

Data Act Addendum

1 General

1.1 **Incorporation.** This Data Act Addendum (this **"Addendum"**) is incorporated into, and forms part of, the Subscription Agreement between the Provider and the Customer (the Provider and the Customer are hereinafter referred to together as the **"Parties"**).

1.2 **Purpose and Regulatory Background.** As part of the Checkmk Cloud (SaaS) provided by the Provider to the Customer under the Subscription Agreement, the Provider provides the Customer with access to and use of the Checkmk Cloud (SaaS) as a Data Processing Service within the meaning of the Regulation (EU) 2023/2854 of the European Parliament and of the Council on harmonised rules on fair access to and use of data (**"Data Act"**). Chapter VI of the Data Act imposes specific contractual obligations on the Provider as a Data Processing Service provider regarding the provision of the Checkmk Cloud (SaaS) as agreed in the Subscription Agreement. This Addendum sets out the Parties' rights and duties under Chapter VI of the Data Act with respect to the provision of access to and use of the Checkmk Cloud (SaaS), while safeguarding their commercial and confidentiality interests.

1.3 **Hierarchy.** In the event of any conflict between this Addendum and any other document of the Subscription Agreement, this Addendum shall prevail. Nothing herein shall waive or limit any mandatory statutory provision of the Data Act.

2 Definitions

2.1 **Definitions in the Subscription Agreement.** Capitalised terms not defined in this Addendum have the meanings ascribed in the Subscription Agreement, in particular in the General Terms and Conditions for Checkmk Cloud (SaaS).

2.2 Additional Definitions.

- **"Switching Option"** means any option that the Customer elects in its Switching Request as set forth in Sec. 4.1 a) to c) of this Addendum.
- **"Switching Request"** means the Customer's written notice to the Provider exercising a Switching Option.
- **"Initial Transition Period"** means the period starting upon expiry of the Notice Period during which the Provider shall complete the Switching without undue delay and in any event within thirty (30) calendar days in accordance with Art. 25 (2)(a) Data Act.
- **"Alternative Transition Period"** means the additional period of time proposed by the Provider under Sec. 6.1 of this Addendum in the event that the Initial Transition Period is technically infeasible and shall not exceed seven (7) calendar months.
- **"Extended Transition Period"** means a single additional period elected by the Customer under Sec. 6.2 of this Addendum, that extends whichever Transition Period (Initial or Alternative) is then in effect, for such duration as the Customer reasonably considers appropriate for its own purposes.
- **"Transition Period"** means the applicable periods resulting from the Initial Transition Period, Alternative Transition Period or Extended Transition Period then in effect, as the context requires.
- **"Notice Period"** means a fixed lead time of two (2) consecutive calendar months between the Customer's submission of a Switching Request and the commencement of the Initial Transition Period.

2.3 Data Act Definitions.

For convenience the following terms are used exactly as defined in Art. 2 Data Act:

- **"Data"** means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording (Art. 2 No. 1 Data Act).
- **"Data Egress Charges"** means data transfer fees charged to customers for extracting their data through the network from the ICT Infrastructure of a provider of Data Processing Services to the system of a different provider or to on-premises ICT Infrastructure (Art. 2 No. 35 Data Act).
- **"Data Processing Service"** means a digital service that is provided to a customer and that enables ubiquitous and on-demand network access to a shared pool of configurable, scalable and elastic computing resources of a centralised, distributed or highly distributed nature that can be rapidly provisioned and released with minimal management effort or service-provider interaction (Art. 2 No. 8 Data Act).

- **"Digital Assets"** means elements in digital form, including applications, for which the customer has the right of use, independently from the contractual relationship with the Data Processing Service it intends to switch from (Art. 2 No. 32 Data Act).
- **"Exportable Data"** means the input and output data, including Metadata, directly or indirectly generated or co-generated by the Customer's use of the Data Processing Service, excluding any assets or data protected by intellectual-property rights or constituting a trade secret of providers of data-processing services or third parties (Art. 2 No. 38 Data Act).
- **"Metadata"** means a structured description of the contents or the use of data facilitating the discovery or use of that data (Art. 2 No. 2 Data Act).
- **"On-premises ICT Infrastructure"** means ICT infrastructure and computing resources owned, rented or leased by the customer, located in the data centre of the customer itself and operated by the Customer or by a third party (Art. 2 No. 33 Data Act).
- **"Switching"** means the process involving a source provider of Data Processing Services, a customer and, where relevant, a destination provider, whereby the customer changes from using one Data Processing Service to another Data Processing Service of the Same Service Type, or to an On-premises ICT Infrastructure, including through extracting, transforming and uploading the Data (Art. 2 No. 34 Data Act).
- **"Same Service Type"** means a set of Data Processing Services that share the same primary objective, Data Processing Service model and main functionalities (Art. 2 No. 9 Data Act).
- **"Switching Charges"** means charges, other than standard service fees or early termination penalties, imposed by a provider of Data Processing Services on a customer for the actions mandated by the Data Act for Switching to the system of a different provider or to On-premises ICT Infrastructure, including Data Egress Charges (Art. 2 No. 36 Data Act).

3 Commitment to the Regulatory Objective of the Data Act

The Provider acknowledges the Data Act's goal of fostering fair competition and customer mobility in the cloud market and undertakes, without prejudice to its trade-secret, intellectual property rights and cost-recovery rights, to facilitate Switching in accordance with this Addendum.

4 Switching of the Customer

4.1 **Switching Options.** The Customer may deliver a Switching Request at any time during the Term. Upon receipt of the Switching Request, the Notice Period shall commence, all in accordance with the communication procedure set out in the Subscription Agreement. The Customer may elect one of the following Switching Options: (a) switch to another Data Processing Service offering the Same Service Type; (b) switch to an On-premises ICT Infrastructure; or (c) request erasure of all Exportable Data and Digital Assets.

4.2 **Termination of the Subscription Agreement.** If the Customer elects one of the options set out in Sec. 4.1 a) or b) of this Addendum, the Subscription Agreement terminates automatically upon completion of the Switching. If the Customer elects the option set out in Sec. 4.1 c) of this Addendum, the Subscription Agreement terminates automatically upon expiration of the Notice Period. The Provider shall confirm such termination in written form.

5 Transition Period

5.1 **Support During any Transition Period.** During any Transition Period, which shall be completed without undue delay, the Provider shall: (a) provide reasonable assistance to the Customer and any third party authorised by the Customer; (b) act with due care to maintain business continuity and continue delivering the contracted service functions; (c) provide clear information concerning known risks to continuity in the provision of the functions or services on the part of the Provider; (d) maintain a high level of security for data transfer and during the Retrieval Period (as defined below); (e) provide all information reasonably required to support the Customer's exit strategy; (f) make available open interfaces to the Customer and the given destination provider of Data Processing Services of the respective Same Service Type free of charge to facilitate the Switching, including sufficient information on the Checkmk Cloud (SaaS) to enable the development of software to communicate with the Checkmk Cloud (SaaS), for the purposes of data portability and interoperability under Art. 30 (2) Data Act; (g) upon request, make available to the Customer all Exportable Data in a structured, commonly used, machine-readable format until interoperability standards under Art. 30 (3) Data Act apply, after which

those standards shall be used; and (h) keep the Subscription Agreement, including any agreed support services, fully in force throughout the Transition Period.

5.2 **Switching Information Online Register.** The Provider shall make a continuously updated online register available to the Customer which: (a) describes the procedures for the Switching, including all steps that must be completed by the Customer, the Provider and any destination provider; (b) specifies all data formats, compression or encryption methods, application programming interfaces (APIs) and network protocols supported for data export and import; (c) identifies any common interoperability specifications or harmonised standards applied in accordance with Art. 30 Data Act; and (d) discloses any technical or organisational limitations that could materially affect a Switching scenario.

6 Technical Infeasibility and Customer Extension

6.1 **Notification of Infeasibility.** If completion of the Switching within the Initial Transition Period is technically infeasible for the Provider, the Provider shall, within fourteen (14) working days following the Switching Request (i) notify the Customer in writing; (ii) provide a reasonable justification; and (iii) propose an Alternative Transition Period not exceeding seven (7) months.

6.2 **Extension by the Customer.** The Customer may, by written notice delivered before the expiry of the Transition Period then in effect (whether the Initial Transition Period or an Alternative Transition Period), extend that period once for an Extended Transition Period.

6.3 **Service Continuity.** The Provider shall maintain the service availability and security defined in the Subscription Agreement throughout the Initial Transition Period, any Alternative Transition Period and any Extended Transition Period at the fees originally agreed in the Subscription Agreement.

7 Retrieval Period

Following the Initial Transition Period or the Alternative Transition Period, as applicable, the Customer may retrieve the Exportable Data for thirty (30) calendar days (the "**Retrieval Period**").

8 Deletion of Exportable Data

Unless the Parties agree on a later erasure date and provided that the Switching has been completed successfully, the Provider shall, automatically and without further instruction of the Customer, irreversibly erase all Exportable Data and Digital Assets after the end of the Retrieval Period. The Provider shall confirm such erasure to the Customer upon request.

9 Technical Specifications

The categories of Exportable Data and Digital Assets that may be ported under this Addendum are listed in the Exportable Data catalogue, which is made available to the Customer. The categories of data that are excluded in order to protect the Provider's or third parties' trade secrets or intellectual property rights are identified in the excluded data catalogue and are accessible at the same location.

10 Charges and Payment

10.1 **Switching Charges.** The Provider does not charge any switching fees.

10.2 **Early Dissolvement Payment.** Upon the termination of the Subscription Agreement as set out in Sec. 4.2 of this Addendum, the Customer shall be obliged to make an "**Early Dissolvement Payment**" equal to the fees that would have been payable from the termination date until the end of the originally agreed Subscription Period, as set forth in the Order. This includes all minimum-commitment fees, as well as all upgrades purchased until the effective date of such termination that would have been due during this period. The Early Dissolvement Payment shall be payable and due in installments in accordance with the payment schedule agreed upon by the Parties in the Order for the respective fees. The Customer acknowledges that in return for the Subscription Agreement of a minimum Subscription Period as set forth in the Order, the Provider granted an initial discount for access to and use of the Checkmk Cloud (SaaS) compared to its standard list prices. For the avoidance of doubt, the Customer

acknowledges and agrees that the Early Dissolvement Payment is a standard service termination fee and not a Switching Charge within the meaning of Art. 2 No. 36 Data Act.

10.3 **Consolidated Invoicing.** Regarding the Early Dissolvement Payment as described in Sec. 10.2 of this Addendum, the Provider may, with the Customer's prior consent, issue a single consolidated invoice covering all outstanding fees set forth in the Order to be paid by the Customer at once.

10.4 **General Invoicing and Payment Terms.** All invoice-timing, payment-term, late-payment and tax provisions of the Subscription Agreement apply mutatis mutandis to any invoice issued under this Addendum.

11 Exemptions

11.1 **Custom-built Data Processing Services.** In line with Art. 31 (1) Data Act, the following Switching-facilitation duties shall not apply to any Data Processing Service provided to the Customer by the Provider of which the majority of main features has been custom-built to accommodate the specific needs of the Customer or where all components have been developed for the purposes of the Customer, and where such Data Processing Services is not offered at broad commercial scale by the Provider: (a) the duty to allow the Customer to unbundle the respective Data Processing Service according to Art. 30 (1) Data Act from other Data Processing Service where technically feasible (Art. 23 (e) Data Act); (b) the prohibition on, and subsequent sunset of, Switching Charges (Art. 29 Data Act); (c) the duty, for pure-infrastructure services, to enable the Customer to achieve functional equivalence at the destination provider (Art. 30 (1) Data Act); and (d) the duty, for higher-layer services, to provide open interfaces and ensure compatibility with common interoperability specifications or harmonised standards (Art. 30 (3) Data Act).

11.2 **Non-Production Environments.** In addition, no obligation set forth in Chapter VI of the Data Act shall apply to any part of the Checkmk Cloud (SaaS) provided as a non-production version for testing and evaluation purposes and for a limited period of time.

11.3 **Pre-Contract Disclosure.** Prior to the conclusion of the Subscription Agreement for any service falling under Sec. 11.1 or 11.2 of this Addendum, the Provider shall inform the Customer of the obligations of Chapter VI of the Data Act that do not apply to any relevant services.

12 Website Transparency

The transparency information on international data access and data transfers (cf. Art. 28 Data Act) is currently published at <https://checkmk.com/legal> and <https://trust.checkmk.com/>. This information is kept up to date on an ongoing basis. Customers will be notified of any successor URL within a reasonable period of time after publication.

13 Miscellaneous

13.1 **Contractual Continuity.** For the avoidance of doubt, all provisions of the Subscription Agreement, and in particular the General Terms and Conditions for Checkmk Cloud (SaaS), continue to apply to the provision of access to and use of the Checkmk Cloud (SaaS) agreed therein by the Parties.

13.2 **Protection of Intellectual Property, Trade Secrets and Security.** Nothing in this Addendum shall be construed to oblige the Provider to: (a) develop new technologies or services; (b) disclose or transfer any Digital Assets or other assets protected by intellectual property rights or constituting a trade secret of the Provider or any third party; or (c) compromise the security or integrity of the Checkmk Cloud (SaaS), the Support Services and/or of the Customer's or any third party's environment; all in accordance with Art. 30 (6) Data Act.

13.3 **Good-Faith Compliance.** Recognizing that the Data Act may be further interpreted by competent authorities, regulators and courts, the Parties shall cooperate in good faith to implement commercially reasonable compliance measures.

13.4 **Amendment Procedure.** Any amendment to this Addendum shall enter into effect exclusively in accordance with Sec. 21.5 of the General Terms and Conditions for Checkmk Cloud (SaaS).

14 Execution

This Addendum is executed contemporaneously with the Order and shall enter into force upon the execution of the Order by both Parties