



# MES END USER LICENSE AGREEMENT

Last amended: September 2019

GLOBAL VERSION - NOT APPLICABLE FOR GREATER CHINA AREA

IMPORTANT – THE USE OF MES PRODUCTS IS SUBJECT TO LICENSE RESTRICTIONS. PLEASE READ THIS END USER LICENSE AGREEMENT (“EULA”) CAREFULLY BEFORE USING MES PRODUCTS. IF YOU DO NOT AGREE WITH THE EULA, DO NOT INSTALL OR USE AN MES PRODUCT.

The following provisions govern the license terms and conditions for using an MES Product as a perpetual or subscription based License, manufactured by **Model Engineering Solutions GmbH**, business address: Waldenserstraße 2-4, 10551 Berlin, Germany (hereinafter “**Licensor**”) by you personally or the business entity on whose behalf you are acting (hereinafter “**Licensee**”).

If the Licensor provides the Licensee with additions (e.g. patches, amendments to the Documentation) or new versions of an MES Product (e.g. updates, upgrades) which replace prior versions of an MES Product within the context of a software support and maintenance agreement, the rectification of defects or otherwise, then the newer version of the MES Product shall be subject to the terms of use set forth in this EULA unless agreed differently with our company in writing

## 1 DEFINITIONS, INTERPRETATION

The following definitions apply to the EULA:

- “**Designated Territory**” shall mean the geographical area EMEA (Europe/MidEast/Africa), APAC (Asia/Pacific), and the AMERICAS (North - and South America) as set forth in the individual License Certificate. The geographical area of the People’s Republic of China, including the Special Administrative Regions of Hong Kong and Macao, as well as Taiwan is governed by a specific EULA.
- “**Documentation**” means written information, provided by the Licensor, that is part of the MES Product and that describes the features and various aspects of the software’s intended operation, e.g., tutorials, user guides, and product descriptions, whether distributed in print or electronic form, that are in effect as of the date on which the MES Product is shipped to the Licensee.
- “**Dongle**” means a small piece of hardware that connects to a COMPUTER and that is used as a form of copy protection or digital rights management to authenticate a piece of installed MES Product.
- “**Infringement Claim**” shall mean a claim by a third party against the Licensee asserting that the Licensee’s use of the MES Product in accordance with the EULA violates the Third Party’s intellectual property right in the Designated Territory.
- “**License**” is the Right of Use under the EULA.
- “**License Certificate**” shall mean the written confirmation by the Licensor, specifying the Type of License for an MES Product under the EULA.

<b>“License Files”</b>	shall mean the specific technical details to run the MES Product
<b>“License Protection”</b>	shall mean a mechanism that protects the Licensor against an unauthorized use of a Certain License Type.
<b>“MES Product”</b>	shall mean the computer programs MES Model Examiner <sup>®</sup> , MES Test Manager <sup>®</sup> , MES Quality Commander <sup>®</sup> , MES Model & Refactor <sup>®</sup> , and MES M-XRAY <sup>®</sup> in object code along with its Documentation. MES Products may also include software by Third Parties, which are provided under separate license terms that may be subject to other or additional terms and conditions, which are typically provided in a “Read Me”-file of an MES Product.
<b>“Perpetual License”</b>	shall mean a license to use the Licensed MES Product in perpetuity under the EULA.
<b>“Subscription based License”</b>	shall mean a license to use the Licensed MES Product under the EULA during a defined period of time, the subscription time.
<b>“Quality Defect”</b>	shall mean with regard to the MES Product a deviation of it in functionality and quality from the functionality and quality agreed of the EULA and with regard to the Documentation, if an average prudent user with basic knowledge of the use of the MES Product is unable to grasp the individual functions of it using the Documentation and reasonable effort.
<b>“Third Party”</b>	shall mean any party other than the Licensor or the Licensee.
<b>“Type of License”</b>	shall mean each of the license models defined in Section 4 of the EULA.

## 2 SUBJECT MATTER

Subject matter of this EULA is the use of an MES Product by the Licensee that is subject of a License Certificate. The MES Product shall have the functionality and quality specified and described in the Documentation. The Licensee was able to access the Documentation, provided on Licensees' request prior to the execution of this EULA and has informed itself about the functionality of the MES Product and its fitness for the intended use. The Licensor shall not be liable to the Licensee for any other functionality or quality of the MES Product, in particular the MES Product's suitability for any particular use intended by the Licensee or its suitability for its ordinary use, its compliance with descriptions and statements of the Licensor or its employees made in public or in advertisements, unless the Licensor has approved such description and statements explicitly in writing. The specifications and descriptions of the MES Product in the Documentation shall not be deemed or construed a guarantee of quality given by the Licensor.

## 3 SCOPE OF LICENSE

- 3.1 **Right of Use** - The Licensor grants the Licensee a non-exclusive right to use the MES Product, during a period of time and within a scope set forth in the License Certificate on the condition precedent of the payment of all applicable license fees and subject to the terms of this EULA; this includes the right to access, install, download, copy or otherwise benefit from using the functionality of the MES Product in accordance with the Documentation. The right of use of the MES Product is granted for the Designated Territory and limited to the Type of License as provided in the License Certificate. The Licensee may only use the MES Product for its internal use. The Licensee shall not use the MES Product to render data processing center services, outsourcing services or application services to Third Parties and shall not let or sublicense the MES Product to Third Parties without the prior written consent of the Licensor.
- 3.2 **Ownership** - Unless explicitly set forth otherwise in the EULA, all rights in the MES Product and in all copies made thereof by the Licensee – whether amended or not – in particular the copyright and the right to and on inventions and other intellectual property rights remain exclusively with the Licensor.
- 3.3 **Distributors** - No distributor, or other Third Party contracted by the Licensor for the purposes of selling and distributing MES Products, shall have any rights in the MES Product, other than the right to distribute or sell the MES Product in accordance with such written agreement entered into between on the one hand, the Licensor, and on the other hand, such distributor or other Third Party. No such distributor or other Third Party shall at anytime be considered an authorized representative of the Licensor under the EULA. Furthermore, such

distributors and other Third Parties shall have no rights whatsoever to enter into separate license agreements with licensees or users, nor to deliver or otherwise deal directly with the MES Products .

- 3.4 **Term and Termination** - The EULA is effective upon Licensee's acceptance or upon Licensee's downloading, installing, accessing or using the MES Product. The EULA shall continue in effect until expiration or termination as provided herein. Without prejudice to any other rights, the EULA will terminate automatically without notice if Licensor breaches or fails to comply with any of the limitations or other requirements described herein.

In case of a termination of the Licensee's right of use in the licensed MES Product, in particular in case of a withdrawal from the EULA, the Licensee shall return all tangible storage media with the MES Product received – if any – and delete all copies of the MES Product, unless the Licensee is obliged to retain copies of the MES Product pursuant to mandatory statutory law and shall confirm such deletion in writing to the Licensor.

## 4 TYPES OF LICENSES

MES Products are licensed under the following licensing models:

- 4.1 **Dongle License** - A "Dongle License" permits the Licensee the use of one instance of the MES Product at a time on a single PC, but is not fixed to a designated PC. The Use of the MES Product on a specific computer is authorized by plugging the Dongle into the computer's USB port and by License Files. An external access to the MES Product installed on the computer e.g. by remote desktops, web interfaces, command line, batch functionality and continuous integration servers is not permitted. The use of Dongle management devices and software is not permitted.
- 4.2 **Node-Locked License** - A "Node-Locked License" permits the Licensee the use of one instance of the MES Product and is fixed to one designated computer by its MAC address. It uses the MAC address of a computer specified by the Licensee and License Files to authorize the Use of the MES Product. Each copy of the Licensed MES Product shall be installed and used by the Licensee on only one single computer. The Licensee agrees to provide the Licensor with the MAC address of each computer unit on which a copy of the MES Product will be installed, prior to installing or using the MES Product. An external access to the MES Product installed on the computer e.g. by remote desktops, web interfaces, command line, batch functionality and continuous integration servers is not permitted.
- 4.3 **Floating Network License (FNL)** - A "Floating Network License" permits the Licensee the use of one or more instances of the MES Product on one or more work stations. The Use of the MES product is authorized by a license server in combination with the License Files. A Floating Network License is granted subject to the following restrictions:
- a. Unless otherwise approved by the Licensor in writing, the Floating Network Licenses shall be used only in one of the Designated Territories. Floating Network License must not be invoked or used from outside the Designated Territory. Multiple floating licenses on one license server must have the same settings for Designated territories.
  - b. Depending on the Licensed MES Product, a timeout mechanism (linger time) may apply. The License Certificate provides information about any linger time that applies.
  - c. An external access to the MES Product installed on the computer e.g. by remote desktops, web interfaces, command line, batch functionality and continuous integration servers is not permitted.
- 4.4 **Continuous Integration License (CIL)** - A "Continuous Integration License" permits the Licensee the Use of the MES Product within a centralized automated process environment. The CIL allows the remote triggering of the MES Product on an external installation via e.g. a script. The total number of instances that can be used in parallel is specified in the license file that is subject for the Use of the MES Product. The Use of the MES product is authorized by a license server in combination with the License Files. Unless otherwise approved by the Licensor in writing, the Continuous Integration License shall be used only in one of the Designated Territories. A Continuous Integration License must not be invoked or used from outside of the Designated Territory. The access of the CIL by a specific user requires a client access license (CAL) for this user. The Use of a CIL within a team of a given number of users thus requires CALs for every user who has access to the centralized process environment. Access shall be defined as either operating the MES Product in the centralized process environment, or accessing outputs e.g. reports created by the MES Product. The CAL does not permit the usage of the functions of the MES Product's graphical user interface, configuration, or batch functions.

## 5 LICENSE PROTECTION, CONFIDENTIALITY

- 5.1 **License Protection** - The MES Product contains a License Protection. Licensee may not circumvent or try to circumvent the License Protection, either by using any technical means, hardware or software, in order to eliminate, evade, duplicate or otherwise manipulate the License Protection, or in any other way. This expressly includes the reproduction of the MES Product, the bypassing of the protection mechanism by means of a virtual machine, and the indirect use of a Dongle via a device server or other network technique. It is not allowed to mechanize or automate the process of checking out or in license keys for the MES Product, including by running a second session of a software, or rebooting the license manager, for a principal purpose of minimizing the license check out time of any programs, or otherwise circumventing the intended license manager operation. Any attempt to circumvent the License Protection is prohibited and constitutes a material breach of the EULA.
- 5.2 **Confidentiality** - Licensee shall permit only authorized users, who may rightfully use the licensed MES Product within the parameters of this EULA. Except as expressly authorized by the EULA, Licensee shall not make available the MES Product to any Third Party, or use the MES Product or any license key for any purpose other than exercising rights expressly granted to the Licensor hereunder. The Licensee agrees to cooperate with and assist the Licensor in identifying and preventing any unauthorized use, copying, or disclosure of the MES Product, Documentation, or any portion thereof.
- 5.3 **Users** – The Licensee shall only authorize user with whom it has entered into an employment or other written agreement that is no less onerous on such user than the terms set out in the EULA, in particular with regard to what is stated herein under clauses 5.1 (License Protection), 5.2 (Confidentiality), 7 (Restrictions), and 8 (Export). The Licensee shall be fully liable vis-à-vis the Licensor for any EULA violations committed by its users.

## 6 TRANSFER

The Licensee may transfer the License in the MES Product to a Third Party, if (i) Licensee fully and permanently ceases to use the MES Product, (ii) Licensee has handed over all original copies of the MES Product to such Third Party and Licensee has deleted all copies made by Licensee and (iii) the Third Party has agreed in writing vis-à-vis the Licensor to comply with the terms of the EULA regarding use and transfer of the MES Product. Additional fees may apply to a transfer of the License, or the principal location of any licensed user, to another Designated Territory, or to contract for worldwide use.

## 7 RESTRICTIONS

The License is subject to the express restrictions set forth below:

- 7.1 **Proprietary Markings** - The Licensee shall not remove or destroy any proprietary markings or proprietary legends placed upon or contained within the MES Product.
- 7.2 **Duplication / Copying** - The Licensee may duplicate the Documentation, at no additional charge and for the Licensee's use only, as long as all the required proprietary markings are retained on all the duplicated copies. Copying of the MES Product is prohibited unless it is necessary for using the MES Product as intended according to the EULA or for normal archiving practices, or is otherwise permitted under applicable law. It is not allowed to disclose or transfer activation keys, login credentials, and/or License File to a Third Party, or allow them to be used by a Third Party.
- 7.3 **No Modification, Decompilation, etc.** - The Licensee shall not copy, modify, adapt, translate or create derivative works based upon the MES Product or associated documentation. Further, the Licensee shall not reverse-engineer, decompile, disassemble, or otherwise attempt to discover the source code of the Licensed MES Product, unless this is expressly permitted by the applicable law. Any proprietary markings, serial numbers or other attributes of identification shall not be modified. It is not permitted to access, enable access to, modify, translate, or deploy temporary intermediate files produced by an MES Product.
- 7.4 **No Internet, Network Or Virtual Applications** - The Licensee is not authorized to access (directly or indirectly) the Licensed MES Product or its license protection mechanism via Internet or network applications (e.g. Citrix, Microsoft Remote Desktop or other terminal/device servers) or to grant third parties such access. This restriction does not include the use of the Licensed MES Product within the framework of a Floating Network License and

the Continuous Integration License as permitted under Section 4. Furthermore, the Licensee is not authorized to run the Licensed MES Product as an application program on a virtual machine separately from a physical computer where this enables the Licensed MES Product to be used outside or independently of the number or type of licenses granted.

## 8 EXPORT

The Licensee must not use the MES Product in a manner or ship, transfer or export it to a country to which export is prohibited under the export provisions of the United States or other export laws and regulations, restrictions or provisions (hereinafter "Export Laws"). If the MES Product is subject to export control pursuant to the Export Laws, the Licensee warrants that it is neither a citizen nor a resident of a country on which an embargo has been imposed and the Licensee is not prohibited under the Export Laws from receiving the MES Product. All rights to use the MES Product are granted subject to the condition that those rights are void if the Licensee fails to meet the terms and conditions of this EULA.

## 9 AUDIT RIGHTS

Upon at least fifteen (15) days prior notice, the Licensor may audit the Licensee's compliance with the terms and conditions of this EULA, provided that such audit(s) shall be conducted during normal business hours and in such a manner as not to interfere unreasonably with the operations or to endanger confidential information of the Licensee. Such audits may be conducted only by an independent expert who is subject to professional secrecy or otherwise bound to confidentiality. Such expert may provide the Licensor with such information only – if any – to the extent required by the Licensor to assert claims for and to prosecute Licensee's breaches of intellectual property rights of the Licensor or to identify potential violations against this EULA or other contractual responsibilities. If such an inspection reveals that the Licensee is not compliant with EULA, the Licensor may exercise any or all rights and remedies provided under this EULA or by law, including but not limited to the right to recover the cost of such audit.

## 10 LIMITED WARRANTY

- 10.1 **Free of Quality Defects** - The Licensor warrants that the MES Product is free of Quality Defects at the time the risk passes and does not infringe any rights of third parties in the Designated Territory. If the media on which the MES Product is supplied is found to be defective and the Licensor is notified of this by the Licensee within 14 days of delivery, the Licensor will replace the copy of the MES Product delivered to the Licensee.
- 10.2 **Notification by Licensee** - The Licensee shall notify the Licensor of any defect in writing and without undue delay. The assertion of warranty claims shall be otherwise excluded, regardless on which legal basis or theory.
- 10.3 **Rectification of Quality Defects** - The Licensor shall rectify Quality Defects at its own election by either repairing or replacing the defective MES Product or respective parts thereof.
- 10.4 **New Versions of MES Product** - The Licensor may replace a defective MES Product with newer versions of the same, provided that (i) the replacement is at least equal in performance and functionality to the MES Product to be replaced or (ii) the replacement does not require undue adjustments on the Licensee's side, (e.g. the use of a different operating system or hardware with higher performance). For the avoidance of doubt, additional training of personnel required due to minor changes in the structure of the MES Product shall not be construed as undue adjustment in the meaning of the aforesaid sentence.
- 10.5 **Workarounds** - If a Quality Defect cannot be rectified by repairing or replacing the MES Product, the Licensor may provide the Licensee with workarounds for the respective defect. To the extent reasonable, such workarounds shall be considered a rectification of the Quality Defect.
- 10.6 **Statutory Rights** - The Licensee's rights pursuant to mandatory statutory law to lower payment, withdraw from the Agreement and to claim damages or futile expenses in case of a Quality Defect remain unaffected.
- 10.7 **Notification and Indemnification** - The Licensee shall notify the Licensor without undue delay of any Infringement Claim giving reasonable details. The Licensor shall promptly assume full control over any court- or out-of-court defense activities of the Licensee against such Infringement Claim and shall indemnify the Licensee of all reasonable expenses and costs, including reasonable attorney's fees and damages finally awarded against the

Licensee. If (a) a final and binding court decision confirms the infringement of Third Party's intellectual property rights through the allowed use of the MES Product by the Licensee in the Designated Territory, or (b) a preliminary injunction is properly served upon the Licensee, or (c) the Licensor concedes that the MES Product infringes third party's intellectual property right, the Licensor shall promptly procure an irrevocable release for the Licensee, free of cost to the Licensee, from such alleged Infringement Claim(s) for past use; and for continued use of the MES Product, subject to the Infringement Claim(s), do one of the following:

- procure for the Licensee a license for future use of the MES Product free of charge for the Licensee, and if unable to procure such right,
- modify or replace the MES Product so as to make it non-infringing to the satisfaction of such third party while retaining their form, fit and functionality.

- 10.8 **Failure To Assume Control** - If the Licensor fails to assume full control over the defense of the Licensee as set forth in the section above within thirty (30) days upon notification by the Licensee, the Licensee may conduct the defense and the Licensor shall reimburse the Licensee for the costs incurred by it including reasonable attorney's fees and damages finally awarded against the Licensee to the extent of the allowed use of the MES Product.
- 10.9 **Assistance by the Licensee** - The Licensee shall provide, upon the Licensor's written request and at the expense of the Licensor, reasonable assistance to the Licensor to support the Licensor in the settlement of and/or defense against the Infringement Claim. The Licensor agrees to provide such reasonable assistance to the Licensee where the Licensee undertakes to conduct the defense pursuant the provisions of this Section.
- 10.10 **No Liability under this Section 10** - The Licensor shall not be liable to the Licensee under this Section 10, if and to the extent the Infringement Claims or Quality Defects are based solely on an alteration or modification or use of the MES Product by the Licensee which is not in compliance with the EULA.
- 10.11 **No warranty** - The warranty of this Section 10 shall be void in so far as the MES Product is a free copy, a pre-release version, a beta tester version, a demonstration product or a free copy not meant for resale (NFR copy).

## 11 LICENSORS LIABILITY

No claims for damages shall be asserted against the Licensor (including its legal representatives and agents) on any legal grounds whatsoever except in compliance with the following terms:

- 11.1 The Licensor is liable for intentional acts and in cases where liability is mandatory by law, including, but not restricted to, cases where product liability law applies, where there is culpably caused injury or damage to health or loss of life, or material damage due to the absence from the Licensed MES Product of features that are guaranteed by the Licensor.
- 11.2 If none of the foregoing applies, the Licensor is liable as follows:
- a. In cases of gross negligence. In such cases, the liability for damage to property and assets shall be limited to the amount of damage that might reasonably be predicted, unless the damage is caused by members of the Licensor's executive body or by the Licensor's authorized managers, or unless an essential contractual duty, which has to be fulfilled in order to reasonably fulfill the contract and which the contractual partner may reasonably expect to be fulfilled (cardinal duty), is violated.
  - b. In cases of slight negligence, in as much as a cardinal duty is violated. In such cases liability for damage to property and financial damage shall be limited to the damage that might reasonably be expected in such cases.
- 11.3 In the event of data loss, the Licensor is liable under the conditions stated above only for and up to the cost of recovering the data, and only on the condition that proper data backup has been performed by the Licensee.
- 11.4 No liability is otherwise accepted. This particularly applies to consequential harm caused indirectly by a defect, including loss of profit or non-achievement of savings.
- 11.5 To the extent possible and allowed by law the parties herewith explicitly agree that any punitive damages shall be excluded from the Licensor's liability.

## 12 PUBLIC USE OF LICENSEE'S NAME

The Licensee consents to the public use of its name as a licensee of MES Products, unless the Licensee notifies the Licensor in writing that it withholds such consent.

## 13 MISCELLANEOUS

- 13.1 **Written Form Requirement** - Any amendments or additions to this EULA must be made in writing and must be expressly marked as such. This also applies to this written form requirement.
- 13.2 **Severability** - In the event that any of the above terms is or becomes invalid, the remaining terms shall continue in full force and effect.
- 13.3 **Headings** - Any headings in the EULA are included for convenient reference only and shall not affect the interpretation of the EULA.
- 13.4 **Waiver** - Any failure to enforce, or any waiver of, any right under the EULA by the Licensor shall not be construed as a waiver of future rights.
- 13.5 **Choice of Law** - Except in cases where the provisions of the EULA differ from the mandatory legal regulations, the latter shall apply additionally. This Agreement shall be governed by the laws of the Federal Republic of Germany, excluding the UN Convention on Contracts for the International Sale of Goods (CISG).
- 13.6 **Place of Jurisdiction** - The courts of Berlin, Germany, shall have the exclusive jurisdiction over all disputes arising from or in connection with the EULA.
- 13.7 **Trademark Notice** - MES Model Examiner®, MES Test Manager®, MES Quality Commander®, MES M-XRAY®, and MES Model & Refactor® are registered trademarks in Germany. All other trademarks referenced in the Documentation are the property of their respective owners.