

TERMS AND CONDITIONS FOR THE PROVISION OF NETWORK PRODUCTS AND SERVICES



**eircom Limited
1 Heuston South Quarter
St. John's Road
Dublin 8**

TERMS AND CONDITIONS FOR THE PROVISION OF NETWORK PRODUCTS AND SERVICES

Unless otherwise agreed in writing by eircom, these Terms and Conditions shall govern the business relationship between you and any of your Affiliates and eircom and the making of any purchase order by you is your and any of your Affiliates' acceptance of and agreement to abide by these Terms and Conditions. Unless otherwise agreed by eircom in writing, these Terms and Conditions will apply between you and eircom. Any acceptance by eircom of any of your orders is subject to these Terms and Conditions.

In these Terms and Conditions, 'eircom' is a reference to eircom Limited of 1 Heuston South Quarter, St. John's Road, Dublin 8 together with its successors and assigns and 'you', 'your' and 'yours' and words of similar meaning are references to the business entity or person and any Affiliate of such, and its successors and permitted assigns, doing business with eircom.

1. GENERAL

1.1 In these Terms and Conditions, the following expressions shall have the following meanings:

"Affiliate" means, with respect to any natural or legal person, any other natural or legal person directly, or indirectly through one or more intermediaries, controlling, controlled by or under common control with such person;

"Equipment" means third party manufactured equipment and accessories supplied by or behalf of eircom including the physical media upon which the Third Party Software and/or the eircom Software, if any, are stored, and any Replacement Parts and shall include any item comprising any of the foregoing as the context admits or the case may require;

"eircom Software" means all computer programs and software created or developed by eircom and provided to you as part of the Services;

"Location" means your premises or such other location as eircom may approve in writing from time to time and at which the Products will be kept and all or some of the Services may be performed;

"Maintenance Services" means any maintenance services which eircom may agree to provide to you from time to time in connection with the Products;

"Products" means the Equipment, the eircom Software and the Third Party Software or any of them;

"Replacement Parts" means any replacement parts for the Equipment that may be supplied to you as part of the Maintenance Services;

"Services" means any network services to which eircom may agree to provide to you from time to time including technical consultancy, installation, monitoring and managed services and including Maintenance Services;

"Termination Event" means each and every of the termination events set out in clause 12;

"Third Party Software" means third party software supplied by or behalf of eircom for use with the Equipment.

1.2 eircom will use its reasonable commercial efforts to provide the Services to you. You will provide eircom with all documentation and other information as may be deemed necessary by eircom to perform the Services. Unless otherwise agreed, the Services will be performed between 09.00 to 17.30 GMT, Monday to Friday excluding bank and public holidays.

1.3 Headings are for ease of reference only and do not form part of and shall not be construed as forming part of these Terms and Conditions. Any reference in these Terms and Conditions to any statute shall be construed as a reference to such statute as amended, extended, consolidated or re-enacted from

time to time and references to a statutory provision shall extend to any subordinate legislation made under it.

2. DELIVERY

- 2.1 eircom will use reasonable efforts to deliver the Products and perform the Services within the time indicated by eircom but eircom will not be liable to you for any loss or damage of whatsoever nature for late or non-delivery of the Products or late or non-performance of the Services.
- 2.2 The method of packaging and the choice of carrier of the Products are at the sole discretion of eircom.
- 2.3 All risk in and to the Equipment shall pass to you on the earlier of (i) delivery thereof to the Location or (ii) if you request eircom to store the Equipment on your behalf, the date on which you make any such request, and you shall insure the Equipment accordingly. eircom accepts no liability of whatsoever nature howsoever arising for storing the Equipment on your behalf following your request to store the Equipment on your behalf.
- 2.4 Orders placed by you with eircom (if accepted by eircom) will be delivered only after the Products have first been delivered to eircom. eircom may execute orders in part from time to time, and payments for each part of an order so executed shall become due thirty (30) days from the date of invoice unless otherwise agreed in writing.
- 2.5 You are not entitled to return any Products to eircom without eircom's prior express consent. No claim in respect of shortages of or damage to the Products will be entertained by eircom unless made in writing and received by eircom within three (3) days from date of delivery of the Products.
- 2.6 You are responsible for the proper disposal of any and all packaging in connection with the Products.

3 RETENTION OF TITLE

- 3.1 Notwithstanding delivery and passing of risk to you, the property in and legal and beneficial title to the Equipment will not pass to you, and you will keep the Equipment as bailee and trustee for eircom returning same upon request, until the price of the Equipment and any other amount on whatever account owing from you to eircom is paid in full.
- 3.2 Until such time as the property and legal and beneficial title in the Equipment passes to you, you must keep the Equipment separate from your other goods or the goods of third parties and properly stored, protected, insured and identified as eircom's property.
- 3.3 Until such time as the property and legal and beneficial title in the Equipment passes to you, on the happening of any Termination Event (whether it leads to termination or not) or upon expiry of these Terms and Conditions or if eircom has reasonable cause to believe that any Termination Event is likely to occur, then, without prejudice to any other rights or remedies, eircom reserves to right to:
 - 3.3.1 enter onto without prior notice the Location or any of your premises where the Equipment is or may be, and to repossess and dispose of any such Equipment so as to discharge any sums owed by you to eircom and such shall not constitute trespass;
 - 3.3.2 require you not to re-sell or part with possession of any Equipment owned by eircom until you have paid in full all sums due to eircom on any account; and/or
 - 3.3.3 withhold delivery of any undelivered Products, stop any Products in transit, suspend performance of the Services (if any) and require payment in advance of any further deliveries of Products ordered by you or Services to be performed by eircom.

- 3.4 You are not entitled to pledge, charge, encumber or otherwise permit the creation of any lien or encumbrance, whether by way of security or otherwise for any indebtedness over, any of the Equipment which remains the property of eircom, but if you do so, all money owing by you to eircom will (without limiting any other right or remedy of eircom) forthwith become due and payable.

4. PRICE AND PAYMENT

- 4.1 Unless a definite price had been expressly agreed between you and eircom for the execution of an order, eircom's list price prevailing at the date of delivery shall apply.
- 4.2 Prices are exclusive of VAT and any other taxes and duties due.
- 4.3 Accounts with overdue balances may be placed on credit hold. This means that no further Products will be shipped and no Services will be performed until the account is brought into order. Credit facilities may be withdrawn without prior notice at the sole discretion of eircom.
- 4.4 Unless an alternative currency and method of payment is agreed in writing by eircom, payment shall be made in euro within 30 days of date of invoice. Payment shall not be treated as having been made until the amount in question has been irrevocably cleared and credited to eircom's bank account. Interest on late payments may be applied and charged by eircom in accordance with and at the rate provided for by the European Communities (Late Payment in Commercial Transactions) Regulations, 2002, any such interest to accrue daily from the date of invoice until the date of actual payment and both before and after judgement.

5. INTELLECTUAL PROPERTY RIGHTS

- 5.1 All intellectual property rights in or to the Services and the eircom Software are hereby expressly reserved and are and shall remain the sole property of eircom. Nothing herein shall be construed as granting to you any right or interest under any intellectual property right owned or controlled by eircom provided that, unless otherwise agreed in writing, eircom grants to you a personal, non-exclusive, royalty free, revocable, non-transferable, licence to use the eircom Software for internal business purposes only subject to these Terms and Conditions. eircom and associated logos are trade marks of eircom and all rights are reserved.
- 5.2 All intellectual property rights in or to the Equipment or the Third Party Software are owned by the relevant manufacturer or its licensors.
- 5.3 In the event that any claim is made against you and/or eircom that the eircom Software infringes the intellectual property or other rights of any third party, or in the reasonable opinion of eircom such a claim may be made, eircom, in its sole discretion, may either replace the eircom Software with software that it is non-infringing, modify the eircom Software so that it is non-infringing or remove the eircom Software and refund to you any money paid by you to eircom for the eircom Software and such shall be the sole and exclusive remedy.

6. WARRANTY

- 6.1 The Equipment and Third Party Software carry only the warranty (if any) of the relevant manufacturer and you are only entitled to the benefit thereof only to the extent that eircom has the power to transfer it to you and the third party supplier agrees. Without prejudice to the foregoing, in no circumstances will eircom's liability to you for any breach of warranty exceed the price paid by you to eircom for the Product or Service in respect of which the claim is made.
- 6.2 eircom warrants that:
- 6.2.1 it is the owner of the eircom Software; and

6.2.2 it has the ability and capacity to provide the Services and the Services will be provided by personnel who are appropriately experienced or trained.

6.3 Unless otherwise agreed by eircom, no commitment or warranty is made in respect of the Third Party Software other than a right for you to use the Third Party Software. eircom disclaims any responsibility or liability in relation to or in connection with the Third Party Software.

6.4 eircom does not warrant that the eircom Software will be uninterrupted or error free.

6.5 In the event of any breach of warranty by eircom in connection with the eircom Software, your sole and exclusive remedy shall be, in the sole discretion of eircom, either the replacement or repair of the eircom Software or a refund of any money paid by you to eircom for the eircom Software, or in the event of any breach of warranty in connection with the Services, your sole and exclusive remedy shall be the re-performance of the Services.

6.6 Other than the representations and warranties expressly provided under these Terms and Conditions, eircom expressly disclaims all warranties, conditions, representations, statements, terms and provisions, whether express or implied by statute, common law, custom or trade, or otherwise in connection with these Terms and Conditions to the maximum extent permissible by law. Without prejudice to the generality of the foregoing, all terms implied pursuant to sections 13-15 of the Sale of Goods and Supply of Services Act, 1893 and 1980 and section 39 of the Sale of Goods and Supply of Services Act, 1893 and 1980 are hereby excluded and the parties agree that is fair and reasonable. You confirm that you enter into these Terms and Conditions in the course of trade.

7. LIMITATION OF LIABILITY

7.1 Without prejudice to clauses 2.1, 2.3, 5.3, 6.1 or 6.5 the liability of eircom arising out of or in any way connected with any purchase order whether in contract, tort, equity, statute or common law shall be in the aggregate limited to the charges paid to eircom by you for the Products and/or Services set out in the purchase order to which the relevant purchase relates.

7.2 In no event shall either party be liable to the other for any suits, claims, judgements, awards, expenses, costs, damages, proceedings, or loss (including without limitation any special, incidental, direct, indirect, punitive or consequential loss or damages, any loss of business, loss of revenue or loss of profits, loss of use of data, loss of savings or anticipated savings, loss of investments or loss of goodwill or reputation) of whatsoever nature howsoever arising or incurred by either party or taken against either party or any other person whether arising out of the provision of the Products and Services or otherwise.

7.3 Nothing in these Terms and Conditions shall be construed as excluding or limiting either party's liability for death or personal injury caused by negligence or fraud (including fraudulent misrepresentation).

8. VARIATION AND CANCELLATION OF ORDERS

8.1 Once accepted by eircom, orders may not be varied or cancelled without eircom's prior written consent. You will reimburse eircom for all loss suffered by eircom as a result of variations or cancellations of orders.

8.2 Any agreed variations or cancellations will be subject to a restocking charge of 15% of the value of the Products or Services varied or cancelled. Any Equipment which may be returned and accepted by eircom in its sole discretion for credit must be returned in a saleable condition, unopened and in the original packing and complete with all accessories, manuals, etc.

9. CONFIDENTIALITY

- 9.1 Both eircom and you will keep in confidence any information of a confidential nature obtained under these Terms and Conditions or during the course of our business relationship and will not disclose that information to any person (other than our employees who may need to know the information) without the prior written consent of the other.
- 9.2 This obligation does not apply to information (i) which has been published other than through a breach of these Terms and Conditions; (ii) lawfully in the possession of the recipient before such disclosure took place as evidenced by its records; and (iii) obtained from a third party who is free to disclose it.
- 9.3 This clause will survive termination of these Terms and Conditions.

10. DATA PROTECTION

- 10.1 To the extent that the information disclosed by you or information disclosed to eircom is comprised of personal data within the meaning of the Data Protection Acts 1988 and 2003 ("DPA"), such personal data may be used, processed or disclosed (including, without limitation, to and by any affiliate, agent or representative of eircom and/or any third party service provider) for such purposes as may reasonably be required in connection with performance of these Terms and Conditions and the Services and for the purpose of enabling eircom to fulfill its duties and obligations pursuant to these Terms and Conditions and the Services. Further, you represent and warrant that you have the authority to disclose any personal data, within the meaning of the DPA, which you disclose or otherwise provide to eircom regarding persons other than yourself. To the extent that the information disclosed by you to eircom is comprised of personal data, you or the individual to whom the information relates are entitled (on payment of the appropriate fee not exceeding the statutory maximum from time to time) to access such personal data and to have any incorrect or misleading personal data amended or erased in accordance with the DPA. However, you acknowledge that the erasure of personal data held by eircom may result in eircom being unable to continue to provide the Services and may result in termination of these Terms and Conditions.
- 10.2 Without prejudice to Clause 10.1, you acknowledge and agree that the personal data referred to in Clause 10.1 above may be used, disclosed or processed by eircom for any or all of the following purposes: to obtain advice from professional advisors; to communicate to third party investors or potential investors in eircom in the event of the sale, disposal, merger or transfer of the business of eircom or in any other manner connected with the sale, disposal, merger or transfer of the business of eircom; or to obtain financing for eircom's business.
- 10.3 From time to time, eircom may process your personal data to advise you of future promotions, seminars and other products and services offered by eircom, its affiliates or third parties, by personal visit, telephone, post, electronic mail (including SMS), facsimile, and/or other similar means. If at any time you would like for eircom to stop processing your personal data in this manner, please contact [] .
- 10.4 You acknowledge and agree that personal data provided by you may be transferred both within and outside of the European Economic Area for any and all of the reasons specified in this Clause 10.

11. Maintenance Services

- 11.1 The Maintenance Services do not include any maintenance of the Products which is necessitated as a result of any cause other than fair wear and tear including without limitation:
- 11.1.1 accident, transportation, neglect, misuse or default by you, your employees, agents or any third party; or
 - 11.1.2 any fault in any attachments or associated equipment (whether or not supplied by eircom) which do not form part of the Products; or
 - 11.1.3 an act of God, flood, fire, war, lightning, act of violence, electrical mains power surge, or any similar occurrence; or

- 11.1.4 any attempt by any person other than eircom personnel or their authorised agents to move, remove, modify, adjust, repair or maintain the Products.
- 11.2 The Maintenance Services do not include the provision of services other than at the Location; maintenance of any attachments or associated equipment (whether or not supplied by eircom) which do not form part of the Products; or maintenance of any Products excluded by eircom from time to time and notified to you by eircom.
- 11.3 You will be responsible for reporting all faults in the Products to eircom in a timely manner and will be responsible for requesting Maintenance Services, as required. In addition your responsibilities include, without limitation:
 - 11.3.1 reading and observing the environmental and electrical conditions in which the Products should be maintained;
 - 11.3.2 maintaining in good condition the accommodation of the Products, the cables and fitting associated therewith and the electricity supply thereto;
 - 11.3.3 taking all reasonable precautions to ensure that eircom personnel are provided with a safe working environment when carrying out Maintenance Services at the Location;
 - 11.3.4 not making any modification to the Products without eircom's prior written consent;
 - 11.3.5 keeping and operating the Products in a proper and prudent manner in accordance with eircom's or the manufacturer's operating instructions and ensure that only employees trained and skilled in the use of the Products are allowed to operate it;
 - 11.3.6 ensuring that the external surfaces of the Products are kept clean and in good condition and carry out any minor maintenance of the Products recommended by eircom from time to time;
 - 11.3.7 save as aforesaid, not attempting to adjust, repair, modify or maintain the Products and shall not request, permit or authorise anyone other than eircom to carry out any adjustments, repairs, modifications or maintenance to the Products;
 - 11.3.8 not removing the Products from the Location without prior written notification to eircom ;
 - 11.3.9 not using in conjunction with the Products any accessory, attachment or additional equipment other than that which has been supplied by or approved in writing by eircom;
 - 11.3.10 being responsible for identifying problems and replacing accessories and supplies including but not limited to analogue telephone sets, batteries, toner, paper and tapes; and
 - 11.3.11 ensuring that all external network elements have adequate lightning protection as specified by the network provider.
- 11.4 You will provide eircom with safe and secure remote access to the Products and you will ensure the appropriateness of all security measures where remote access features are used on the Products which allow direct or indirect access, such as firewalls, password protection and virus checking; provide eircom with full and safe access to the Products at the Location; and make available at the Location such facilities as eircom may reasonably require in order to provide the Maintenance Services or the Services, including but not limited to, adequate work space, storage and office furniture and equipment;
- 11.5 You will indemnify and keep fully and effectively indemnified and hold eircom harmless against any consequences to it or any third party from any unauthorised access to or through the Products, howsoever arising or any loss or damage caused to eircom or any of its personnel, contractors or third party service providers whilst providing the Services to you at the Location.

12. TERMINATION AND CONSEQUENCES OF TERMINATION

12.1 eircom may terminate these Terms and Conditions forthwith on notice to you if you:

12.1.1 fail to make any payment to eircom when due (or you are unable to pay your debts within the meaning of Section 214 of the Companies Act, 1963); or

12.1.2 become bankrupt or insolvent, enter or are put into liquidation, or you have a petition presented for your winding up, make any composition with your creditors, have a receiver, examiner or manager appointed over any of your assets or business; or

12.1.3 breach any provision of these Terms and Conditions or any other agreement you may have with eircom and if such breach is capable of being remedied you fail to remedy that breach within thirty (30) days of written notice from eircom;

or any event similar to any of the foregoing occurs in any jurisdiction.

12.2 Either you or eircom may terminate these Terms and Conditions at any time upon twelve (12) months written notice to the other.

12.3 Upon termination or expiry of this Agreement:

12.3.1 the licence to use the eircom Software pursuant to Clause 5 shall cease automatically along with any right to use the Third Party Software and you shall return all copies of any eircom Software and Third Party Software and/or confirm its deletion from your systems;

12.3.2 you will pay eircom all sums due and payable under these Terms and Conditions but unpaid at the time of termination; and

12.3.3 both eircom and you will return or destroy any confidential information of the other party in our possession, custody or control.

12.4 eircom reserves the right to terminate any right to use the Third Party Software at any time on notice to you.

13. MISCELLANEOUS

13.1 Failure by eircom at any time or for any period, to require strict performance of any of these Terms and Conditions shall not be construed as a waiver and shall in no way affect eircom's right later to enforce these Terms and Conditions.

13.2 The invalidity or unenforceability of any of the provisions of these Terms and Conditions shall in no way affect the validity or enforceability of the remaining provisions.

13.3 eircom may assign, transfer or novate these Terms and Conditions or any of its rights or obligations hereunder. You agree to enter into such documents as eircom may stipulate in order to effect such transfer, assignment or novation. You may not assign, transfer or novate any of your rights or obligations under these Terms and Conditions.

13.4 If your business is a partnership or consists of two or more natural persons, each partner or person shall be jointly and severally liable under these Terms and Conditions.

13.5 eircom may appoint one or more agents or representatives for any of the purposes of these Terms and Conditions.

- 13.6 These Terms and Conditions will be binding upon and will inure to the benefit of you and eircom and each of our respective successors and permitted assigns.
- 13.7 These Terms and Conditions shall be governed by Irish law and parties shall submit to the exclusive jurisdiction of the Irish Courts
- 13.8 Subject to Clause 13.12, no amendment or addition to these Terms and Conditions will be effective unless made or agreed by eircom in writing.
- 13.9 eircom will only continue to provide the Maintenance Services in respect of Products which are supported by its manufacturer and/or distributor. Upon notification to eircom from a manufacturer or distributor that any of the Products are no longer being supported, eircom will continue to support such Products if it is in a position to do so, but reserves the right to terminate the Maintenance Services in respect of such Products on notice to you.
- 13.10 Except for failure to make payments when due, neither party shall be liable to the other by reason of any failure in performance of these Terms and Conditions if the failure arises out of any cause beyond the reasonable control of that party (an event of "Force Majeure"), including, but not limited to, the unavailability of third party communication facilities or energy sources, any act of God, any act or omission of governmental or other competent authority, fires, strikes, riots or war. If an event of Force Majeure shall continue for more than six (6) weeks, either party may terminate these Terms and Conditions, without liability, upon notice to the other.
- 13.11 Subject to Clause 13.12, any notice under these Terms and Conditions shall be given in writing by post or personal delivery or by prepaid registered mail or by facsimile with advice of transmission directed to the address of the party which is set forth in these Terms and Conditions or to such other address as may be substituted by notice to the other party. If notice is sent by post, it will be treated as delivered two (2) business days after it has been posted.
- 13.12 You agree that eircom may from time to time vary this Agreement or part thereof. Any such variation shall become effective upon eircom notifying you thereof and such notification shall be by such means as eircom shall think fit.