

# **Contract for Access Locate Services Conditions**

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## 1. INTERPRETATION

- 1.1 The words and expressions set out in Schedule 1 shall have the meaning given to them in that Schedule.
- 1.2 Any reference in this Contract to any provision of a statute shall be construed as a reference to that provision as amended re-enacted or extended at the relevant time.
- 1.3 The headings in this Contract are for convenience only and shall not affect its interpretation.
- 1.4 Words importing singular shall include plural and vice versa.
- 1.5 The terms “party” or “parties” shall mean BT and/or the CP.
- 1.6 If there is a conflict between the Conditions, the Schedules and/or the Handbook, the order of precedence shall be as follows:
  - (a) the Conditions and Schedule 1
  - (b) Schedule 2, 3 and 4
  - (c) the relevant sections of the Openreach Price List
  - (d) the Contract Form
  - (e) the Order
  - (f) the elements of the Handbook that are incorporated by reference into this Contract.
- 2.1 This Contract begins on the date that the Order is accepted and signed by duly authorised representatives of BT and the CP.
- 2.2 The CP may terminate this Contract on:
  - not less than three months’ notice if BT materially changes the terms and conditions of this Contract to the CP’s detriment provided that such notice to terminate shall be served on BT no later than 28 days from the date the change comes into effect; or
  - (b) not less than twelve months’ notice for any other reason.
- 2.3 BT may terminate this Contract:
  - (a) on not less than one month’s notice if BT does not receive an Order from the CP within 12 months of the commencement of this Contract;
  - (b) immediately upon notice if the CP is suspended or prohibited from providing the CP Service by Ofcom and/or ceases to be a communications provider as defined by section 405(1) of the Act and BT shall immediately reinstate the Service as soon as reasonably practicable upon receipt of notice from the CP confirming that Ofcom has lifted the suspension;
  - (c) on not less than 12 months’ notice for any other reason;
  - (d) immediately on notice if BT is directed by Ofcom to cease the Service or any part of it.
- 2.4 BT agrees to credit or repay the CP with the appropriate proportion of any Licence Fee paid in advance for the period ending after the CP’s liability to pay the Licence Fee ceases.

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- 2.5 If a breach notice is served on the CP then BT may at its sole discretion refuse to accept new Orders except for the processing of orders which relate to cessation of services and suspend such other services or facilities available to the CP as shall be reasonable in the circumstances:
- (a) immediately following a 30 days remedy period upon giving notice if the CP fails to comply with the provisions of this Contract headed Intellectual Property Rights or Marketing and Misrepresentation;
  - (b) for all other breaches detailed in sub-clause 2.7 below immediately, upon giving notice, after the period specified for remedy of the breach in the breach notice expires, if the CP has not remedied the breach.
- 2.6 The CP agrees to pay the charges for the Service in accordance with Clause 11 below.
- 2.7 If BT is directed to cease the provision of the Service or any part of it, or if the CP is suspended or prohibited from providing the CP Service by Ofcom and/or ceases to be a communications provider as defined by section 405(1) of the Act, BT may at its sole discretion refuse to accept any Orders for Service immediately on notice to the CP.
- 2.8 Either party may terminate this Contract or the Service provided under it immediately, on notice, if the other:
- (a) commits a material breach of this Contract, which is capable of remedy, and fails to remedy the breach within the following periods from the date of the notice from the other party:
    - (i) 14 calendar days, where there is a failure to pay a sum due under this Contract; or
    - (ii) 30 calendar days; or
    - (iii) a shorter time, reasonably specified in the notice, in the case of emergency; or
  - (b) commits a material breach of this Contract which cannot be remedied; or
  - (c) is repeatedly in material breach of this Contract (including without limitation repeatedly late in paying sums due under this Contract) ; or
  - (d) is the subject of a bankruptcy order, or becomes insolvent, or makes any arrangement or composition with or assignment for the benefit of its creditors, or if any of its assets are the subject of any form of seizure, or goes into liquidation, either voluntary (otherwise than for reconstruction or amalgamation) or compulsory or if a receiver or an administrator is appointed over its assets (or the equivalent of any such event in the jurisdiction of such other Party); or
  - (e) ceases to carry on business.
- 2.9 Termination or expiry of this Contract shall not be deemed a waiver of a breach of any term or condition of this Contract and shall be without prejudice to a party's rights, liabilities or obligations that have accrued prior to such termination or expiry. If either party delays in acting upon a breach of this Contract that delay will not be regarded as a waiver of that breach. If either party waives a breach of this Contract that waiver is limited to that particular breach.
- 2.10 Each of the parties' rights to terminate or suspend performance is without prejudice to any other rights or remedies available to either party.
- 3.1 BT agrees to:
- (a) provide the CP with the Service on the terms of this Contract;

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- (b) exercise the reasonable skill and care of a competent telecommunications service provider in providing the Service and if required, in determining how best to provide the Service;
  - (c) grant the CP a non-exclusive non-transferable right to use the Service for the sole purpose of enabling the CP to provide the CP Service;
  - (d) use its reasonable efforts to provide the Service by the date specified in this Contract and in accordance with the Service levels set out in Schedule 3 but all dates are estimates and, except as set out in the service guarantee provisions in Schedule 3, BT has no liability for failure to meet any date.
- 3.2 It is technically impracticable to provide a fault free Service and BT does not undertake to do so. If the CP reports a fault BT agrees to respond in line with the level of repair service in accordance with Schedule 3.
- 3.3 BT will only provide the Service in the Territory.
- 4.1 BT may:
- (a) occasionally, for operational reasons, introduce or withdraw Service features, introduce process changes to improve the quality of the Service, change the technical specification of the Service including without limitation Service upgrades upon giving not less than 28 days notice, provided that any such changes do not have a materially adverse effect on the performance or provision of the Service; or
  - (b) give the CP instructions which it believes are reasonably necessary for reasons of health, safety or the quality of the Service and it is the CP's responsibility to ensure these are adhered to; or
  - (c) interrupt the Service for operational reasons (such as maintenance or Service upgrades) or because of an emergency. BT agrees to restore the interrupted Service as quickly as possible and where practicable, BT will give the CP as much notice as possible and agree with the CP when the Service will be interrupted;
- but BT will use reasonable efforts to provide an uninterrupted Service to the CP.
- 4.2 BT and the CP each agree to complete a Customer Service Plan and both parties agree to use their reasonable efforts to keep the Customer Service Plan up to date.
- 4.3 BT and the CP each agree to use their reasonable efforts to provide all such information as may be reasonably required in order for the parties to perform their obligations under this Contract.
- 5.1 Any equipment (including but not limited to CP Equipment) connected to the BT Network must be:
- (a) technically compatible with the Service and not harm the BT Network or another customer's network or equipment; and
  - (b) connected and used in line with any relevant instructions, standards or laws.
- 5.2 BT shall not be liable for failure to meet any Service Level or other obligations under this Contract if any equipment is found to be connected otherwise than in accordance with this Contract.
- 6.1 The CP agrees to only use the Service for the Permitted Use.

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- 6.2 The CP agrees to not to use the Service and agrees to take reasonable steps to ensure that the CP Service, is not used
- (a) unlawfully or fraudulently or in breach of any legislation; or
  - (b) contrary to any instructions given by BT under clause 4.1(b) above.

**7. INTELLECTUAL PROPERTY RIGHTS AND BT CORPORATE MARKS** The CP acknowledges that all Intellectual Property Rights in or relating to the Service vest in or are licensed to BT and nothing in this Contract is to be construed as and it shall not have the effect of assigning or otherwise giving the CP any rights in BT's Intellectual Property Rights except as provided in this clause 7.

- 7.2 The CP only has the right to use the Service and any documentation and manuals relating to the Service (including those on the BT Website) and to make copies of those documents and manuals, to the extent necessary to provide the CP Service and for its own internal use in connection with its obligations under this Contract.
- 7.3 All rights in any developments, improvements or variations to BT's Intellectual Property Rights will vest in BT.
- 7.4 The CP agrees not to without the prior written consent of BT:
- (a) use any of the BT Corporate Marks; or
  - (b) authorise any third party to use any of the BT Corporate Marks; or
  - (c) use any photographs or representations of any BT buildings,
- including in any promotional literature.
- 7.5 The CP agrees not to use or register or attempt to register as a trade mark, company name or domain name, anything that is identical to, similar to, or likely to be confused with any of the BT Corporate Marks.
- 7.6 If authorised to use the letters "BT", the CP will ensure that the letters "BT" will be no more prominent than the immediately surrounding letters and in no case greater than the surrounding typeface.
- 7.7 This clause 7 does not prevent any legitimate use of the term "BT" in any comparison of services and tariffs, in accordance with the Trade Marks Act 1994.

## 8. DATA PROTECTION

- 8.1 In this Contract, the following terms each have the meaning given to it in the GDPR: "Binding Corporate Rules", "Controller", "Data Subject", "Personal Data", "Personal Data Breach", "Processing", "Processor", Special Categories of Personal Data and "Supervisory Authority".
- 8.2 Save where otherwise prohibited under this Contract BT may Process Personal Data for the purposes of providing the Service, by:
- 8.2.1 using, managing, accessing, transferring or holding Personal Data on a variety of systems, networks and facilities (including databases); and / or

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- 8.2.2 transferring Personal Data worldwide to the extent necessary to allow BT to fulfil its obligations under this Contract, and the Communications Provider appoints BT to perform each transfer in order to provide the Services provided that BT shall not transfer Personal Data unless it has implemented appropriate transfer mechanisms permitted by Data Protection Legislation, including:
- (a) BT Group's Binding Corporate Rules (for transfers among BT's Affiliates);
  - (b) agreements incorporating the relevant standard data protection clauses adopted by the European Commission; and
  - (c) where applicable, the EU-US Privacy Shield or any equivalent safeguard mechanism that replaces it.
- 8.3 Where each party acts as a Controller in relation to the Processing of Personal Data under the Contract, the Parties will not act as joint Controllers for the purposes of Article 26 of the GDPR in relation to such Processing.
- 8.4 The Parties acknowledge that, in respect of all End User Data provided by the Communications Provider, the Communications Provider is the data controller and BT is the data processor.
- 8.5 Without limiting clause 8.4, the Parties acknowledge and agree that the Parties will need to share Operational Data between them. Operational Data will be shared on the basis of a transfer from data controller to data controller, and each Party will assume responsibility for its own compliance with the Data Protection Legislation.
- 8.6 BT shall Process Personal Data in accordance with applicable Data Protection Legislation and as set out in the BT Privacy Policy and, where applicable, BT Group's Binding Corporate Rules.
- 8.7 Where BT acts as a Processor:
- 8.7.1 the subject-matter, duration, nature and purpose of the Processing, the type of End User Data and categories of Data Subjects will be set out in Schedule 5;
- 8.7.2 In performing its obligations under the Contract, BT shall:
- (a) Process the End User Data on behalf of the Communications Provider in accordance with the Communications Provider's documented instructions as set out in this clause 8, except where:
    - (i) Applicable Law requires BT to Process the End User Data otherwise, in which case, BT shall notify the Communications Provider of that requirement as soon as reasonably practicable before Processing unless to do so would be contrary to that Applicable Law on important grounds of public interest; and / or
    - (ii) in BT's reasonable opinion an additional instruction or a change to the instructions provided by the Communications Provider infringes the Data Protection Legislation and in which case BT shall inform the Communications Provider of its opinion without undue delay and, if agreed between the Parties, BT will not be required to comply with that instruction;
  - (b) to protect the End User Data against a Personal Data Breach implement technical and organisational security measures as required by Article 32 of the GDPR.

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- (c) provide Notice to the Communications Provider without undue delay (and, in any event, no later than 24 hours) of becoming aware of a Personal Data Breach affecting the End User Data;
- (d) only use the Sub-Processors approved by the Communications Provider or in accordance with Clause 8.7.10; and
- (e) In relation to any Data Security Incident, BT shall:
  - (i) take all reasonable steps to identify and correct the underlying cause of the Personal Data Breach so as to eliminate or minimise the risk of its repetition and the occurrence of similar Personal Data Breach;
  - (ii) take such steps as the Communications Provider may reasonably request and BT may reasonably be able to take to assist the Communications Provider in addressing the adverse consequences for the Communications Provider and its affiliates of, and complying with the Communications Provider and its affiliates' obligations under Data Protection Legislation in relation to, the Personal Data Breach; and
  - (iii) report to the Communications Provider affected by the Personal Data Breach, and/or at its direction to it and another person, promptly and at regular intervals, on the steps taken to identify and correct a Personal Data Breach and their results; and
- (f) assist the Communications Provider in its compliance with the Data Protection Legislation, taking into account the nature of the Processing of the End User Data and the information available to BT, relating to:
  - (i) the Communications Provider's obligation to respond to lawful requests from a Data Subject for access to, or rectification, erasure or portability or restriction of, or objection to any Processing of their Personal Data, to the extent practicable (including by having appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Communications Provider's obligation to respond to requests from a Data Subject to exercise his or her right under the Data Protection Legislation) but BT shall not respond to any such request except with the Communications Provider's prior written consent.
  - (ii) the security of the Processing of the End User Data;
  - (iii) notification of a Personal Data Breach affecting the End User Data to the Supervisory Authority or the Data Subjects; and
  - (iv) a data protection impact assessment as may be required by Article 35 of the GDPR and prior consultation with the Supervisory Authority;

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- 8.7.3 unless Applicable Law requires BT to store a copy of the End User Data, upon expiry or termination of the Contract and at the Communications Provider's option, BT shall delete or return the End User Data within a reasonable time period.;
- 8.7.4 BT shall make available to the Communications Provider the information demonstrating BT's compliance with its obligations set out in Clauses 8.2.2, 8.6 and 8.7.
- 8.7.5 The Communications Provider may, subject to 30 days' Notice (or if an audit needs to be conducted on an Emergency basis, then as much prior Notice as is reasonably practicable), audit BT's compliance with clauses 8.2.2, 8.6 and 8.7. BT shall allow for and reasonably cooperate with the Communications Provider (or a third party auditor appointed by the Communications Provider) to audit BT's compliance, so long as:
- (a) the Communications Provider
    - (i) uses its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt BT's business;
    - (ii) conducts the audit during business hours, unless the audit needs to be conducted on an Emergency basis and the Communications Provider has given Notice to BT that an Emergency audit is required;
    - (iii) uses its reasonable endeavours to ensure that the conduct of each audit does not cause BT to breach its confidentiality obligations with its other customers, suppliers or any other organisation; and
    - (iv) BT shall provide the Communications Provider with the necessary instructions and copies of BT's security policies which apply to the Communications Provider (or its third party auditor) undertaking the audit and the Communications Provider or its third party auditors shall comply with BT's security policies and appropriate confidentiality obligations provided to the Communications Provider by BT.
- 8.7.6 Without prejudice to the Communications Provider's rights of audit under clause 8.7.5 and BT's obligation to rectify issues identified by any such audit adherence by BT to an approved code of conduct or an approved certification mechanism may be used by BT as an element by which to demonstrate compliance with its obligations set out in Clause 8.2.2, 8.6 and 8.7;
- 8.7.7 the Communications Provider may conduct an audit of BT's compliance with its obligations set out in clause 8 only once per Contract Year, except for any additional audits which:
- (a) the Communications Provider reasonably considers necessary because of genuine and evidentially supported concerns as to BT's compliance with Clauses 8.2.2, 8.6 and 8.7 that cannot be resolved without an audit; or

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- (b) the Communications Provider is required to conduct an audit by Applicable Law or a competent data privacy or other regulatory authority.
- 8.7.8 without limiting BT's other obligations under this clause 8, BT shall not disclose End User Data to a third party unless required for the performance of the Service, permitted under the Contract or otherwise required by Applicable Law. If required by Applicable Law BT shall provide as much prior Notice as reasonably practicable; and
- 8.7.9 BT shall ensure that persons authorised by, or on behalf of, BT to Process the End User Data will be bound by a duty of confidentiality.
- 8.7.10 BT shall notify the Communications Provider of proposed changes to its Sub-Processors from time to time, either by providing the Communications Provider with online access to intended changes at <https://www.openreach.co.uk/orpg/customerzone/products/dataprotection/dataprivacy.do>, or by such other means as BT may determine and agreed with the Communications Provider provided that:
- (a) The Communications Provider shall have 90 days from the date of this Notice to object to the use of the new Sub-Processor. BT may use the Sub-Processor during the notification period.
- (b) b) if the Communications Provider does not give Notice of an objection to the proposed Sub-Processors or changes to those Sub-Processors change within 90 days of the date of this Notice, the Communications Provider will be deemed to have authorised the use of those Sub-Processors or changes;
- (c) if the Communications Provider does object to the use of a new Sub-Processor, the Communications Provider shall give Notice in accordance with clause 19 documenting reasonable concerns why the Sub-Processor will not be able to comply with the Data Protection Legislation; and
- (d) if such Notice is received within the 90 days set out in clause 8.7.10(a), the parties will address the Communications Provider's objection in accordance with the dispute resolution set out in clause 15 and BT may use the relevant Sub-Processor to provide the Service until the objection is resolved in accordance with clause 15;
- 8.7.11 BT may use Sub-Processors in accordance with Clause 8.7.2(d) and will remain responsible to the Communications Provider for the compliance by any Sub-Processor with the terms of this clause 8.7 and the Data Protection Legislation (including by ensuring that data protection obligations in respect of Processing End User Data equivalent to those set out in clause 8.7 of the Contract will be imposed on any Sub-Processors);
- 8.7.12 This Contract contains the Communications Provider's complete instructions to BT for the Processing of End User Data. If the Communications Provider requires any additional instructions or changes to the instructions the Communications Provider will raise a Statement of Requirement following the process set out in the Statement of Requirements process for Openreach products document. If the additional instructions or changes to the instructions are accepted by BT the additional instructions, or change(s) will be incorporated into this Contract in accordance with clause 18 to take account of any resulting change to the Contract, the resulting changes to the Contract not being unreasonably withheld by BT.

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- 8.7.13 the Communications Provider and BT shall comply with applicable Data Protection Legislation; and
- 8.7.14 the Communications Provider shall not disclose to BT any Personal Data other than the Personal Data required by BT to perform the Service.
- 8.8 To the extent permitted by Applicable Law and subject to clause 12,
- 8.8.1 a party in breach of the Data Protection Legislation or this clause 8 will be liable to the other for any losses, costs and liabilities (including those arising from Claims) incurred or suffered by the other party where those losses, costs and liabilities are caused by, or in connection with, that breach including where the Parties are jointly and severally liable; and
- 8.8.2 where the Parties are jointly and severally liable for a Claim caused by Processing neither party will make any payment or any offer of payment to any Data Subject (including third parties acting on behalf of any Data Subject) in response to any complaint or claim for compensation caused by or relating to the Processing of Personal Data, without the prior written agreement of the other party, such agreement not being unreasonably withheld.

## 9. CONFIDENTIALITY

- 9.1 The parties agree to keep in confidence any information (whether written or oral) of a confidential nature obtained under or in connection with this Contract or the Service. The parties shall not without the written consent of the other party disclose that information to any person other than:
- (a) their employees or professional advisers;
  - (b) in the case of BT, the employees of a BT Group Company or its or their suppliers; and
  - (c) in the case of the CP, the employees of a CP Group Company or its or their sub-contractors or End Users or resellers.

Any disclosure in (a) to (c) above can only be made to those persons who have a reasonable need to know in order for the party to fulfil its obligations under this Contract or in relation to this Contract.

- 9.2 The parties agree not to, without the written consent of the other party, use information of a confidential nature referred to in sub-clause 8.1 above, for the commercial advantage of their retail businesses.
- 9.3 Sub-clause 9.1 will not apply to:
- (a) any information which is in the public domain other than through a breach of this contract.
  - (b) information lawfully in the possession of the recipient before the disclosure under this Contract took place.
  - (c) information obtained from a third party who is free to disclose it; and
  - (d) information which is required by law to disclose or by any order of competent jurisdiction provided that prior to such disclosure the party required to disclose the information shall consult with the other as to the proposed form, nature and purpose of the disclosure.

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9.4 This clause shall remain in effect for 5 years after the termination or expiry of this Contract.

## 10. MARKETING AND MISREPRESENTATION

10.1 The Parties undertake that in relation to their dealings with End Users and /or potential End Users they will not;

- (a) represent themselves as each other; or
- (b) misrepresent their relationship with each other; or

10.2 (c) misrepresent the nature and/or effect of their contracts with End Users; or

- (d) assert that they have any authority to provide or promote any products or services on behalf of each other.

10.3 The CP also agrees not to represent that:

- (a) the CP Service is a service provided by BT; or
- (b) the End User has access to a dedicated BT customer service.

10.4 The CP agrees to include and maintain in its contracts with any reseller of the CP Service, conditions equivalent to those contained in sub-clause clauses 10.1 and 10.2 above, and undertakes to use reasonable endeavours to enforce such conditions including if appropriate by suspending or terminating the provision of the services under such reseller agreement.

## 11. CHARGES

### PAYMENT AND BILLING

11.1 The CP:

- (a) agrees to pay all charges for the Service as shown in the Openreach Price List (or as otherwise agreed) and calculated using the details recorded by BT.
- (b) shall use the e-billing system, where available, to obtain all invoices in relation to this Contract.
- (c) shall pay the charges within 30 calendar days of the date of BT's invoice.
- (d) agrees to pay the Licence Fee in accordance with BT's billing cycle. If BT begins, or ceases, the Service or part of it on a day which is not the first or last day of the period by reference to which BT charges the Licence Fee, BT will apportion the Licence Fee on a daily basis for the incomplete period. The Licence Fee will be payable in quarterly instalments in advance but BT may on occasion bill the CP in arrears.

11.2 All charges exclude Value Added Tax (VAT). VAT is charged at the applicable rate and payable by the CP.

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- 11.3 BT:
- (a) may charge daily interest on late payments, not the subject of an Invoice Dispute, or dispute, at the Interest Rate both before and after any judgment, for the period beginning on the date on which payment is due and ending on the date payment is actually made;
  - (b) must issue an invoice within twelve (12) months of the date the charge for a Service was incurred (in the case of a recurring charge) or the Service was supplied (in other cases) except for Event and Time Related Charges for which BT must issue an invoice within six (6) months of the date a charge is incurred. In the case of a Series of Services, BT must issue the invoice within six (6) months of the date the last charge in the series was incurred. A charge shall only be valid, and the CP shall only be obliged to make payment, if the charge is raised within the periods specified above.
- 11.4 If the CP has an Invoice Dispute, it will notify BT in writing within six (6) months of the date of the invoice giving its reasons. Notification of an Invoice Dispute under this sub-clause 10.4 is without prejudice to either party's right to refer the subject matter of that Invoice Dispute to Ofcom. The amount in an Invoice Dispute may be withheld by the CP until the Invoice Dispute is resolved and the balance shall be due and payable on the due date. The CP is not entitled to withhold payment of any amount not in the Invoice Dispute. The CP is not entitled to withhold any payments to BT on the grounds that the CP has a dispute with the end user(s) or reseller(s). Payment of the invoice in whole, or in part, by the CP does not affect the right of the CP to dispute all or some of the charges of an invoice at a later date in accordance with this sub-clause 10.4.
- 11.5 BT may make an Invoice Correction to an invoice sent to the CP providing it notifies the CP within six (6) months of the date of the invoice giving its reasons.
- 11.6 Subject to sub-clause 11.11 below, if a refund, payment or credit is due to the CP by BT (unless that overpayment results from information provided by the CP which is not attributable to information provided by BT), the CP may charge daily interest on late repayment at the Interest Rate for the period beginning on the date on which the parties acting reasonably agree BT shall make the repayment and ending on the date BT actually makes payment. If any charge is recalculated or adjusted with retrospective effect under an order, direction, determination or requirement of Ofcom ('determination'), or any other regulatory authority or body of competent jurisdiction, the parties agree that interest will be payable on any amount due to either party as a result of that recalculation or adjustment at the Adjustment Interest Rate payable from the date specified in that determination, or if no date is specified, from the date the recalculated or adjusted charge takes effect to the date of refund or payment in full.
- CREDIT VETTING**
- 11.7 During the term of this Contract, the CP acknowledges that it may become subject to BT's Credit Vetting Policy if the following circumstances apply:
- (a) there is material adverse change in the CP's financial position which results in a reduction in the CP's issued credit rating or (in the absence of such a credit rating) a financial score provided by an accredited ratings agency; and
  - (b) there has been a recent or subsequent non-payment or partial non-payment (by five days or more) of an invoice (where the non-payment or partial non-payment is not the subject of a bona fide dispute) for the Services under this Contract.
- 11.8 BT may acting reasonably and subject to the requirements of sub-clause 11.10 below, require that the CP provides a deposit or guarantee or payment for the Service in advance. If the CP refuses to provide such deposit or guarantee or payment for the Service in advance, BT may refuse to accept any orders for the

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Service until such deposit or guarantee or payment for the Service in advance is provided or the outstanding non-disputed charges are fully paid, whichever is earlier.

- 11.9 Any deposit or guarantee or payment for the Service in advance required to be provided by the CP under sub-clause 11.9 above, shall be no greater than the reasonably estimated value of charges under this Contract for three months and the amount or requirement for the deposit or guarantee or payment for the Service in advance shall be reviewed by the parties at regular intervals (and at least annually).
- 11.10 Where the CP provides a deposit it will be held until twelve (12) consecutive months of payments have been paid on or by the due date after which the CP will have the value of their deposit credited against BT invoices from that date. Interest on deposits held by BT will be paid at the Adjustment Interest Rate.
- 11.11 BT shall advise of any proposed update to the BT Credit Vetting Policy by issuing an industry briefing at least 28 calendar days prior to such update taking effect. Where the CP has nominated a finance contact, BT shall also issue the update via email to the nominated finance contact.
- 11.12 This clause 11 shall continue in force after the termination or expiry of this Contract.

## 12. LIMITATION OF LIABILITY

- 12.1 Subject to any express terms and conditions of this Contract to the contrary, in relation to any liability arising out of or in relation to this Contract either party's liability to the other party in contract, tort (including negligence), breach of statutory duty or otherwise for direct loss or damage howsoever arising (other than loss or damage of the type referred to in sub-clause 12.2 ) for all events of liability connected or unconnected in each Contract Year is limited to the liability cap. In each Contract Year, other than the first Contract Year, the liability cap will be £25 million in total or an amount equal to the Annual Revenue, whichever is the lesser but not less than £250 000 and in the first Contract Year the liability cap will be £25 million in total.
- 12.2 If a party is liable to the other party in relation to any claim by the other party for damage to, loss or destruction of real property or tangible property, the first party's liability shall be limited to £10 million for all such claims connected or unconnected in any Contract Year.
- 12.3 Neither party excludes or restricts its liability for:
- (a) death or personal injury caused by its negligence or that of its employees, subcontractors or agents acting in the course of their employment or agency;
  - (b) any fraudulent act or omission;
  - (c) fraudulent misrepresentation or misstatement; or
  - (d) any liability that may not otherwise be limited or excluded by law.
- 12.4 Except as set out in sub-clause 12.3 and subject to express terms and conditions of this Contract to the contrary, neither party shall be liable whether based on a claim in contract, tort (including negligence) breach of statutory duty, misrepresentation or otherwise arising out of, or in relation to this Contract, for:
- (a) loss of time (whether direct or indirect);
  - (b) wasted expenditure (whether direct or indirect);
  - (c) loss of anticipated savings (whether direct or indirect);

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- (d) loss of opportunity (whether direct or indirect);
  - (e) loss and/or corruption of data (whether direct or indirect);
  - (f) loss of revenue (whether direct or indirect); or
  - (g) any indirect or consequential loss whatsoever (even if the liable party has been advised of the possibility of such loss).
- 12.5 Notwithstanding sub-clause 12.4 and subject to sub-clause 12.1, a party may claim for the following direct losses:
- (a) loss of profit;
  - (b) increased costs of customer handling;
  - (c) damage to, loss or destruction of real property or tangible property; and/or
  - (d) costs incurred in procuring services substantially similar to the Services provided under this Contract.
- 12.6 Each party shall indemnify the other party against all losses, costs, claims (including claims from third parties), expenses, liabilities and demands ("liabilities") in relation to physical damage to property arising directly out of a breach of the Licence or negligence on the part of the other party. Each party's liability under this indemnity is limited to sub-clause 12.2.
- 12.7 Each provision excluding or limiting liability operates separately. If any provision (or part thereof) is held by a court to be unreasonable or inapplicable, the other parts shall continue to apply.
- 12.8 This clause 12 shall continue in force after the termination or expiry of this Contract.
- 12.9 Subject to the exclusions in clause 12.4, each Party's liability to the other in contract, tort (including negligence), breach of statutory duty, or otherwise for any loss or damage in connection with a breach of clause 11 and/or a claim under clauses 12.11 or 12.12 below (a "Relevant Event") for all Relevant Events connected or unconnected in each Contract Year is limited, in the aggregate in each Contract Year, to £70 million – being an amount equal to the total of the cap set out in clause 12.1 and £45 million.
- 12.10 Notwithstanding clause 12.9, a Party's liability under or in connection with this Agreement for a Fine shall not exceed £45 million in each Contract Year.
- 12.11 Subject to clause 12.10 above and clause 12.12 below, if either Party (the "Fined Party") incurs a fine or other monetary penalties or compensatory awards issued by a court or regulatory body (a "Competent Authority") as a result (in whole or in part) of the other Party's ("Breaching Party") act or omission in connection with its obligations under Data Protection Legislation ("Fine"), and the Competent Authority elects not to issue that Fine to the Breaching Party directly then subject to: (i) the exclusions in clause 12.4; and (ii) the liability caps set out in clauses 12.9 and 12.10 above, the Breaching Party shall, to the extent that its act or omission can be evidenced to be the cause of the Fine, indemnify the Fined Party for that proportion of the Fine that the Breaching Party would have been responsible for if the Competent Authority had issued a Fine to the Breaching Party in respect of its act or omission directly and for any incidental costs necessarily incurred by the Fined Party directly relating to the same.
- 12.12 The Fined Party may claim the benefits of the indemnity in clause 12.11 only if, where requested to do so by the Breaching Party promptly following notification by the Fined Party of the Fine:
- (a) the Fined Party has used reasonable endeavours to ensure that the Breaching Party has been given the opportunity to make representations to the Competent Authority either directly or through the Fined Party (or its third party) concerning the circumstances of any breach; and

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(b) the Fined Party initiates (either itself or through a third party) judicial review of the Fine and, where possible, gives the Breaching Party either sole conduct of the proceedings or, if the Fined Party wishes to be involved in the judicial review or also wishes to challenge the determination, joint control, provided that :

(i) the Breaching Party: shall indemnify the Fined Party for any costs reasonably and properly incurred by the Fined Party in acting pursuant to this Clause 12.12; and

(ii) the obligation in clause 12.12 (b) shall not apply unless the Breaching Party produces evidence to the Fined Party's reasonable satisfaction that judicial review of the Fine would not be considered vexatious.

12.13 Notwithstanding clauses 12.9, 12.10, 12.11 and 12.12, to the extent that there is a loss or corruption of Personal Data arising out of or in connection with a breach of clause 8, the exclusion in clause 12.4 (e) shall not apply.

12.14 For the avoidance of doubt a Fine shall be deemed to be a direct loss or damage in respect of this Agreement.

## 13. FORCE MAJEURE

13.1 To the extent a party is delayed in meeting or fails to perform an obligation under this Contract directly caused by Force Majeure, the party affected shall have no liability to the other for such delay or failure to perform provided that:

13.1.1 the affected party shall continue performing those obligations under this Contract that are not affected by Force Majeure and in performing those obligations shall deploy its resources so that (when taken with obligations to third parties) there is no undue discrimination;

13.1.2 the affected party shall promptly notify the other Party of the Force Majeure event, its geographic scope together with, if practicable, an estimate of the impact on the Service and the extent and duration of its inability to perform or delay in performing its obligations and any mitigating actions it has or is intending to take. The format and detail of notice shall be consistent with any industry-agreed arrangements governing such notifications. The scope of any Force Majeure notice must be no more than necessary to particularise the impact of the event that is beyond that party's control;

13.2 If the affected party is prevented from or delayed in performing its obligations under this Contract as a result of Force Majeure, the other party shall be released to the equivalent extent from its obligation (including to pay any charge for a Service that is not provided) in relation thereto.

13.3 Upon cessation of the effects of a Force Majeure event any Party relying on it must forthwith give notice to the other Party of such cessation.

13.4 Force Majeure does not discharge any Party relying on it from any obligation accrued beforehand. Any Party relying on Force Majeure must continue to perform those of its obligations not affected by Force Majeure.

13.5 Any Party affected by Force Majeure shall use reasonable endeavours to mitigate as soon as practicable those consequences of the Force Majeure event which have affected its obligations under this Contract. The affected Party shall provide an estimated time of clearance for any Force Majeure event. If those times are missed information shall be provided detailing the reasons. The affected Party shall, at regular intervals which are proportionate to the forecast period of the Force Majeure event (in any event in accordance with any industry agreed arrangements) keep the other Party fully informed about the status of the Force Majeure event and the extent to which it is preventing the first Party from performing those obligations.

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13.6 At the time of notification by BT of Force Majeure, the CP immediately has the right to challenge BT's notice of Force Majeure. Where the CP challenges a Force Majeure notice at the time of notification, BT must provide the CP with all the evidence BT has relied on to support the notice. If, following this, the Customer still disputes the Force Majeure notice the Customer shall be entitled to escalate the disputed Force Majeure notice in accordance with the process set out at clause 15. The procedures to be followed in relation to such notifications and challenges shall be consistent with any industry-agreed processes that have been established.

13.7 If BT seeks to rely on Force Majeure in relation to failure to meet any Service Level Agreement or to avoid payment of any Service Level Guarantees, the CP may dispute that notice. If disputed, the notice will be subject to independent verification in accordance with an escalation process set out at clause 15 or any industry-agreed process for escalation. The parties agree that the outcome of that independent verification shall determine whether 13.1 applies in relation to event described in that notice. Subject to any industry-agreed processes, 'independent verification' shall include, at the option of either party, adjudication by the Office of the Telecommunications Adjudicator (OTA).

## 14. CONDUCT OF INDEMNIFIED EVENTS

14.1 The indemnified party must notify the indemnifying party of any related claims or legal proceedings and use its reasonable endeavours to do so within 14 days of receipt and if it fails to do so, any additional cost reasonably incurred as a consequence of that failure may be deducted from the indemnified sum.

14.2 The indemnifying party may assume conduct of the claim providing it notifies the indemnified party of such intention within 5 days of receipt of the notification in 13.1. The indemnified party may re-assume conduct of the claim at any time if it reasonably believes a failure to do so would be prejudicial to its interests.

14.3 The party assuming conduct of the claim must:

- (a) actively consult with the other party regarding the conduct of any action and take their views into account; and
- (b) make no admissions relating to any claims or legal proceedings without the consent of the other party, which shall not be unreasonably withheld; and
- (c) nor agree any settlement of such claims or legal proceedings nor make any payment on account of them without the consent of the other party, which shall not be unreasonably withheld.

## 15. ESCALATION AND DISPUTE RESOLUTION

15.1 Each party agrees to use its reasonable efforts to resolve disputes, with the other. A dispute will first be escalated to the nominated contacts for disputes set out in the Customer Service Plan.

15.2 If the dispute is not resolved within 30 calendar days of the matter being raised and it relates to the accuracy of an invoice delivered under this Contract then the parties shall refer the dispute for investigation and resolution by such chartered accountants as the parties may agree, or in default of agreement, as may be nominated by the President of the Institute of Chartered Accountants in England and Wales. Such chartered accountants shall act as an expert and not as arbitrator and their decision, in the absence of evidence of manifest error, shall be final and binding.

15.3 For any dispute not covered by sub-clause 15.2, if the dispute is not resolved within 14 calendar days of the matter being raised then the parties (if they agree) shall have the option of:

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- (a) referral of the dispute to a mediator in accordance with sub-clause 15.4; or
- (b) referral of the dispute for early neutral evaluation; or
- (c) pursuing any other dispute resolution option which the parties agree is appropriate.

15.4 If the dispute is referred to a mediator:

- (a) the mediator will be appointed by agreement of the parties. If the parties fail to agree within 3 calendar days of a proposal by one party, the mediator will be appointed by the Centre for Dispute Resolution (CEDR);
- (b) all negotiations connected with the dispute will be conducted in confidence and without prejudice to the rights of the parties in any further proceedings; and
- (c) if the parties reach agreement on the resolution of the dispute, the agreement will be put in writing and once signed by the parties will be binding on them. Any such agreement will constitute confidential information for the purposes of the confidentiality provisions in this Contract.

15.5 If the parties are not prepared to agree to the dispute being referred to a mediator or fail to reach agreement within 2 months of the mediator being appointed, then either party may exercise any remedy that it has under this Contract.

15.6 The third party costs of alternative dispute resolution shall be shared equally between the parties unless determined otherwise by competent or authorised bodies. Nothing in this clause 15 shall prevent the parties from agreeing that any mediator, adjudicator, arbitrator, court or other competent person or body selected by the parties for the purposes of alternative dispute resolution may require the costs of the alternative dispute resolution to be paid by one of the parties on the resolution of the dispute.

15.7 Nothing in this clause 15 shall prevent either party from referring the dispute to Ofcom in accordance with any right either party may have to request a determination or from taking any other appropriate steps for its resolution.

## 16. CHANGES TO THIS CONTRACT

16.1 BT may change this Contract at any time by giving at least 28 days notice before the change takes effect in order to:

- (a) comply with any legal or regulatory obligation; or
- (b) change the charges payable under this Contract; or
- (c) protect the use of the BT Corporate Marks; or
- (d) introduce new or improved service levels; or
- (e) maintain the integrity or security of the Service or BT Network; or
- (f) make corrections to typographical errors;

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providing that the changes in sub-clauses (d) to (f) inclusive, shall not materially adversely affect the Service.

- 16.2 BT may introduce changes to this Contract at any time which are proposed by the CP or BT and agreed by the parties. BT will give the CP written notice of the proposed changes and publish details of those changes on the BT Website for at least 28 days before the date the changes are proposed to take effect. The CP may, within 28 days of the service of BT's notice of the proposed changes, serve a notice on BT stating its objections to the proposed changes. If there are no objections to the proposed changes within that period from the CP or from anyone who has a contract for the Service, the CP agrees that the changes shall take effect from the proposed effective date.
- 16.3 A general review of this Contract will commence on 1<sup>st</sup> September 2008 and not less than 3 months prior to every second anniversary of 31<sup>st</sup> July 2008. Following a notice of review, BT agrees to negotiate in good faith with a group of CPs which it reasonably believes represents the CP industry ("CP Contracts Group"). If the parties fail to reach agreement on the subject matter of the review within 3 months of commencing negotiations, the parties will resolve the dispute in accordance with the Escalation and Dispute Resolution provisions of this Contract. Any change resulting from negotiation or resolution with the CP Contracts Group shall be deemed agreement with the CP to that contractual change. Any change will be notified to the CP and BT will publish details of any change on the BT Website not less than 28 days (unless the CP Contracts Group and BT agree to less than 28 days) before the change is to take effect.

## 17. TRANSFER OF RIGHTS AND OBLIGATIONS

- 17.1 Neither party may transfer any of their rights or obligations under this Contract, without the written consent of the other, such consent not be unreasonably withheld or delayed, except that
- (a) the CP may transfer its rights and obligations by way of novation to an eligible CP Group Company subject to BT's Credit Vetting Policy and the signing of a novation agreement in such form as BT shall reasonably require; and
  - (b) BT may transfer its rights or obligations (or both) to a BT Group Company without consent provided that it notifies the CP that it has done so.

## 18. ENTIRE AGREEMENT

- 18.1 This Contract contains the whole agreement between the parties and replaces all previous written or oral agreements relating to its subject matter.
- 18.2 The parties agree that:
- (a) the parties have not been induced to enter into this Contract by, nor have relied on any statement, representation, warranty or other assurance not expressly incorporated into it; and
  - (b) in connection with this Contract the only rights and remedies of the parties in relation to any statement, representation, warranty or other assurance are for breach of this Contract and that all other rights and remedies are excluded.
- 18.3 Nothing contained in sub-clauses 18.1 and 18.2 above shall affect the rights or remedies of the parties for any fraudulent misrepresentation.

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18.4 A person who is not a party to this Contract has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Contract.

## **19. NOTICES**

19.1 All notices given under this Contract must be in writing and may be delivered by hand, fax, e-mail or first class post to the following:

- (a) to the appropriate person for that matter indicated on the Customer Service Plan;
- (b) for all other matters, in the case of notices from the CP, to the CP's BT account manager ;
- (c) for all other matters, in the case of notices from BT, to the CP's registered office address or a fax number at its registered office or any alternative address or fax number or e-mail address which the CP notifies to BT;

19.2 A notice shall be duly served:

- (a) if delivered by hand, at the time of delivery;
- (b) if sent by first class post, three Working Days after the date of posting;
- (c) if sent by fax, at the time of transmission; and
- (d) if sent by email, at the time of transmission.

Provided that any notice relating to contract termination, suspension or breach must be delivered by hand or first class post.

## **20. SEVERABILITY**

If any Court of competent jurisdiction holds any provision of this Contract invalid, illegal or unenforceable for any reason, such provision shall be severed and the remainder of its provisions will continue in full force and effect as if this Contract had been executed with the invalid, illegal or unenforceable provision omitted.

## **21. WAIVER AND REMEDIES**

No failure to exercise, or delay in exercising, any right, power or privilege set forth in the contract will operate as a waiver of any right, power or privilege.

## **22. LAW AND JURISDICTION**

The law of England and Wales governs this Contract and both parties submit to the exclusive jurisdiction of the English Courts.