

# Terms & Conditions

## 1. SERVICES PROVIDED

1.1 eircom net will provide the Client the services/facilities identified in Clause 1.2 (which term shall be deemed to include the physical facilities including telecommunications links, processors, computers and interfaces which make up the connections (both logical and physical) between the end user and the information provider) subject to the terms and conditions contained in this Agreement, any applicable end user licence agreements annexed to this Agreement and the prices and any special terms contained in the schedules referenced in Clause 1.2 for purposes of giving access to the Client to such information providers as may from time to time be available via the Services or such providers as shall have been chosen by the Client. Services which are made available from outside Ireland will be provided by eircom net but sourced from other locations. The Client is responsible for obtaining, installing and maintaining the equipment, communication lines and services necessary to access the Services, unless otherwise stated in an applicable Schedule.

1.2 Services to be provided are those which are identified in eircom net's Services Price Schedule and in the application specific Service Description and Price Schedules ("Schedule") listed on the Order Form attached.

In the event of any inconsistency between the terms of this Agreement and any of the Schedules referred to above or annexed to this Agreement, the terms of the applicable Schedule shall prevail.

## 2. TERM, CHANGES, PAYMENT, TAXES

2.1 This Agreement will remain in effect until terminated as provided in Clause 7. Unless otherwise stated in an applicable Schedule, eircom net may change the prices of this Agreement and any applicable Schedule on thirty five (35) days prior notice. The provisions of Clauses 2.3, 3.2, 4.3, 6, 7.3, and 9 and such others as would by their nature and context imply survival shall survive any termination of this Agreement.

2.2 eircom net may:

- supplement or make changes to its rules of operation, access procedures, security procedures and standards for Client equipment,
- change the type and location of the system equipment, facilities and software used by it in providing Services, and
- modify or withdraw any particular Service.

2.3 The Client will pay charges for its use of the Services as recorded by eircom net's computer systems plus an amount equal to value added taxes. Fixed monthly charges for Services initiated or terminated during a calendar month will be prorated. Invoices are payable upon receipt. Invoices not paid within thirty (30) days after the date of invoice shall be subject to interest charges on the unpaid amount at a rate of two per cent above the Allied Irish Banks plc A Rate in force at the date of such unpaid invoice for the period from the date of invoice to the date that payment is received by eircom net.

## 3. USE OF SERVICES

3.1 The Client will use the Services in accordance with the precepts of public morality and all applicable law, including data privacy laws, communications regulations and tariffs, and standard conditions of use

established by eircom net from time to time. In particular, the Client will not use any Service to export or re-export any defamatory, racist, pornographic or immoral material or any material in violation of any applicable export control laws and regulations. eircom net reserves the right to terminate access or take other actions it reasonably believes to be necessary to comply with the law and eircom net's standard conditions of use.

3.2 The Client agrees to indemnify and hold eircom net, its employees and agents harmless against any liability, cost or damages suffered by them and arising directly or indirectly from anything done by the client in breach of Clause 3.1.

3.3 Except as otherwise provided in an applicable Schedule, the Client will not resell the Services to third parties without eircom net's written consent. The Client agrees to indemnify and hold eircom net, its employees and agents harmless against any liability, costs or damages arising out of claims or suits by third parties who have received the right to access the Services from the Client.

3.4 The Client will use any access codes, details, Client/user identities, passwords, account formula or similar material (the "Client Details") assigned to it only from the locations authorised for those Client Details. In the event of use from unauthorised locations, the Client will pay the list prices applicable to that use. The Client's payment will be without prejudice to any other legal remedies available to eircom net. The Client is responsible for all charges incurred in relation to Client Details. Client Details issued to the Client may not be divulged to any unauthorised person or assigned without the prior written approval of eircom net.

3.5 Without prejudice to the generality of Clauses 3.1, 3.2, 3.3 and 3.4 the Client agrees that it shall:

- observe and comply fully with the laws of copyright and intellectual property rights in respect of the information provided through the Services and the Client may not use, copy or deal with such information other than for the Services without the due and proper authorisation of the copyright owner;
- not store information (which term shall include ideas but not be limited to information, inventions, specifications and dialogue in a form in which it can be sourced) ("the Information") in any form or on any media other than as specified in the Order Form or in Clause 1.2. The Client undertakes dutifully to reproduce any copyright symbol and clause in whole as may appear on screen or printer at the head of the relevant data base or the head or foot of the information being processed;
- be prohibited from selling, reselling or otherwise dealing in an unauthorised manner with the information in any manner on any media. Unless the Client has obtained in writing the prior written approval of eircom net he is prohibited from allowing any other party access to the Service through the Network or via the Client's equipment or personnel;
- prohibited from processing automated personal data as defined in the Data Protection Act, 1988;
- be absolutely bound to observe the confidentiality of the Client Details. eircom net may suspend without notice and without explanation access or change access to the Client's account immediately upon notification by the Client of the loss or disappearance of the Client Details or upon the occurrence of any events as set out in Clause 8 hereunder;
- ensure that all software and hardware equipment or facilities required in order to provide a connection to the Services is made available and in good and compatible working order.

#### **4. SECURITY AND CONFIDENTIALITY**

4.1 eircom net will provide reasonable physical security for the Client's computer- stored files and programs and will make reasonable security procedures available to enable the Client to protect those files and programs from unauthorised access. The Client is responsible for selecting and properly using the security procedures made available by eircom net as well as other procedures and measures necessary to safeguard and back-up its files, data and programs or any other form of information..

4.2 The Client acknowledges that eircom net's employees and representatives may gain access to the Client's data in the course of providing Services to the Client. eircom net will protect from unauthorised disclosure or access the Client data in its possession to which its employees or representatives gain access by using the same degree of care that eircom net takes to protect its own data of a similar nature. However, this obligation will not apply to the Client data which is or becomes publicly available without fault on the part of eircom net, is already in eircom net's possession prior to the time eircom net gains access to the data under this Agreement, is independently developed by eircom net, or is rightfully obtained from third parties.

4.3 Each party shall treat as confidential all information obtained from the other pursuant to this Agreement and shall not divulge such information to any person (except to such party's own employees and then only to those employees who need to know the same) without the other parties prior written consent, provided however that this clause shall not extend to information rightfully in the possession of such party prior to commencement of the negotiations leading to this Agreement, which is already public knowledge or will become so at a future date (otherwise that as a result of a breach of this clause) or which is trivial or obvious. Each party shall ensure that its employees are aware of and comply with the provisions of this clause. The foregoing obligations as to confidentiality shall survive any termination of this Agreement.

4.4 The security and confidentiality obligations of eircom net under this Clause 4 are subject to all applicable law. It is expressly agreed that eircom net shall be released from these obligations in the event of the breach of Clause 3.1 by the Client.

## 5. WARRANTIES

5.1 Subject to Clauses 5.4 and 5.5 below, eircom net warrants that each Service, if used properly by the Client, will perform substantially in accordance with the then current published user documentation for that Service. The warranties in this Clause will only apply to failures to meet the applicable warranty which are reported to eircom net in writing within sixty (60) days after the date of failure.

5.2 eircom net's sole obligations for failure to meet the warranties specified in Clause 5.1 will be as follows:

- For failures to perform in accordance with the then current published user documentation, eircom net will attempt to correct any failure to meet warranted performance which materially impairs the operation of the affected Service. eircom net will also pay to the Client a portion of the charges paid for such Service as eircom net determines is attributable to the period during which the Service did not perform as warranted after deduction of any charge payable by eircom net to any third party carrier or service or system provider. If eircom net fails to restore warranted performance within a reasonable time, the Client may terminate the application specific Schedule for the affected Service.
- For failures of System availability, eircom net will reduce the total charge for the month for the Service affected by the percentage by which actual System availability is less than warranted availability. The term "System" means eircom net's specific computer and its directly connected central communications processor(s) which directly provide access to the Client data files; other computer and communications equipment, including that which is the property or responsibility of eircom net are explicitly excluded. eircom net reserves the right to suspend the availability of the System to carry out routine maintenance and other adjustments to the System as it shall deem necessary from time to time and eircom net shall make no reduction in its charges for the resulting unavailability of the System. All such suspensions shall be notified in advance and, insofar as possible, shall take place at such times as will cause least disruption.

If eircom net fails to meet one of the foregoing warranties for three (3) out of six (6) consecutive months, the Client may terminate the Schedule(s) for the affected Service(s) upon notice to eircom net.

5.3 Subject to the limitations thereon specified in this Agreement, Clause 5.1 sets out the sole warranties applicable to a Service. All conditions, warranties and terms implied by law are hereby excluded.

5.4 eircom net does not warrant that the Services will meet the Client's requirements or that the operation of the Services will be uninterrupted or error free. In particular, eircom net makes no warranties or representation to the extent that the operation of the Services is dependent on third party service providers and eircom net shall have no liability in respect of defects, interruptions or malfunctions in the Services which are attributable to such third party service providers. The Client assumes the responsibility to take adequate precautions against damages to its operation which could be caused by defects, interruptions or malfunctions in the Services.

5.5 In respect of information provided by information providers to which access has been gained by the Client via the Services

- the Client acknowledges that eircom net makes no warranties or representation concerning the accuracy, completeness, performance or usefulness of such programs or databases and, therefore, that Clauses 5.1 and 5.2 shall not apply to such information, and
- the Client agrees to assume the risk of using such information.

## **6. LIMITATION OF LIABILITY**

6.1 The following provisions set out eircom net's entire liability (including any liability for the acts and omissions of its employees, agents or sub-contractors) to the Client in respect of:

- any breach of the contractual obligations arising under this Agreement; and
- any representations, statements or tortious act or omission (including negligence) arising under or in connection with the Agreement.

AND THE CLIENT'S ATTENTION IS IN PARTICULAR DRAWN TO THE PROVISIONS OF THIS CLAUSE 6.

6.2 Any act or omission on the part of eircom net or its employees, agents or sub-contractors falling within Clause 6.1 above shall, for the purposes of this Clause 6, be known as an "Event of Default".

6.3 No statement on equipment or on any document including this Agreement shall in any way prejudice the statutory rights which the Client may enjoy while "dealing as a consumer" within the meaning of the Sale of Goods and Supply of Services Act, 1980 or which he may otherwise enjoy under the said Section 55 or Sections 40 and 46 of the 1980 Act or while dealing as a "consumer" within the meaning of Regulation 2 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. Subject and without prejudice to other aspects of mandatory public general law, the requirements of the said European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, shall only be imported into this Agreement when, and to the extent that, the Client with whom eircom net is dealing is a "consumer" within the meaning of the said Regulation 2.

6.4 eircom net's entire liability in respect of an Event of Default shall be limited to damages of an amount to the lower of:

- €25,395 in the case of any Event of Default resulting in personal injuries or damage to tangible property;
- in the case of any other Event of Default the aggregate of the Total Monthly Charges for the twelve (12) months immediately preceding the date of the Event of Default.

6.5 eircom net shall not be liable to the Client in respect of any Event of Default for loss of profits, goodwill or any type of special, indirect or consequential loss (including loss or damage suffered by the Client as a result of an action by a third party even if such loss was reasonably foreseeable or eircom

net had been advised of the possibility of the Client incurring the same) nor shall eircom net be liable in respect of any fault which is the responsibility of any third party service provider or licensor to eircom net from outside the State.

6.6 Except in the case of an Event of Default arising under Clause 6.3 above, eircom net shall have no liability to the Client in respect of any Event of Default unless the Client shall have served notice of the same upon eircom net within one calendar month of the date on which the Client became aware of the circumstances giving rise to an Event of Default or the date when it ought reasonably to have become so aware. The Client hereby agrees to afford eircom net not less than 30 days from the date of such notice in which to remedy any Event of Default hereunder.

6.7 The Client shall indemnify eircom net against all claims made against eircom net, its employees or agents, for loss, damage or injury to any person or property occasioned by or arising from the Client's operation of the Services except and insofar as eircom net, its employees or agents are directly liable therefor.

6.8 Save as expressly stated in this Agreement, eircom net shall have no liability whatsoever to the Client in respect of this Agreement whether in contract, tort, or otherwise and all conditions and warranties express or implied whether by statute or common law or otherwise are hereby excluded to the extent permitted by applicable public general law.

6.9 eircom net will not be liable to the Client for special, incidental, indirect or consequential damages (even if eircom net has been advised of the possibility of such damages), including, but not limited to, lost profits or savings, loss of use or Services, cost of capital, cost of substitute Services or facilities, downtime costs, or damages and expenses arising out of third party claims.

## **7. TERMINATION**

7.1 Unless otherwise stated in an applicable Schedule, this Agreement or any specific Schedule may be terminated by either party upon thirty (30) days prior notice.

7.2 This Agreement may be terminated forthwith by eircom net in the event of:

- The Client being in arrears for a period of thirty (30) days after any payment to be made hereunder has become due; or
- If the Client commits a breach of any of the terms of this Agreement and fails to remedy such breach within fourteen (14) days notice by eircom net requiring such breach to be remedied.

7.3 On termination of this Agreement for whatever reason each party will return to the other forthwith all copies of programs, documentation, books, records, papers or other property in their possession provided under this Agreement and belonging to the other.

## **8. FORCE MAJEURE**

8.1 Except for failure to make payments when due, neither party will be liable to the other by reason of any failure in performance of this Agreement if the failure arises out of the unavailability of third party communication facilities or energy sources, acts of God, acts of the other party, acts of governmental authority, fires, strikes, delays in transportation, riots or war, or any cause beyond the reasonable control of that party. If any such event prevents the Client from accessing the Services and continues for more than one (1) month, the Client may terminate the Schedule(s) for the affected Service(s) upon delivery of notice to eircom net.

## **9. GENERAL PROVISIONS**

9.1 Neither party may assign this Agreement without the prior written consent of the other party, which consent will not be unreasonably withheld; provided, however, that either party may assign this Agreement, without consent, to a successor in interest to substantially all of the business of that party to which the subject matter of this Agreement relates or, in the case of eircom net, to any wholly owned subsidiary of Eircom.

9.2 If any part or parts of this Agreement are held to be invalid, the remaining parts of the Agreement will continue to be valid and enforceable.

9.3 This Agreement will be governed by the laws of Ireland.

9.4 Any action of any kind by either party arising out of this Agreement must be commenced within two (2) years from the date the right, claim, demand or cause of action shall first arise.

9.5 Any notice under this Agreement shall be given in writing by 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 this Agreement or to such other address as may be substituted by notice to the other party.

9.6 The Agreement (including the applicable Schedules and third party licence agreements) and the Acceptable user policy contains the complete and exclusive understanding of the parties with respect to the subject matter hereof. Eircom net will upgrade the Acceptable User Policy from time to time and the most recent version of this will be available on [www.eircom.net](http://www.eircom.net). No waiver, alteration, or modification of any of the provisions hereof will be binding unless in writing and signed by a duly authorised representative of the party to be bound. Neither the course of conduct between the parties nor trade usage will act to modify or alter the provisions of this Agreement. If the Client issues a purchase order or other similar document it shall be for the Client's internal purposes and, therefore, even if it is acknowledged by eircom net, the terms and conditions of such purchase order or similar document will have no effect on this Agreement or the Services.