

# Terms of Service

## for Upsun Services purchased via a Marketplace or Reseller

Last updated 27 May 2026

These Terms of Service for Upsun Services ordered via a Marketplace or Reseller (the “Terms of Service”) set forth the terms and conditions governing the Customer’s (as defined below) subscription to and use of the Upsun Services when procured by Customer through a Marketplace or Reseller (as defined below).

Customer’s order of Upsun Services listed or made available through a Marketplace or Customer’s order of Upsun Services through a Reseller constitutes Customer’s acceptance of these Terms of Service and their entry into this Agreement (as defined below).

The “Effective Date” of this Agreement is (i) the date upon which Customer accepts a private offer or purchases publicly-listed Upsun Services via the applicable Marketplace; or (ii) the effective date of a Reseller Order Form.

### 1. Definitions and interpretation

1.1. Capitalised terms used but not defined in these Terms of Service shall have the meaning given to them in the Service Specific Terms or any other document incorporated by reference into the Agreement.

1.2. In these Terms of Service:

- **“Agreement”** means these Terms of Service, the Service Specific Terms, any applicable Marketplace Order Form, and any documents referred to therein.
- **“Acceptable Use Policy”** means the acceptable use policy available at <https://upsun.com/trust-center/legal/aup/>.
- **“Account”** means a Customer account on the Platform.
- **“Affiliates”** means an entity that controls, is controlled by, or is under common control with a Party, where “control” means control of more than fifty percent (50%) of the voting shares of such entity.
- **“Beta Feature(s)”** means any beta or pre-release features still undergoing testing that are not generally available.
- **“Confidential Information”** means: (i) any non-public technical or business information of a Party, including without limitation, any information relating to a Party’s techniques, algorithms, know-how, current and future products and services, research, engineering, designs, financial information, procurement requirements, manufacturing, customers, business forecasts and marketing plans; and (ii) any other information that is designated as “confidential” or that should reasonably be understood by the receiving Party to be Confidential Information. Confidential Information will not include any information that (i) is or becomes generally known to the public through no fault or breach of this Agreement; (ii) the receiving Party can demonstrate was rightfully in its

possession at the time of disclosure, without an obligation of confidentiality; (iii) is independently developed by the receiving Party without the use of or access to the disclosing Party's Confidential Information; or (iv) the receiving Party rightfully obtains from a third party not under a duty of confidentiality and without restriction on use or disclosure.

- **“Console”** means the web administration console in Customer’s Account through which Customer manages its Projects.
- **“Content”** means all information and content relating to a Customer’s Projects, including without limitation related data files, written text, software or program source code, pictures, music, audio or video files, or other images or materials.
- **“Fees”** means the fees set out in the Order Form.
- **“Customer”** means the Customer entity set forth in an Order Form.
- **“Data Processing Agreement”** or **“DPA”** means the data processing agreement at <https://upsun.com/trust-center/privacy/dpa/>.
- **“Documentation”** means the documentation at <https://docs.upsun.com/>
- **“Managed Services”** means third-party services, components, or tools which are provided to Customer by Upsun as a managed service.
- **“Marketplace”** means the Amazon Web Services Marketplace and the Microsoft Azure Marketplace through which Upsun makes the Services available for subscription by Customer.
- **“Marketplace Order Form”** means, as applicable, (i) Upsun’s public listing on a Marketplace or (ii) a private offer and any related ordering, pricing, or transaction terms accepted by Customer through a Marketplace.
- **“Order Form”** means a Marketplace Order Form or a Reseller Order Form, as the case may be.
- **“Organization”** is a structured entity created by Customer in Customer Account to group Customer’s Projects for managing resources, access, and billing.
- **“Party”** means the Customer or Upsun, collectively the “Parties”.
- **“Platform”** means the Upsun PaaS-Platform-as-a-Service.
- **“Privacy Notice”** means the privacy notice available at <https://upsun.com/trust-center/privacy/privacy-notice/>.
- **“Projects”** means Customer applications, data and related services developed and/or hosted on the Platform.
- **“Representatives”** means the Users, employees, agents, legal affiliates, consultants, or professional advisors of a Party.
- **“Reseller”** means a third party authorized by Upsun to resell the Upsun Services. For the avoidance of doubt, where an Upsun customer accesses or uses the Services pursuant to a subscription purchased by an OEM Partner or Agency Partner of Upsun, customer’s access to and use of such Services shall be governed by the applicable agreement between customer and such partner, and not by these Terms of Service.
- **“Reseller Order Form”** means an order document executed between a Reseller and Upsun for the subscription of the Services.
- **“Services”** means the provision of the Platform to help Customer develop, deploy, host, monitor, and maintain its Projects and related services.
- **“Service Specific Terms”** means the service-specific additional terms available at <https://upsun.com/trust-center/legal/service-specific-terms/>

- **“Third Party Services”** means all third party tools and websites accessed through the Platform or used by the Customer with the Platform but excluding Managed Services.
- **“Upsun”** or **“Upsun Contracting Entity”** is the Upsun entity identified in the Order Form.
- **“User(s)”** means any individual accessing or using the Services on behalf of Customer.

## 2. Orders

### 2.1. Orders via a Marketplace

- 2.1.1. Where Customer has ordered Services via a Marketplace, Customer agrees to pay the Fees through its account with such Marketplace provider and any refund to which Customer is entitled under the Agreement may be provided in the form of a credit back to Customer's account with such Marketplace provider.
- 2.1.2. Orders for Services placed through a Marketplace, including multi-year subscriptions, are non-cancellable except as expressly set forth in these Terms of Service.

### 2.2. Orders via a Reseller

- 2.2.1. If Customer orders Services through a Reseller, Customer shall enter into a separate agreement directly with such Reseller governing the applicable commercial terms, including pricing, invoicing, and payment obligations. Upsun is not a party to, and shall not be bound by, any agreement between Customer and a Reseller, nor shall any such agreement modify or supersede this Agreement. Customer acknowledges that Reseller acts independently from Upsun, and Upsun shall have no liability or responsibility for any acts, omissions, representations, warranties, or obligations of the Reseller.
- 2.2.2. Upsun's obligation to provide the Services is conditional upon Reseller's payment of all applicable Fees owed to Upsun for such Services. Subject to the foregoing Upsun shall remain responsible solely for providing the Services in accordance with this Agreement.
- 2.2.3. Any refund to which Customer is entitled in connection with the Services may be provided in the form of a credit to Reseller.
- 2.2.4. Orders for Services placed through a Reseller, including multi-year subscriptions, are non-cancellable except as expressly set forth in these Terms of Service.

## 3. Provision of the Services

- 3.1. Upsun will provide the Services ordered by Customer in accordance with this Agreement.
- 3.2. The Services ordered by Customer may come with resources and usage limits. Usage in excess of the contracted scope and/or capacity may be allowed and billed as used.

## 4. Data protection

- 4.1. Each Party shall comply with the Data Processing Agreement.

- 4.2. Upsun may collect personal data from Customer's Users and/or employees, consultants, directors, or agents in connection with the Services. The Privacy Notice describes how Upsun collects, uses, and discloses such personal data.

## **5. Security**

- 5.1. Upsun will maintain the technical and organizational security measures set out in the DPA.
- 5.2. Security and backups are a shared responsibility between Upsun and Customer, as further described in the Documentation. Customer is solely responsible for the security of any Project Customer deploys on the Platform. Upsun will regularly schedule automated backups of Customer production environments, as further described in the Documentation. Upsun may notify Customer of security vulnerabilities relating to elements under Customer's control and responsibility (e.g., application code, configuration of application, and routes managed through YAML files), but has no obligation to review or advise Customer of any security vulnerabilities. Customer must patch any notified vulnerabilities as soon as possible. Failure to do so may result in the immediate suspension of Customer Projects, at Upsun's sole discretion. Upsun is not responsible for any vulnerabilities relating to elements under Customer's control.
- 5.3. Upsun may provide templates and code examples in the Documentation, public repositories, and support interactions. It will make reasonable efforts to make sure these examples respect secure coding standards, but example code may not be ready for production settings. It is the Customer responsibility to make sure any application code Customer runs is up to date and secure, even when originally provided by Upsun.

## **6. Beta Features**

- 6.1. Upsun may allow Customer to try certain Beta Features. Beta Features are provided for evaluation purposes and are not intended for production use. Beta Features do not come with any uptime commitment or support obligation. Any Beta Features may be modified, removed, or discontinued, or made generally available to all Upsun customers for production use (including for a fee) at Upsun's sole discretion and without any liability to Customer. All Beta Features are provided "AS IS," without warranty or representation of any kind. Notwithstanding section 19 Liability, Upsun's liability for any damage arising out of or in connection with any Beta Feature is excluded in its entirety, including any obligation or liability with respect to Customer Content, except to the extent liability cannot be excluded or limited under applicable law. Customer assumes all risks associated with Customer use of a Beta Feature.

## **7. Third-party services and Managed Services**

- 7.1. Upsun may provide Customer with direct access to, integrations, or connections with, Third Party Services. Upsun is not responsible for evaluating such Third Party Services. Access to Third Party Services is "as is" and "as available," without any warranties or representations of any kind and without any endorsement. Upsun shall have no liability for any harm or damages related to Customer's use of optional Third Party Services. In the event that Customer or any Customer User consents to a third-party integration, Customer shall be

deemed as agreeing to the passage of data to the third-party integration partner for the purposes agreed upon between Customer and Upsun.

- 7.2. Upsun will make reasonable efforts to maintain integration with Third Party Services and Managed Services. However, Upsun cannot guarantee the continued availability of any integrated or managed features and may cease to provide these without entitling Customer to any refund, credit, or other compensation, if for example and without limitation, the provider of a third-party service, tool, or component ceases to make its service, tool, or component available for integration with the Services in a manner acceptable to Upsun or changes the terms of the third-party services in a manner that no longer allows Upsun to provide said integration feature.

## **8. Changes to the Services**

- 8.1. Upsun reserves the right to modify, add, or remove portions and/or functionality of the Services on a temporary or permanent basis, without liability to Customer. Except where an urgent change is required for security reasons, Upsun will notify Customer ahead of any material change by displaying a prominent notice within the Platform and/or by sending Customer an email. Except for changes that are implemented by Upsun for legal, regulatory or security reasons, if and to the extent a change introduced by Upsun has a material adverse effect on Customer's use of the Services, Customer may, as its sole and exclusive remedy, terminate any active subscription and obtain a pro-rata refund of any prepaid and unused Fees. Customer's failure to exercise its right to terminate and request a pro-rata refund within thirty (30) days from the day the change is released by Upsun will be deemed to be Customer's acceptance of the revised Services. When the Customer purchases through a Reseller, Customer must request that the Reseller exercises this right to terminate on its behalf. Failure to do so shall be deemed acceptance of the revised Services. Any refund will be made to the Reseller.

## **9. Customer's obligations**

- 9.1. Customer must comply, and shall ensure that its Users comply, with the Acceptable Use Policy, applicable laws, and this Agreement.
- 9.2. Customer will ensure that its Users' login details are kept confidential, are individual, and are not shared between several individuals.
- 9.3. Customer is liable for its Users' acts and omissions as if they were acts and omissions of Customer. Customer will notify Upsun immediately and terminate the relevant User(s)'s access to the Services should Customer become aware of (i) any breach of this Agreement by a User or (ii) any possible misuse of a User's login details.
- 9.4. Customer is solely responsible for the use and submission of Content. Customer must make sure such Content is validly licensed to Customer for the intended use and Customer is solely liable for complying with any third-party intellectual property rights or licenses over any software or programs included in its Content. If Customer's Projects developed or hosted on the Platform allow for third parties (including but not limited to end users of the Customer's applications) to publish, transmit, or host Content, Customer is solely responsible for any Content that breaches this Agreement or applicable law.

- 9.5. Customer agrees to immediately remove any Content that breaches this Agreement upon first request of Upsun or upon becoming aware of any such breach.

## **10. Customer Affiliates**

- 10.1. Customer may enter into this Agreement on behalf of itself and Affiliates and may enable Affiliates to use the Services under Customer's Account. Customer will remain liable for all obligations under our Agreement and any act or omission of any Affiliates will be deemed to be an act or omission of Customer. Any claim under this Agreement will be brought by or against Customer and not the Affiliate.

## **11. Fees, billing, and payment**

- 11.1. This section 11 shall not apply where Customer has ordered Services via a Reseller.
- 11.2. Orders via a Marketplace
  - 11.2.1. Customer will pay the Fees as set out in the Marketplace Order Form. Bills will be issued through the Marketplace on behalf of Upsun and Customer's payment of Fees to the Marketplace will be deemed to be Upsun's receipt of the same.
  - 11.2.2. If Customer wishes to dispute a payment, it must provide written notice of the dispute to Upsun promptly, and in any event no later than fifteen (15) days from the payment date. Initiating a chargeback or requesting a reversal through a bank or credit card provider does not relieve Customer of its obligation to notify Upsun directly. Customer and Upsun shall work together in good faith and without undue delay to resolve the dispute.
  - 11.2.3. Any amount payable under this Agreement that is not paid when due will accrue interest at the interest rate applied by the European Central Bank to its main refinancing operation plus 10%, from the due date until paid, and (ii) a minimum fixed sum of EUR/USD 40 by way of compensation for recovery costs to Upsun for every invoice paid late. In the event Upsun brings a legal action for collection or hires an agent or authorized representative of collections due to overdue amounts, Customer will reimburse Upsun for all costs and expenses related to such collection, including but not limited to Upsun attorneys' fees, court costs, and any other related collection enforcement fees.
  - 11.2.4. All Fees are exclusive of tax. Customer must pay all taxes and duties assessed in connection with this Agreement, including any sales, use, value-added, withholding, and other taxes and duties. In the event tax is required by law to be withheld from the Fees, Upsun may gross up the invoice such that after the deduction of withholding tax, the original Fees are received in full by Upsun. In the event that any withholding taxes are paid by Customer, Customer shall provide Upsun with a valid withholding tax receipt in Upsun's name and all information reasonably required by Upsun within thirty (30) days following the payment.
  - 11.2.5. If Customer requires a purchase order or purchase order number it must provide that purchase order number to Upsun upon acceptance of the Marketplace Order Form. Terms and conditions on any Customer purchase order are expressly excluded and shall be null and void.

## **12. Changes to prices**

- 12.1. Unless expressly stated otherwise in an Order Form, Upsun may change the Fees at any time. When Services are ordered by Customer via a Marketplace, Upsun must notify Customer of the change not less than thirty (30) days prior to the change taking effect. When Services are ordered by Customer via a Reseller, Upsun must notify the Reseller and the Customer of the change not less than thirty (30) days prior to the change taking effect.
- 12.2. If Customer objects to the updated prices, Customer (or the Reseller on behalf of the Customer) can terminate its subscription as its sole and exclusive remedy.

## **13. Representations and warranty**

- 13.1. When Platform.sh SAS doing business as Upsun, Platform.sh Ltd trading as Upsun, Platform.sh Canada Sub Ltd doing business as Upsun Canada Sub, or Platform.sh Pty Ltd trading as Upsun is the Upsun Contracting Entity:
  - 13.1.1. Upsun warrants that the Services will conform in all material respects with the Service Specific Terms and Documentation when used in accordance with this Agreement. In the event of a breach of the foregoing warranty, Upsun's sole obligation, and Customer's sole and exclusive remedy shall be for Upsun to (i) issue a Service Credit to Customer in accordance with the subscribed service level agreement (where applicable), (ii) correct any failure(s) of the Services to conform in all material respects with the Service Specific Terms and Documentation, or (iii) re-perform the Services at no additional cost to Customer or Reseller.
  - 13.1.2. This warranty will not apply if the error or non-conformity was caused by: (i) Customer's breach of the Acceptable Use Policy, (ii) incidents caused by Customer's Projects (e.g. Project that exceeds the allocated resources, contains a programming error, failure to apply updates) and/or caused by failure of TLS certificates provided by Customer, (iii) any services or hardware of Customer or any Third Party Services or Managed Services used by Customer.
  - 13.1.3. No implied warranty. Except as expressly provided in this Agreement and to the fullest extent permitted by applicable law, the Services are provided on an "as-is" and "as available" basis, and neither Party makes any warranties of any kind, whether express, implied, statutory, or otherwise, and all implied warranties, including the implied warranties of merchantability and fitness for a particular purpose are hereby excluded.
- 13.2. When Platform.sh Inc doing business as Upsun is the Upsun Contracting Entity, the Services (including but not limited to products, functionalities, and information) are provided on an "AS IS" and "AS AVAILABLE" basis. TO THE FULLEST EXTENT PERMITTED BY LAW AND EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, UPSUN HEREBY DISCLAIMS TO CUSTOMER OR TO ANY OTHER PERSON, INCLUDING ANY OF CUSTOMER'S USERS, ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, UPSUN DOES NOT WARRANT THAT THE SERVICES, PRODUCTS, FUNCTIONALITY, DOCUMENTATION, OR INFORMATION, AS APPLICABLE, WILL MEET CUSTOMER'S REQUIREMENTS,

OR BE UNINTERRUPTED OR ERROR-FREE, AND IT DOES NOT MAKE ANY REPRESENTATION REGARDING RESULTS OR USE IN TERMS OF CORRECTNESS, ACCURACY, RELIABILITY, OR RISK OF INJURY.

#### **14. Intellectual Property**

- 14.1. Upsun, and where applicable its licensors, are the sole and exclusive owners of all right, title, and interest in and to the Services.
- 14.2. Upsun hereby grants Customer a limited in time, worldwide, royalty-free, non-transferable, non-assignable, non-sublicensable, and non-exclusive right to use the Services as permitted by this Agreement and subject to the usage restrictions in the Acceptable Use Policy, Service Specific Terms, and Documentation.
- 14.3. Customer may not, and shall procure that Users, or others within Customer's control do not copy, republish, reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code or underlying ideas or algorithms of the Services; modify, translate, or create derivative works based on the Services; rent, lease, distribute, sell, resell, assign, or otherwise transfer intellectual property rights of the Services; use the Services for time-sharing or service bureau purposes, or otherwise for the benefit of a third party; or remove any trademark or proprietary notices from the Services.
- 14.4. Customer, and where applicable, Customer licensors, are and will remain the sole and exclusive owners of all rights and title to and interest in the Content. Customer hereby grants to Upsun a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to host, reproduce, distribute, use, publicly perform, publicly display, and digitally perform the Content only as necessary to provide the Services.
- 14.5. Upsun may state publicly that Customer is an Upsun customer by displaying Customer's name and logo in online or offline promotional materials, or on Upsun websites.
- 14.6. The Services provide Customer with ways to share feedback with Upsun. Customer has no obligation to provide feedback. However, if Customer submits feedback, Customer acknowledges that such feedback is free from any confidentiality restriction and Customer hereby grants Upsun a fully-paid, royalty-free, perpetual, irrevocable, worldwide, non-exclusive, and fully sublicensable right and license to use, reproduce, perform, display, distribute, adapt, modify, translate, create derivative works of, and otherwise commercially exploit such feedback. The foregoing grant of rights is made without any duty to account to Customer or Customer Users for the use of such feedback. No feedback will be considered Customer Confidential Information, and nothing in this Agreement limits Upsun's right to independently use, develop, evaluate, or market products or services, whether incorporating feedback or otherwise.
- 14.7. Any open-source software available through the Services is provided as-is and is not subject to the terms and conditions of this Agreement. Each item of open-source software is licensed under the end-user license that accompanies it.

#### **15. Confidentiality**

- 15.1. Each Party will, during the term of this Agreement and for a period of three (3) years after its termination or expiry, maintain in confidence all Confidential

Information of the other Party and will not use such Confidential Information for any purpose, except as expressly permitted herein.

- 15.2. Each Party will limit the disclosure of such Confidential Information to those of its Representatives who need to access such Confidential Information and are subject to binding use and disclosure restrictions at least as protective as those set forth herein. The receiving Party will be liable for any act or omission of such Representatives that, if taken by the receiving Party, would constitute a breach of this Agreement. The receiving Party will notify the disclosing Party of any actual or suspected breach of this Confidentiality section.
- 15.3. The receiving Party may make disclosures to the limited extent required by law or court order, provided the receiving Party uses reasonable efforts to limit disclosure and to obtain confidential treatment or a protective order and allows the disclosing Party to participate in the proceedings (to the extent legally permitted).
- 15.4. In the event of a breach or threatened breach of this section by either Party, the other Party shall be entitled to seek preliminary and permanent injunctive relief (in addition to monetary damages and other remedies at law) to enforce the provisions hereof and shall be entitled to recover attorneys' fees incurred in connection therewith. Notwithstanding the foregoing, the remedies in this section shall in no way be considered the exclusive remedies of a breach of this section by either Party.

## **16. Indemnification**

- 16.1. Upsun hereby agrees to defend, indemnify, and hold Customer harmless from and against any and all liabilities, losses, damages, or expenses incurred by Customer arising out of or relating to any claim, suit, action or proceeding by a third party alleging that Customer's use of the Services in compliance with the terms of this Agreement infringes upon such third party's intellectual property rights. Upsun indemnification obligation does not apply to the extent the third-party claim arises out of or relates to (i) Customer breach of the Agreement, including the Acceptable Use Policy or Documentation, (ii) Customer Content, (iii) the use of the Services in connection with materials, including third-party materials, not provided by Upsun, and (iv) Beta Features, or free trials.
- 16.2. Customer hereby agrees to defend, indemnify, and hold harmless Upsun and Affiliates against all claims, settlements, procedures, expenses, damages, or suits (including attorneys' fees and expenses) resulting from Customer Content and Customer's use of the Services in breach of the Acceptable Use Policy or this Agreement.
- 16.3. The above indemnification obligations are subject to the following: (i) the indemnified Party will promptly inform the indemnifying Party of the applicable claim, (ii) the indemnifying Party will have sole control of the defense and all related settlement negotiations with respect to the claim, provided the Indemnifying Party may not settle the claim unless it unconditionally releases the indemnified Party of all liability or such settlement receives the indemnified Party prior approval, and (iii) the indemnified Party will, to the necessary extent and upon request of the indemnifying Party, fully cooperate to the claim investigation, defense, and trial.

## **17. Liability**

- 17.1. When Platform.sh Inc doing business as Upsun is the Upsun Contracting Entity, the liability of the Parties is as follows:
- 17.1.1. IN NO EVENT SHALL UPSUN OR ITS SUBCONTRACTORS, LICENSORS, AFFILIATES, OR SUBSIDIARIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS BE LIABLE TO CUSTOMER OR TO ANY THIRD PARTY, INCLUDING ANY END USER, FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY, OR INCIDENTAL DAMAGES OR LOSSES, INCLUDING WITHOUT LIMITATION, LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, GOODWILL OR SAVINGS, LOSS OR CORRUPTION OF DATA, DATA FILES, OR PROGRAMS, OR OTHER PECUNIARY LOSS ARISING OUT OF THE USE OF OR INABILITY TO USE THE SERVICES OR IN CONNECTION WITH THIS AGREEMENT, EVEN IF CUSTOMER OR UPSUN HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL UPSUN AGGREGATE LIABILITY TO CUSTOMER OR ANY THIRD PARTY, INCLUDING ANY END USER, FROM ALL CAUSES OF ACTION AND THEORIES OF LIABILITY, EXCEED THE ACTUAL AMOUNT OF FEES DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE DATE THE LIABILITY AROSE. SUCH FOREGOING EXCLUSIONS, LIMITATIONS OF LIABILITY, AND REMEDIES WILL APPLY, TO THE FULLEST EXTENT PERMITTED BY LAW, IN ALL ACTIONS OF ANY KIND, WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER LEGAL OR EQUITABLE THEORY.
- 17.1.2. EACH EXCLUSION AND LIMITATION IS INTENDED TO BE SEPARATELY ENFORCEABLE, WITHOUT REGARD TO THE OTHER EXCLUSIONS AND LIMITATIONS, AND WITHOUT REGARD TO WHETHER ANY OTHER REMEDY UNDER THIS AGREEMENT FAILS OF ITS ESSENTIAL PURPOSE.
- 17.2. When Platform.sh SAS doing business as Upsun, Platform.sh Ltd trading as Upsun, Platform.sh Canada Sub Ltd doing business as Upsun Canada Sub, or Platform.sh Pty Ltd trading as Upsun is the Upsun Contracting Entity, liability of the Parties is as follows:
- 17.2.1. Upsun will not be liable to the Customer for any indirect, punitive, exemplary, special or consequential damages, including without limitation loss of profit, revenue, business interruption, procurement of substitute products or services, or other pecuniary loss arising out of the use or inability to use the Services, even if such Customer has been advised as to the possibility of such damages.
- 17.2.2. In no event will the aggregate liability of Upsun arising out of or related to this Agreement exceed the actual amount of Fees during the twelve (12) months immediately preceding the date the liability arose.
- 17.2.3. The limitation set forth in section 17.2.2 will not apply (i) in the event of gross negligence or willful misconduct and matters for which liability cannot be excluded under applicable law, and (ii) to the indemnification obligations under section 16 "Indemnification".
- 17.2.4. The exclusions and limitations of liability in this section 17.2. apply to the fullest extent permitted by law, in all actions of any kind, whether based on contract, tort or any other legal or equitable theory.

- 17.3. When Customer ordered Services through a Reseller, amounts paid by the Reseller to Upsun for Services ordered on behalf Customer shall be deemed to be fees paid by Customer hereunder for the purposes of section Liability.

## **18. Suspension**

- 18.1. Upsun may immediately suspend Customer's access to Customer Account and/or suspend Customer Project(s):
  - 18.1.1. If Customer or any User(s) breaches the Acceptable Use Policy or applicable law or as reasonably deemed necessary by Upsun to prevent any harm to the Platform, to Upsun's customers, or to the underlying infrastructure, or
  - 18.1.2. Upon request of the Reseller when Customer ordered Services via a Reseller.
- 18.2. Upsun may suspend Customer access to Customer Account and/or suspend Customer Project(s) eight (8) days from written notice to Customer or Reseller if:
  - 18.2.1. Customer fails to pay any amounts due under the Marketplace Order Form or Reseller fails to pay any amounts due under the Reseller Order Form; and/or
  - 18.2.2. Customer fails to provide any document or information reasonably requested by Upsun and necessary for the billing of the Services.
- 18.3. Suspension will be lifted when the circumstances giving rise to the suspension have been resolved. Suspension does not relieve Customer or the Reseller from its payment obligations or prevent Upsun from exercising any right to terminate this Agreement under section 21 below.

## **19. Term and Termination**

- 19.1. This Agreement takes effect when Customer agrees to these Terms of Service and will continue until expiry of the Order Form or terminated in accordance with this section.
- 19.2. For Services ordered under a fixed-term Order Form, deletion of Customer Projects or Organizations shall not terminate the applicable Order Form or relieve Customer or Reseller of its payment obligations.
- 19.3. Unless otherwise expressly stated on the Order Form, auto-renewal is excluded. Customer and, if applicable, Reseller is responsible for ensuring that any renewal or replacement Order Form is executed prior to expiration of the applicable Subscription Term in order to avoid interruption of the Services. Upsun shall not be liable for any suspension, unavailability, or loss of access or Content resulting from Customer's or Reseller's failure to timely renew or replace an expired Order Form.
- 19.4. Either Party may terminate this Agreement immediately on written notice to the other if the other Party is in breach of the Agreement and fails to cure that breach within thirty (30) days of receipt of written notice of the breach and a request to do so.
- 19.5. Upsun may terminate this Agreement:
  - 19.5.1. immediately on written notice to Customer, if Customer's use of the Services breaches the Acceptable Use Policy or applicable law; or
  - 19.5.2. with eight (8) days prior written notice to Customer or Reseller if Customer or Reseller fails to pay any amount due to Upsun under the Marketplace Order Form or the Reseller Order Form.

- 19.6. Upon termination or expiry of this Agreement, Customer rights and access to the Services will be terminated, and Upsun will delete all Customer Projects and Content without undue delay, unless otherwise required by applicable law or as reasonably necessary for the establishment, exercise, or defense of legal claims. It is Customer's sole responsibility to carry out any action necessary for the conservation or transfer of its Content.
- 19.7. All sections of this Agreement, which, by their nature, extend beyond termination of this Agreement, shall survive the expiration or termination of this Agreement to the fullest extent necessary for their enforcement and for the protection of the Party in whose favor they operate, including, without limitation, accrued rights to payment, confidentiality obligations, warranty disclaimers, and limitations of liability.

## **20. Force Majeure**

- 20.1. Except for payment obligations of amounts due under this Agreement, neither Party will be responsible for failure or delay of performance if caused by: an act of war, hostility, terrorism, riot; strike or sabotage; an act of God, like epidemic, fire, or floods; energy crisis or electrical, internet, or telecommunication outage that is not caused by the obligated Party; government restrictions or embargoes; or other event outside the reasonable control of the obligated Party. Such failure or delay will not be deemed to constitute a breach of this Agreement, but such obligation will remain in full force and effect, and will be performed or satisfied as soon as reasonably practicable after the termination of the circumstances causing such failure or delay, provided that if such Party is prevented or delayed from performing for more than sixty (60) days, the other Party may terminate this Agreement upon fifteen (15) days' prior written notice. Each Party will use reasonable efforts to mitigate the effect of a force majeure event.

## **21. Export control**

- 21.1. Customer represents and warrants that Customer is not a restricted party (e.g., individual or entity that has been denied import or export privileges) and will comply with all applicable export control laws, regulations, and trade sanctions, including those emitted by the United Nation Security Council (UNSC), the US Government, the European Union or its Member States, the UK Government, the Government of Canada, and the Government of Australia. Customer further represents and warrants that: (i) Customer will not directly or indirectly use or allow Users to use the Services in a prohibited country (e.g., Cuba, Iran, North Korea, South Sudan, and Syria) or engage in any export or re-export activity with any entity or individual who Customer knows or has reason to know is engaging in the design, development, or production of nuclear, chemical, or biological weapons, or missile technology, and (ii) none of Customer, Customer's affiliates, nor any of Customer's directors, officers, employees, and none of the Users of the Service is a sanctioned person.

## **22. Anti-bribery**

- 22.1. Each Party shall comply with applicable laws concerning anti-bribery and anti-corruption, which may include the US Foreign Corrupt Practices Act of 1977, the French law of December 9, 2016 on transparency, the fight against

corruption and the modernisation of economic life, known as "Sapin 2," and the UK Bribery Act 2010.

### **23. Non-consumer service**

- 23.1. The Services are not designed primarily for personal, family, or household use, but rather are designed for purposes which are inside Customer's trade, business, craft, or profession. As such, and to the fullest extent allowed by applicable law, Customer understands and agrees that this Agreement is primarily deemed to be entered into between two professionals. Nonetheless, if Customer qualifies as a consumer under applicable law, and applicable law provides consumers with consumer-specific, statutory and non-waivable rights, then any such statutory provision will prevail over any conflicting terms of this Agreement.
- 23.2. If Customer is a UK or European Union resident: by agreeing to these Terms of Service, Customer consents to the immediate performance of this Agreement and acknowledges that it will lose its right of withdrawal from the Agreement once the ordered Services have been made available to Customer by Upsun.

### **24. Notices**

- 24.1. Notices concerning the day-to-day operation of this Agreement shall be sent to:
  - 24.1.1. Upsun via email through the Upsun support portal; and
  - 24.1.2. Customer by posting notices within the Platform or by email to the Customer Account owner listed in the Customer Account.
- 24.2. All other notices must be sent by email to the Customer Account owner and to [legal@upsun.com](mailto:legal@upsun.com), unless applicable law requires notice to be provided by an express courier (with confirmation) in which case notices shall be sent to the Upsun Contracting Entity address listed in section 2 or to the Customer's billing address listed in the Customer Account.
- 24.3. The Parties may use emails to satisfy written notice or consent requirements under this Agreement.

### **25. Changes to this Agreement**

- 25.1. Upsun may, in its sole discretion, modify these Terms of Service or the Service Specific Terms from time to time. When Upsun makes a material change to these documents, Upsun will provide Customer and if applicable the Reseller with prominent notice of that change by displaying prominent notice within the Platform and/or by sending Customer and Reseller an email. To the extent any material change introduced by Upsun is materially less favorable to the Customer than the original term, Customer may, as its sole and exclusive remedy, terminate this Agreement or request that Reseller terminate the Reseller Order Form and obtain a pro-rata refund of any prepaid and unused Fees. Customer's failure to terminate or request that the Reseller terminate this Agreement and request a pro-rata refund within thirty (30) days from the day Customer is informed about the change will be deemed acceptance of the revised terms.

### **26. Governing law and jurisdiction**

- 26.1. The Parties undertake to take all steps to reach a mutual agreement to any dispute arising in relation to the validity, interpretation, or fulfillment of this Agreement.

- 26.2. When Platform.sh SAS doing business as Upsun is the Upsun Contracting Entity, the Parties agree that this Agreement will be governed by and construed under the laws of France, without regard to conflict of law principles. The United Nations Convention for the International Sale of Goods shall not apply. The Parties agree that all disputes and any claims arising out of or in connection with this Agreement and its subject matter shall be exclusively settled by the Commercial court of Paris or any court of competent jurisdiction in Paris (France).
- 26.3. When Platform.sh Ltd trading as Upsun is the Upsun Contracting Entity, the Parties agree that this Agreement will be governed by and construed under the laws of England and Wales, without regard to conflict of law principles. The United Nations Convention for the International Sale of Goods shall not apply. The courts of London (England) shall have exclusive jurisdiction to hear any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof.
- 26.4. When Platform.sh Pty Ltd trading as Upsun is the Upsun Contracting Entity, the Parties agree that this Agreement shall be governed by the laws of New South Wales, Australia. The United Nations Convention for the International Sale of Goods shall not apply. The courts of Sydney, New South Wales (Australia) shall have exclusive jurisdiction to hear any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof.
- 26.5. When Platform.sh Canada Sub Ltd doing business as Upsun Canada Sub is the Upsun Contracting Entity, the Parties agree that this Agreement will be governed by and construed under the laws of British Columbia (Canada) and the federal laws of Canada applicable therein, without regard to conflict of law principles. The United Nations Convention for the International Sale of Goods shall not apply. The courts of Vancouver, British Columbia (Canada) shall have exclusive jurisdiction to hear any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof.
- 26.6. When Platform.sh Inc doing business as Upsun is the Upsun Contracting Entity, the Parties agree that this Agreement will be governed by and construed under the laws of the State of California, applicable to contracts between residents of that State and executed in and to be performed in that State, without regard to conflict of law principles. The United Nations Convention for the International Sale of Goods shall not apply. The courts of Los Angeles, California shall have exclusive jurisdiction to hear any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof.

## **27. Miscellaneous**

- 27.1. This Agreement is in English. Any translations produced in other languages are for convenience only. The English language version of this Agreement shall be controlling in all respects and shall prevail in the event of any inconsistencies with translated versions.
- 27.2. Except where expressly provided herein, no failure or delay by either Party in exercising any right or remedy under this Agreement will constitute a waiver of that right or remedy or any other right or remedy.

- 27.3. The Parties to this Agreement are independent contractors. There is no relationship of agency, partnership, joint venture, employment, or franchise between the Parties. Neither Party nor its employees has the authority to bind or commit the other Party in any way or to incur any obligation on its behalf.
- 27.4. If a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, that provision of the Agreement will be amended to achieve as nearly as possible the intent of the Parties, and the remainder of this Agreement will remain in full force and effect.
- 27.5. This Agreement shall constitute the entire agreement and understanding between Customer and Upsun and govern Customer's use of the Services, superseding any prior or contemporaneous agreements, communications, and proposals, whether oral or written, between Customer and Upsun.
- 27.6. Neither Party may assign this Agreement without the prior written consent of the other Party, except that either Party may assign this Agreement without the prior written consent of the other Party, (i) to any of its Affiliates, (ii) in connection with a corporate reorganization, merger or consolidation of its business, or (iii) pursuant to the sale of all or substantially all of its assets. Notwithstanding the foregoing, for the purposes of verification and registration, if a Party assigns this Agreement in accordance with (i)-(iii) above, it will provide the other Party with prompt written notice and will together with its assignee provide and/or execute such additional documents and take such other actions as reasonably required by the other Party to register the assignment.
- 27.7. Except as expressly set out herein, there are no third-party beneficiaries under this Agreement.