General Terms and Conditions of x-cellent technologies GmbH

1.   Preamble

1.1   x-cellent technologies GmbH, Rosenkavalierplatz 10, 81925 Munich, Germany (hereinafter: Provider) provides hosting resources for cloud-based operation with automatic load balancing (hereinafter: Scaling) to its Customers via the Platform https://console.metalstack.cloud/ (hereinafter: Platform) in accordance with these General Terms and Conditions (hereinafter: GTC). The Customer wants to use these hosting resources.

1.2   This Agreement regulates the terms and conditions for the use of the Platform and individual contracts concluded on the Platform.

1.3   The Provider will only make a binding offer to conclude a contract or accept the Customer's binding offer if the Customer is a company with its registered office in the EU or a person who is acting in the course of his trade or profession and has its habitual place of residence within the EU.

2.   User Contract for the Platform

2.1   With the registration, the Provider and the Customer conclude a user contract that entitles the Customer to use the Platform. The scope of the Provider's services includes at least the possibility of concluding and managing individual contracts for hosting resources. The service descriptions on the Provider's Platform apply in addition.

2.2   A user contract is concluded as follows: By filling out the registration form and clicking on the button with the inscription "Sign In" (or an identical inscription), the Customer submits his offer to conclude the user contract. The user contract can be accepted by the Provider towards the Customer via a corresponding notification of success or by sending a corresponding declaration via e-mail.

2.3   With the registration, the Customer receives a free, non-exclusive, non-transferable and non-sublicensable right to use the Platform.

2.4   The Customer receives access to a user account, which is a prerequisite for concluding individual contracts for the provision of hosting resources via the Platform.

3.   Conclusion of Individual Contracts via the Platform

3.1   The Customer is entitled, but not obliged, to conclude individual contracts with the Provider based on the user contract in accordance with Section 2.

3.2   The registered Customer can conclude an individual contract with the Provider via the Platform for the provision of hosting resources with different power levels. The contract is concluded as follows: The Customer submits his offer to conclude a contract by filling out the order form and clicking on the corresponding button or by entering it in the corresponding command line tool. The contract can be accepted by the Provider towards the Customer via an associated notification of success or by sending a corresponding declaration via e-mail.

4.   Services and Obligations of the Provider

4.1   As a service, the Provider provides the accessibility of the hosting resources ordered by the Customer with automatic Scaling during the contractually agreed term in accordance with Section 8. The Customer can create different clusters and choose the region of the server location, the performance of the hardware, the storage space, the minimum and maximum instances available in that cluster for Scaling, and the type of IP address. The type and scope of performance can be changed even after a cluster has been created. Furthermore, the Customer can also add additional storage (volumes) and create a backup (snapshot) of his existing volumes. Furthermore, the Customer can also book additional IP addresses.

4.2   The cluster can be administered via the Platform and via an associated command line tool.

4.3   The Provider is not obliged to provide the hosting resources with a specific hardware to the Customer but is free to choose the hardware as long as the hosting resources provided meet the chosen requirements of the Customer in terms of region and type and scope of performance.

4.4   The Scaling across the different instances and thus the actual use of the instances is done automatically by the Kubernetes Autoscaler software. The Customer can specify with a minimum and a maximum number of instances, within which range the Scaling should take place.

4.5   Access to the storage space allocated to the Customer shall be established via the Platform.

4.6   The Provider's services for the transmission of data shall be limited solely to data communication between the transfer point of the Provider's own data communication network to the internet and the hosting resources provided for the Customer. It is not possible for the Provider to influence data traffic outside its own communications network. A successful forwarding of information from or to the computer requesting the content is not owed.

4.7   The Provider does not back up the data on the provided hosting resources, nor does the Provider create log files on the Customer's use of the resources.

4.8   The Provider is entitled to involve subcontractors in the provision of services.

4.9   After the end of the contract, the Provider is obliged to completely delete any data still present in the hosting resources provided.

4.10   The service descriptions on the Provider's Platform apply in addition to these terms and conditions.

5.   Obligations of the Customer

5.1   The Customer is solely responsible for securing its data in backups and is also obligated to do so towards the Provider.

5.2 The Customer undertakes not to store any illegal data and content that violates laws, official regulations or the rights of third parties on the storage space provided and to comply with applicable law when using the hosting resources.

5.3 The Customer shall also ensure that its usage does not compromise the operation of its own and other hosting resources and the Provider's communication network. In particular, the Customer must ensure that no viruses or other malware are transferred to the Provider's systems by taking appropriate protective measures (e.g. by using up-to-date virus scanners).

5.4 The Customer shall indemnify the Provider against any claim by third parties, including the costs triggered by the claim, in particular the costs of legal defense, if the claim by third parties is caused by the Customer's use of the hosting resources.

5.5 In the event of an imminent or actual breach of the aforementioned obligations, as well as in the event of the enforcement of not obviously unfounded claims by third parties against the Provider to refrain from the use of the hosting resources made by the Customer, the Provider shall be entitled, also taking into account the legitimate interests of the Customer, to temporarily suspend the provision of the hosting resources in whole or in part with immediate effect. The Provider shall inform the Customer of this measure without delay.

5.6 The Customer may only pass on access to the Platform to those persons who have been authorized by him to access the hosting resources in the interest of the Customer. The Customer is not entitled to transfer access to hosting resources to third parties for their self-interested use. In particular, the Customer is not entitled to provide access to hosting resources to third parties for a fee.

6. Availability

6.1 The Provider offers an availability of hosting resources of 99% on an annual average. In the case of a shorter term, availability refers to the respective term.

6.2 The hosting resources are available when their use is possible.

6.3 For the purpose of calculating actual availabilities, downtime not attributable to the Provider shall be deemed to be available time. These harmless downtimes are:

- Downtime during maintenance or other services agreed with the Customer that do not allow access to the hosting resources;

- Downtime during unforeseen maintenance work, provided that this work was not caused by a breach of the Provider's obligations to provide the services, e.g. force majeure, in particular unforeseeable hardware failures, strikes, natural events, etc.;

- Downtimes due to virus or hacker attacks, insofar as the Provider has taken the agreed or, in the absence of an agreement, the usual protective measures;

- Downtime for the installation of urgently needed security patches;

- Downtime caused by third parties (persons not attributable to the Provider);

- Downtime for scheduled maintenance and data backups if they are carried out between 10:00 p.m. and 6:00 a.m. (CET) and have been announced to the Customer at least 7 days before the work is carried out. The announcement can be made in text form.

7. Reference Naming

The Provider is entitled to name the Customer, including the company name and logo, for reference purposes on the Provider's website and in offline marketing materials such as flyers and product presentations.

8. Term

8.1 The user contract pursuant to Section 2 and the respective individual contracts pursuant to Section 3 shall run for an unlimited period of time and may be terminated at any time without notice. The termination of individual contracts does not affect the term of the user contract and the term of other individual contracts. The termination of the user contract terminates all individual contracts concluded under this user contract.

8.2 Notice of termination can be made in writing or in text form, e.g. by e-mail.

8.3 The right of both contracting parties to terminate the contracts for good cause remains unaffected by the above provision.

9. Remuneration; Billing

9.1 Registration in accordance with Section 2 is free of charge.

9.2 For the provision of hosting resources by means of an individual contract in accordance with Section 3, the Customer shall pay the agreed remuneration for use per instance and per minute. All other services provided by the Provider are also billed per minute, unless expressly agreed otherwise. Prices are available on the Provider's website at https://metalstack.cloud/de/prices.

9.3 By selecting the minimum and maximum available instances, the Customer can specify a minimum and maximum limit for the costs incurred. Scaling beyond the maximum number of instances specified by the Customer will not be carried out or will only be carried out free of charge.

9.4 The remuneration for the provision of the hosting resources in accordance with Section 9.2 for the respective calendar month is due at the end of each calendar month.

9.5 The Provider will create an invoice for the Customer and make it available to the Customer for retrieval in his user account and send it by e-mail.

9.6 The remuneration due shall be collected from the deposited means of payment after invoicing.

9.7   All prices are subject to the applicable statutory value added tax.

10.   Privacy

If the processing of personal data is to be carried out on behalf of the Customer as data processing, the Customer and the Provider conclude a Data Processing Agreement. For this purpose, the Provider will send the template for the Data Processing Agreement after conclusion of this Agreement. If the Customer intends to process personal data, he is obliged to fill out the DPA and return it to the Provider signed.

11.   Limitation of Liability

11.1   Within the scope of this Agreement, the Provider shall only be liable for damages (a) caused by the Provider or its legal representatives or vicarious agents intentionally or through gross negligence or (b) resulting from injury to life, body or health caused by a breach of duty by the Provider or one of its legal representatives or vicarious agents. The Provider shall also be liable (c) if the damage is caused by the breach of an obligation of the Provider, the fulfilment of which makes the proper execution of this Agreement possible and on the compliance of which the Customer regularly trusts and may rely (cardinal obligation).

11.2   In the cases referred to in paragraph 1 of this section, letters (a) and (b), the Provider shall be liable within the scope of the statutory liability. In all other cases, the claim for damages shall be limited to the damage foreseeable and typical for this type of contract. The Parties agree that a maximum damage of 100,000 EUR per case of damage is foreseeable and typical for this type of contract. If the Customer is at risk of damage that may exceed this amount, the Customer is obligated to notify the Provider immediately.

11.3   In cases other than those referred to in paragraph 1, the Provider's liability shall be excluded.

11.4   The liability provisions in the preceding paragraphs shall also apply to the personal liability of the Provider's representatives, employees and vicarious agents.

11.5   Insofar as liability arises under the Product Liability Act from the assumption of a guarantee or due to fraudulent misrepresentation, it shall remain unaffected by the liability regulations above.

12.   Final Provisions

12.1   This Agreement, including its annexes and the elements expressly included therein, shall govern the agreement between the parties conclusively and completely. The Provider does not accept deviating, conflicting or supplementary General Terms and Conditions. This also applies if he does not expressly object to the inclusion.

12.2   All contracts can be concluded in German and English. The contract texts are not stored by the Provider. The contract texts will be sent to the Customer once by e-mail upon conclusion of the contract.

12.3   The assignment of claims is permissible for the Customer with the prior written consent of the Provider. The consent may not be unreasonably withheld. The provision of § 354a HGB remains unaffected.

12.4   A right of retention may only be asserted due to counterclaims from the respective contractual relationship. The contracting Parties may only offset claims that have been legally established or are undisputed.

12.5   German law shall apply to the exclusion of the provisions of private international law and the UN Convention on Contracts for the International Sale of Goods. If the Customer is a consumer within the meaning of § 13 BGB (German Civil Code), he may invoke more favorable provisions of the law of his place of residence, notwithstanding this choice of law clause.

12.6   For all disputes arising from or in connection with this Agreement (including those relating to its validity), the courts in Munich shall have exclusive jurisdiction in the first instance.

12.7   The Provider is entitled to amend this GTC, provided that the amendments are reasonable for the Customer. The Customer shall be notified of any changes to the GTC in writing, by e-mail or in any other suitable manner at least six weeks before the amended GTC become effective. The changes shall be deemed to have been approved and to be binding for an existing contractual relationship upon coming into force if the Customer does not raise an objection either in writing or by e-mail within one month of receipt of the notification of amendment. This consequence shall be pointed out to the Customer in the notification.

12.8   Amendments and additions to this Agreement as well as a waiver of a right under this Agreement must be made in writing or text form to be effective. This also applies to the waiver of the written or text form requirement.

12.9   If any provision of this Agreement is invalid or unenforceable in whole or in part, or subsequently loses its validity or enforceability, or if a regulatory gap becomes apparent, this shall not affect the validity of the remaining provisions. The Parties undertake to replace the invalid or unenforceable provision or to fill the regulatory gap with an appropriate provision which, to the extent legally permissible, comes as close as possible to what the Parties intended or would have intended according to the meaning and purpose of this Agreement if they had known the invalidity or the regulatory gap. If the invalidity or unenforceability of a provision is based on a measure of services or time (deadline or date) specified therein, the legally permissible measure that comes closest to the provision shall be agreed. It is the explicit intention of the Parties that this provision does not result in a mere reversal of evidence, but that § 139 BGB is waived overall.

12.10   This Agreement shall be executed in German and English language. In the event of any discrepancies between the two language versions, the German version shall take precedence over the English version.

Last updated: May 2023