

## END USER LICENSE AGREEMENT (subscription)

### PARTIES:

1. The Backbone B.V, a corporation incorporated and existing under the laws of the Netherlands, hereinafter referred to as: "The Backbone";

and

2. The organization (hereinafter referred to as: "Licensee") purchasing The Backbone End-User Performance Management Pack (hereinafter: "Product").

The Backbone and Licensee hereinafter are collectively referred to as "Parties" and individually as "Party".

### WHEREAS:

- Licensee wishes to obtain a license to use the Product;
- The Backbone is willing to grant the Licensee a license to use the Product for the term and specific purpose set forth in this software limited (Art. 2.1) license agreement (hereinafter: "License").

### HAVE AGREED AS FOLLOWS:

#### Article 1 Definitions

- 1.1 "Quote" shall mean a quote or invoice issued by The Backbone and accepted by Licensee by Licensees payment of the specified fees.
- 1.2 "Simulation" shall mean the simulation of the operation and use of a computer and applications by execution of a graphical user interface automation script tool with use case scenario's (i.e. the script is sending key strokes and mouse movements as if a real end-user is performing the operation).
- 1.3 "Management Group" shall mean a single, not tiered, management group as created and managed by Licensee in Microsoft System Center Operations Manager (SCOM).
- 1.4 "License Email" shall mean the email sent to Licensee containing further License details including, but not limited to, the name of the Management Group.
- 1.5 "Product Support and Maintenance" shall mean support and maintenance to the Product as specified in article 4 of this License.

#### Article 2 License Grant

- 2.1 The Backbone hereby grants to Licensee a non-exclusive, non-transferable (unless otherwise agreed in writing) and worldwide license to install and use the Product licensed from The

Backbone or distributed through a distributor reseller or a service provider of The Backbone (collectively referred to as "The Backbone Partner"), in object code form only and solely for internal use within Licensee's own business.

- 2.2 Licensee may only use the Product in the Management Group as specified in the License Email and/or Quote.
- 2.3 In case the Licensee owns more than one Management Group with the name as specified in the License Email and/or Quote, the Product may only be used in just one of those Management Groups.
- 2.4 Licensee may make one (1) back-up copy of the Product in machine-readable form, provided such copy is used for back-up only and provided all copyright information contained on the original is included in the copy.
- 2.5 The use of the Product is subject to payment of the license fee and the fulfillment of all requirements stipulated in this License. The rights granted herein are limited to The Backbone's and its licensor's intellectual property rights in the Product. Software products not proprietary to The Backbone ("Third Party Products") are licensed separately from the respective proprietary owner of such Third Party Products.
- 2.6 Licensee acknowledges and agrees that nothing herein transfers or conveys to Licensee any right, title or interest to any intellectual property rights in or to the Product and any part thereof or copy thereof. No title to any intellectual property rights is transferred to the Licensee.

### **Article 3      Restrictions on Use**

- 3.1 Except as expressly permitted by mandatory applicable law and this License, Licensee agrees not to copy, amend, modify, decompile, reverse engineer, disassemble, or otherwise discover, rent, lease, or loan the Product, in whole or in part. Licensee may further not create derivative works from or transmit the Product over any public or distributed network, distribute the functionality of the Product as a packaged service or use the Product to operate in or as a time-sharing, outsourcing, service bureau, application service provider or managed service provider environment.
- 3.2 The Backbone, and as the case may be The Backbone licensors, reserves all right, title, and interest in and to the Product not explicitly licensed herein, including without limitation all copyrights, patents, and other proprietary rights. Licensee shall not remove or obscure any copyright notices or proprietary legends contained within the Product.
- 3.3 Licensee shall not reverse engineer, decompile (get the source code out of the object code) or disassemble the Product or any part thereof except for as provided for by mandatory law that cannot be deviated from by contract. Licensee shall not make any changes to the Product.
- 3.4 The Backbone reserves the right to make such audits at Licensee's premises as is necessary to ascertain that the Licensee's use of the Product accord with the provisions of this License and the Licensee shall be obliged to assist The Backbone in the preparation of such audit and shall grant The Backbone access to the Licensee's computer equipment and systems.

#### **Article 4      Product Support and Maintenance**

- 4.1 Product Support and Maintenance is provided pursuant to this License and for a period equal to the Term of this License. Product Support and Maintenance will start from the effective date of the License. The effective date is specified in the License Email and/or the Quote. After expiration of the Term Licensee can renew the License as well as the Product Support and Maintenance pursuant to a Quote.
- 4.2 Product Support and Maintenance is solely provided for the latest version of the Product. If Licensee uses the penultimate release of the Product, then Product Support and Maintenance with respect to that penultimate release of the Product will expire three months after the release of the latest version of the Product.
- 4.3 Product Support and Maintenance is limited to the following:
- Bug fixes (limited to patches and hot fixes);
  - Product releases (limited to service packs upgrades and/or new versions);
  - Technical support for the installation and configuration of the Product.
- 4.4 Any Bug fixes and/or Product releases provided pursuant to Product Support and Maintenance shall be governed by this License.
- 4.5 Product Support and Maintenance is provided on weekdays between 09.00 - 17.00 o'clock, local time of The Netherlands (London +1 hour), national holidays in The Netherlands are excluded.
- 4.6 Response to a Product Support or Maintenance question is guaranteed within 24 hours on weekdays after receiving the question.
- 4.7 The Backbone is not responsible for a correct operation of the Simulation after the update to the latest version of the Product.
- 4.8 For the avoidance of doubt and for clarification of article 4.3, Product Support and Maintenance does not include - for example but not limited to – support related to questions about:
- The necessary IT Infrastructure;
  - Simulation scripting;
  - Installation of SCOM and SQL server;
  - Deployment of SCOM agents;
  - Simulation tool/engine;
  - Related products to the Product.

#### **Article 5      License Fees**

- 5.1 Licensee shall pay the license fee for the Product agreed with The Backbone or The Backbone Partner, if the Product is distributed through a The Backbone Partner. The license fees are to be paid in advance.
- 5.2 The Backbone retains the right to change the prices for Licenses at any time provided that The Backbone notifies Licensee no later than thirty (30) days prior to the change of the license fees.

## **Article 6      Term and termination**

- 6.1 The Product is licensed to the Licensee on a subscription basis. The term of any License shall be twelve (12) months commencing on the start date as specified in the License Email and/or Quote ("Term"). If no subscription start date is specified in the License Email or Quote, the start date of the License shall be the date of delivery of the License to use the Product to the Licensee. The Licensee shall not be entitled to terminate this License prematurely.
- 6.2 Upon the expiration of the Term, the License will automatically renew for twelve (12) months, unless either Party provides the other Party with a minimum of sixty (60) days' written notice of termination before the end of the Term.
- 6.3 The Backbone may terminate this License at any time with immediate effect and without judicial intervention, by written notice to Licensee upon any breach of this License by Licensee which is capable of complete remedy but which is not completely remedied within thirty (30) days after written notice from The Backbone specifying the breach and requiring it to be remedied, or upon any breach of this License by Licensee which cannot be remedied.
- 6.4 This License shall further terminate, without notice, (i) upon the institution by or against Licensee of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of Licensee's debts, (ii) upon Licensee's making an assignment for the benefit of creditors, or (iii) upon initiation of dissolution proceedings of Licensee.
- 6.5 Upon termination of the License, all the rights granted to Licensee under this License shall immediately cease.
- 6.6 Upon termination Licensee shall cease any and all use of the Product and shall destroy all copies of the Product in Licensee's possession. No repayment of license fees paid in advance will be made.

## **Article 7      Limited Warranty**

- 7.1 The Backbone warrants that the Product hereunder will perform during the warranty period in conformance to the functionality specifications for and distributed with the Product by The Backbone at the date of initial delivery of the Product to the Licensee. The warranty period applicable to the Product is ninety (90) days commencing on the date the Product is accepted or installed and used commercially by the Licensee, whichever occurs first.
- 7.2 The Backbone's sole obligation hereunder shall be to refund any license fee paid by Licensee to The Backbone, or if the Product is distributed through a The Backbone Partner, the credit of any payment made by such The Backbone Partner for such defective Product, or to replace any defective Product with software which conforms with the functionality specifications for and distributed with the Product at the date of initial delivery of the Product to the Licensee by The Backbone.
- 7.3 The Backbone shall not be liable under this warranty if the alleged defect in the Product does not exist or was caused by Licensee's or user's or any third person's misuse, negligence, improper installation or testing, unauthorized attempts to support, or any other cause beyond the range of the intended use.

- 7.4 This warranty does not cover any Third Party Products, which are licensed by the proprietary owner of such Third Party Products pursuant to separate license agreements. Such Third Party Products are warranted in accordance with the license agreement governing such Third Party Products.
- 7.5 The foregoing remedy constitutes Licensee's sole and exclusive remedy related to any breach of any warranty related to the Product. To the fullest extent allowed by applicable law, the warranties and remedies set forth in this License are exclusive and in lieu of all other warranties or conditions, express or implied, either in fact or by operation of law, statutory or otherwise, including but not limited to warranties, terms or conditions of merchantability, fitness for a particular purpose and satisfactory quality, all of which are expressly disclaimed. The Backbone's warranties herein run only to Licensee, and are not extended to any third parties which, for the avoidance of doubt, includes any agents of Licensee or end users. The Backbone neither assumes nor authorizes any other person to assume for it any other liability in connection with the licensing, support or use of the Product, and The Backbone makes no warranties or conditions whatsoever for any non-standard products supplied by it hereunder.

#### **Article 8 Patent and Copyright Indemnity**

- 8.1 The Backbone shall, at its own expense, defend or settle any suit or proceeding that is instituted against Licensee to the extent such suit or proceeding alleges that any Products licensed by The Backbone hereunder infringes any intellectual property right of a third party, and shall pay all damages awarded therein against Licensee or agreed upon in settlement by The Backbone; provided that Licensee (i) gives The Backbone immediate notice in writing of any such suit, proceeding or threat thereof; (ii) permits The Backbone sole control, through counsel of The Backbone's choice, to answer the charge of infringement and defend and/or settle such suit; and (iii) gives The Backbone all the needed information, reasonable assistance and authority, at The Backbone's expense, to enable The Backbone to defend or settle such suit.
- 8.2 The above provision shall not apply to, and The Backbone shall have no liability or obligation for, any infringement arising from the following: (i) any modification, servicing or addition made to the Product by anyone other than The Backbone; (ii) the use of such a Product as a part of or in combination with any devices, parts or products not provided by The Backbone if the Product would not have been infringing but for such combination; (iii) the use of other than a current unaltered release of the Product available from The Backbone; or (iv) use of any Third Party Products. This exclusion applies to the extent that the infringement would have been avoided but for such modification, combination, compliance with specifications, use of other than the current release.
- 8.3 In the event the use of any Product purchased from The Backbone is challenged by a third party, or in the event The Backbone wishes to minimize its potential liability hereunder, The Backbone may, at its sole option and expense and without any cost or harm to Licensee: (i) procure for Licensee the right to use such Product; (ii) substitute a functionally equivalent, non-

infringing unit of the Product; (iii) modify such Product so that it no longer infringes but remains functionally equivalent.

#### **Article 9          Limitation of Liability**

- 9.1 In no event shall The Backbone be liable for indirect, incidental, consequential, or exemplary damages, even if it has been advised of the possibility of such damages. In addition, The Backbone's total liability fee to Licensee under this License shall be limited to one hundred percent (100%) of the license fees actually paid by Licensee to The Backbone under this License or to a The Backbone Partner in respect thereof.
- 9.2 Subject to the remainder of this paragraph, Licensee releases The Backbone from all obligations, liability, claims or demands in excess of the limitation. This limitation shall survive and apply even if any limited warranty or remedy hereunder is found to have failed of its essential purpose.
- 9.3 This limitation of liability shall not apply if the damages are caused by, or relate to, gross negligence or wilful misconduct by or on behalf of The Backbone.

#### **Article 10        General Provisions**

##### **10.1 Injunctive Relief**

Licensee acknowledges that, due to the nature of the licensed Product and the inherent difficulty of adequately protecting the proprietary rights of The Backbone in the licensed Product, a breach of this License will cause The Backbone irreparable harm for which money damages would be inadequate. Therefore, Licensee agrees that The Backbone is entitled to seek injunctive relief to protect its rights under this License, in addition to any and all remedies available at law.

##### **10.2 Export Law Compliance**

Licensee will be responsible for compliance with any local export or other law and any other applicable export control rules, regulations, directives or laws with respect to its use or disposition of the Product and any related technical data, and will not export or re-export Products or any related technical data contrary to such applicable laws and/or regulations.

##### **10.3 Waiver**

The failure of either Party to require performance by the other Party of any provision hereof shall not constitute a waiver of the provision itself nor the right to require performance thereunder.

##### **10.4 Assignment**

Licensee shall not assign or transfer this License or delegate any of its rights, duties or obligations hereunder without the prior written consent of The Backbone, which consent shall not unreasonably be withheld.

##### **10.5 Notices**

All notices, consents, waivers and other communications under this License must be in writing and will be deemed to have been duly given when (i) delivered by hand (with written confirmation of receipt); (ii) sent by a facsimile (with written confirmation of receipt), provided

that a copy is also promptly mailed by registered mail, return receipt requested; or (iii) when received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested), or by registered or certified mail, return receipt requested, in each case to the appropriate addresses and facsimile numbers as a Party may designate by notice to the other Party.

#### 10.6 Controlling Law and Dispute Resolution

This License shall be governed by, and construed in accordance with, the substantive laws of The Netherlands excluding its conflict of law provisions. Any dispute, claim or controversy arising out of or in connection with the License that cannot be settled amicably by the Parties shall be settled by the competent Dutch court of Overijssel, location Almelo, the Netherlands.

#### 10.7 Severability

In the event that any provision of this License shall be unenforceable or invalid, such unenforceability shall not render this License unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or court decisions, provided, however, if the provision rendered unenforceable or invalid shall substantially destroy or impair the bargain represented in this License, the License shall be deemed to be terminated.

#### 10.8 Complete License

This License constitutes the entire agreement between the Parties with respect to the use of the Product and supersedes all prior or contemporaneous understandings regarding such subject matter. No amendment to or modification of this License will be binding unless in writing and signed by The Backbone.