid by Customer, unless Customer provides TMSe Marketing Services Austria with a valid tax exemption certificate authorized by the appropriate taxing authority. For clarity, TMSe Marketing Services Austria is solely responsible for Taxes assessable against it based on TMSe Marketing Services Austria's income, property, and employees.

## **1.5. Limitaion of Liability**

**1.5.1 Limitation of liability.** IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE LESSER OF (A) THE TOTAL AMOUNT PAID BY CUSTOMER HEREUNDER OR (B) THE ACTUAL DIRECT DAMAGES SUSTAINED BY SUCH PARTY OR, WITH RESPECT TO ANY SINGLE INCIDENT, THE LESSER OF (C) EURO 250,000, (D) THE ACTUAL DIRECT DAMAGES SUSTAINED BY SUCH PARTY RELATED TO SUCH SINGLE INCIDENT, OR (E) THE AMOUNT PAID BY CUSTOMER HEREUNDER IN THE 12 MONTHS PRECEDING THE INCIDENT. THE FOREGOING SHALL NOT LIMIT CUSTOMER'S PAYMENT OBLIGATIONS UNDER CLAUSE 1.4.

**1.5.2. Exclusion of Consequential and Related Damages.** IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

THE ABOVE DOES NOT APPLY IF THERE IS GROSS NEGLIGENCE OR INTENTIONAL MIS-CONDUCT FROM EITHER PARTY.

## **1.6. Term and Termination**

**1.6.1. Term of Agreement.** This Agreement commences on the Effective Date and continues until all subscriptions granted in accordance with this Agreement have expired or been terminated.

**1.6.2. Term of Purchased Subscriptions.** Subscriptions purchased by Customer commence on the Effective Date and continue for the subscription term specified in the applicable Order Form. Except as otherwise specified in the applicable Order Form, all subscriptions shall automatically renew for additional periods equal to the expiring subscription term or one year (whichever is shorter), unless either party gives the other

notice of non-renewal at least 30 days before the end of the relevant subscription term. The per-unit pricing or revenue share during any such renewal term shall be the same as that during the prior term unless TMSe Marketing Services Austria has given Customer written notice of a pricing change at least 30 days before the end of such prior term, in which case the pricing change shall be effective upon renewal and thereafter.

**1.6.3. Termination for Cause.** A party may terminate parts or the entirety of this Agreement for cause: (i) upon 30 days written notice to the other party of a material breach if such breach remains uncured at the expiration of such 30-day period, or (ii) immediately upon written notice if the other party becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors, or (iii) immediately upon written notice if TMSe Marketing Services Austria for any reason loses its rights to resell and/or deliver services from any of its technology partners.

**1.6.4. Refund or Payment upon Termination.** Upon any termination for cause by Customer according to Clause 1.6.3, TMSe Marketing Services Austria shall refund Customer any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. Upon any termination for cause by TMSe Marketing Services Austria, Customer shall pay any unpaid fees covering the balance of the remaining term of all Order Forms that were valid up to the effective date of termination. In no event shall any termination relieve Customer of the obligation to pay any fees payable to TMSe Marketing Services Austria for the period prior to the effective date of termination.

1.6.6. Effects of termination. In the event of termination of this Agreement, Customer shall immediately cease using the Services and shall destroy or return to TMSe Marketing Services Austria all copies in any form of TMSe Marketing Services Austria' Confidential Information and, upon request, will certify in writing to TMSe Marketing Services Austria that such delivery or destruction has been fully effected.

**1.6.5 Surviving Provisions.** Clauses 1.4, 1.5, 1.6.4, 1.7, 1.8, and 1.9 shall survive any termination or expiration of this Agreement.

## **1.7. Indemnification and Liability**

Subject to Sections 1.5.1 and 1.5.2 above, the Parties make the following representations, warranties and indemnities:

**1.7.1 Representations, warranties and Indemnities by TMSe Marketing Services Austria.** TMSe Marketing Services Austria warrants and represents at all times that TMSe Marketing Services Austria (i) has the right and full power and authority to enter into this Agreement, to grant the rights herein granted and to fully perform its obligations hereunder, and (ii) that, to the best of its knowledge, the Services will not

infringe the copyright held by any third party. In the event that a third party initiates any action against TMSe Marketing Services Austria based on an infringement claim in respect of intellectual property rights of that third party, TMSe Marketing Services Austria may, at its sole option, either (a) obtain for Customer the right to continue using the Services, (b) replace or modify the Services so that the Services no longer infringe or misappropriate the intellectual property rights of a third party; however, providing substantially the same functionality, or (c) terminate the Services. TMSe Marketing Services Austria shall indemnify, defend and hold Customer harmless from and against any and all claims, actions, losses, damages, liabilities, reasonable costs and expenses (including reasonable outside attorneys' fees) resulting from or arising out of or in connection with any breach of the foregoing representations and warranties. Customer shall promptly notify TMSe Marketing Services Austria of all claims and proceedings related thereto of which Customer becomes aware.

**1.7.2 Representations, warranties and Indemnities by Customer.** Customer warrants and represents at all times that Customer (i) has the right and full power and authority to enter into this Agreement, to grant the rights herein granted and to fully perform its obligations hereunder, (ii) owns and/or has the right to use any and all Customer Data, and all materials contained on the Customer and/or its Affiliates websites and/or applications, including, without limitation, all copyrights, trademarks and other proprietary rights in and to such materials, (iii) has secured the requisite permission to use any person's name, voice, likeness and performance, and any Customer Data, as embodied in such materials, (iv) has secured that the Customer Data does not contain any messages or images that are in violation of applicable laws, (v) will use the Services in accordance with the terms and conditions hereof and applicable laws and in a manner that, to the best of its knowledge, will not infringe or misappropriate the intellectual property rights held by any third party. In furtherance of the foregoing, Customer agrees to indemnify and hold TMSe Marketing Services Austria harmless from and against any and all claims, actions, losses, damages, liability, reasonable costs and expenses (including reasonable outside attorneys' fees) arising out of or in connection with the breach of the foregoing representations and warranties. TMSe Marketing Services Austria shall promptly notify Customer of all claims and proceedings related thereto of which TMSe Marketing Services Austria becomes aware.

**1.7.3 Disclaimer.** EXCEPT AS EXPRESSLY PROVIDED HEREIN, TMSE MARKETING SERVICES AUSTRIA MAKES NO WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS OF THE SERVICES HEREUNDER FOR A PARTICULAR PURPOSE OR APPLICATION.

## **1.8 Notices, Governing Law and Jurisdiction**

**1.8.1. General.** This Agreement, its interpretation, performance or any breach thereof, will be construed in accordance with, and all questions with respect thereto will be determined by the laws of the state of Austria. Both parties hereby irrevocably submit

any disputes under this Agreement to the non-exclusive jurisdiction of the courts located in Vienna, Austria. Each party agrees to the governing law above without regard to choice or conflicts of law rules.

**1.8.2. Notices.** All notices permitted or required to be given hereunder shall be addressed to Sales Operations at sales@tmse.at

Notices to Customer shall be addressed to the business contact designated by Customer in the applicable Order Form.

**1.8.3. Manner of Giving Notice.** Except as otherwise specified in this Agreement, all notices hereunder shall be in writing and shall be deemed to have been given upon the first business day after sending by email.

## **1.9 General Provisions**

**1.9.1. Waiver and Cumulative Remedies.** No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated herein, the remedies provided herein are in addition to, and not exclusive of, any other remedies of a party under applicable laws.

**1.9.2. Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.

**1.9.3. Assignment.** Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the prior written consent of the other party (not to be unreasonably withheld). Notwithstanding the foregoing, either party may assign this Agreement in its entirety (including all Order Forms), without consent of the other party, to its Affiliate or in connection with a merger, acquisition, corporate reorganization, or sale of all or substantially all of its assets not involving a direct competitor of the other party. A party's sole remedy for any purported assignment by the other party in breach of this clause shall be, at the non-assigning party's election, termination of this Agreement upon written notice to the assigning party. In the event of such a termination by Customer, TMS Marketing Services Austria shall refund to Customer any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. In no event shall any termination relieve Customer of the obligation to pay any fees payable to TMS Marketing Services Austria for the period prior to the effective date of termination. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**1.9.4. Confidentiality.** Both parties agree to keep all information as specified in the Order Form confidential and not to inform any third party about its content unless required to do so by law or regulation or mutually agreed upon by the parties.

**1.9.5. Entire Agreement.** This Agreement, including all exhibits and addenda hereto, and all Order Forms, constitute the entire agreement between the parties and supersede all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and either signed or accepted electronically by the party against whom the modification, amendment or waiver is to be asserted. However, to the extent of any conflict or inconsistency between the provisions in the body of this Agreement and any exhibit or addendum hereto or any Order Form, the terms of such exhibit, addendum or Order Form shall prevail. Notwithstanding any language to the contrary therein, no terms or conditions inserted by Customer in Customer's purchase order or other order documentation (excluding Order Forms) shall be incorporated into or form any part of this Agreement, and all such terms or conditions shall be null and void.

**1.9.6 Marketing and PR.** During the Term, Customer grants TMSe Marketing Services Austria a limited, royalty-free, non-transferrable right to identify the client as a customer or user of the Services solely in connection with providing the Services hereunder, and use Customer's name, marks and logos in marketing materials, in press releases with other customers and on TMSe Marketing Services Austria's website. Customer shall not use TMSe Marketing Services Austria's name, logos or other marks without TMSe Marketing Services Austria's prior written consent. Any other use of Customer's name, logos, or other marks by TMSe Marketing Services Austria shall be subject to Customer's prior approval. The parties shall work together in good faith to issue a press release within sixty (60) days of the Effective Date, in a form mutually agreed by the parties announcing the business relationship between them.

## **2. Special Terms Applying to the Advertising Platform**

These terms apply specifically to the subscription and use of the TMSe Marketing Services UI (ClipFlip), and act in addition to 1. General Terms. In case of inconsistencies between these special terms and the general terms, these special terms shall prevail over the general terms.

### **2.1. Support and Service Levels**

TMSe Marketing Services Austria shall: (i) provide to Customer basic support for the Services, and (ii) use commercially reasonable efforts to make critical support available 12 hours a day, 5 days a week, except for: (a) planned downtime (of which TMSe Marketing Services Austria shall give at least 2 business days' notice by email to Customer's system administrator, and which TMSe Marketing Services Austria shall



schedule to the extent practical during the weekend hours from 9:00 p.m. Central European Time (CET) Friday to 2:00 pm CET Sunday), or (b) any unavailability caused by circumstances beyond TMSe Marketing Services Austria' reasonable control, including without limitation Force Majeure events.

## **2.2 Invoicing**

Unless otherwise stated in the Order Form, charges are invoiced monthly.

## **3. Special Terms Applying**

### **3.1 Use of Partners**

TMSe Marketing Services Austria uses technology partners for providing additional functionality, and the Customer accepts that TMSe Marketing Services Austria uses such partners to provide additional functionality.

### **3.2 Invoicing**

Unless otherwise specified in the applicable Order Form, Customer will be invoiced for spending from TMSe Marketing Services Austria Services, a company fully owned by TMSe Marketing Services Austria. Unless otherwise stated in the Order Form, charges are invoiced monthly, and are based on the spending in the previous month. If the Customer is charged any fixed fees for access to the Services, these will be invoiced from TMSe Marketing Services Austria as well.

### **3.3 Customer Responsibilities**

**3.3.1 Solicitation and rights management.** Customer is solely responsible for soliciting all Media related services, trafficking of Ad Banners and handling all inquiries of any type related to Customer's use of the Service. Customer will obtain all necessary rights, waivers and permissions from (i) Media related services to allow the storage and the serving of their Advertising; (ii) to give client the right to serve Advertising onto online media inventory; and (iii) end users who view, click or convert on the Advertising, to the extent that any information is collected from or about them.

**3.4.2 Limitation of usage.** Customer is responsible for using the Services only for the purposes of: (i) uploading and storing Ad Banners, Video Banners, Rich Media; (ii) selecting Ad Banners and designating the criteria for the serving of those Ad Banners onto online media inventory; and (iii) receiving reports of Ad Banner impressions and other data related to Customer's use of the Service.

**3.4.3 Correct information.** Customer acknowledges that TMSe Marketing Services Austria is not liable for or in connection with transactions executed by the System as a

result of errors made in entering information into the System by or for Customer, for example, incorrectly entering pricing, targeting or budgeting information.

**3.4.4 Content (if relevant).** Customer agrees that (a) Customer will not, directly or indirectly, introduce viruses, spyware or other malicious code into the System; and (b) Customer's use of the Service and System, will not violate the applicable laws or regulations, be deceptive, misleading, harmful, obscene, defamatory, unethical, infringing or violative of any third party right, and (c) more explicitly any content deemed pornography by TMSe Marketing Services Austria will lead to an immediate termination of this agreement and any applicable legal recourse. In connection with 3(a) above, Customer will promptly notify TMSe Marketing Services Austria upon becoming aware of any such incident and reasonably cooperate with TMSe Marketing Services Austria in addressing the same. Customer will also notify TMSe Marketing Services Austria promptly upon becoming aware of any budget or ad serving malfunctions from the system and reasonably cooperate with TMSe Marketing Services Austria in addressing the same.