

# WHOLESALE TERMS AND CONDITIONS (WTC)

## DEFINITIONS

All capitalized terms not otherwise defined shall have the meaning ascribed to them below:

**Agreement** means these Terms and Conditions together with at least a Service Order Form. The Agreement may also include a Framework Agreement plus SOF(s), Service Description(s), SLA(s) and other schedules together with these Terms and Conditions.

**Charges** means any and all payments levied by the Supplier on the Customer and includes up-front payments, regular recurring as well as usage-based payments.

**Customer** means the Customer entity named on the SOF and/or Framework Agreement receiving Services from the Supplier.

**Customer Committed Date** or **CCD** means the date on which the Supplier contractually commits to deliver the Service to the Customer.

**Demarcation Point** means the Interface point at the POI where the Supplier hands over the Service to the Customer.

**Disputed Amount** shall mean the amount, or part of it, stated in any invoice which is disputed by the Customer.

**Due Date** means the date when payment for Services has to be effected in accordance with clause 4.1.

**Effective Date** means the date of signature of a Framework Agreement or the Service Order Form whichever is earlier, or the date mentioned as Effective Date on the SOF or in the Framework Agreement, or the moment when the Supplier commences to provide Service to the Customer as ordered.

**MSP or Minimum Service Period** or Minimum Contract Duration means the initial contract period of at least one year beginning on the Service Activation Date and ending on the last day of the calendar month one year after the Service Activation Date, unless another Minimum Service Period is specified on the Service Order Form or in the corresponding Schedule of the Agreement.

**Party** means either the Supplier or the Customer.

**Parties** means both the Supplier and the Customer.

**POI or Point of Interconnection** means any end point of the telecommunications infrastructure which serves to connect the Customer's equipment.

**RFS Date or Ready-For-Service Date** has the same meaning as **SAD** or **Service Activation Date** defined below.

**Services** means the Services or, where appropriate, part of the Service as described in a Service Description (SD), SOF and SLA associated with this Agreement. **Service** shall mean any one of the Services.

**Service Acceptance** means that the Service has passed the relevant acceptance tests and is available for use.

**SAD or Service Activation Date** means the date when the Service is first activated and made available to the Customer to use.

**SAF or Service Acceptance Form** means the completed Service Acceptance form included with the written notification of Service delivery (i.e. Service Activation) by the Supplier to the Customer.

**Site** means the place at which the Supplier agrees to provide the Service to the Customer.

**SLA or Service Level Agreement** means the agreement defining the Quality and Availability parameters of the Service.

**SOF or Service Order Form** means a completed order form issued by the Customer to the Supplier requesting the Service to be provided to a particular POI, the details of which may be amended from time to time by the Supplier.

**Supplier's Equipment** means equipment (including any software) placed on a Site for the provision of the Service and owned by the Supplier.

**Supplier** means the Supplier entity named on the SOF and/or Framework Agreement supplying the Service to the Customer.

## 1 COMMENCEMENT

1.1 This Agreement shall commence on the Effective Date.

1.2 The Service commencement shall be the Service Activation Date. In case the Service Acceptance Form is not rejected by the Customer within 5 (five) working days from the Service Activation Date, the Service is deemed to be accepted on the Service Activation Date.

## 2 PROVISION OF THE SERVICE

2.1 The Supplier provides the Service to the Customer based on the terms of this Agreement on a non-exclusive basis.

2.2 The Supplier will use all reasonable endeavours to provide the Services by the Customer Committed Date specified on the Service Order Form, but all dates are estimates and the Supplier has no liability for any failure to meet any date, except as defined in the SLA.

2.3 The Supplier reserves the right for operational reasons to:

(a) change the Services provided to the Customer, as long as any change to the technical specification, equipment, operations or procedures does not materially affect the performance of the Services;

(b) suspend the Services for planned maintenance or emergencies; or

(c) give the Customer instructions which it believes are necessary for reasons of health, safety or the quality of any telecommunications services provided to the Customer or any other Customer.

Before doing so the Supplier will give the Customer as much notice as possible and whenever practicable will agree with the Customer when the Services will be suspended.

## 3 CHARGES AND FEES

3.1 The Customer shall pay the Charges as specified on the Service Order Form or in the relevant Schedule of the Agreement, if one is applicable.

3.2 All Charges will be invoiced and paid in Swiss Francs (CHF) or as stated on the Service Order Form or relevant Schedule to the Agreement.

3.3 Services are charged starting from the Service Activation Date or the date when the Customer first makes use of the Service should this be earlier. Usage-based charges for use of the Service shall be calculated in accordance with the details recorded by, or on behalf of the Supplier.

3.4 Regular recurring and up-front charges, including all charges with respect to installation of the Network, will be invoiced in advance. All usage-based charges will be invoiced in arrears.

3.5 The Supplier may revise the Charges at the end of the Minimum Service Period as specified on the Service Order Form observing a 1 (one) month notice period.

3.6 The Charges are exclusive of value-added tax and any other similar sales taxes, duties or levies imposed by any authority, government or governmental agency. In case such a tax, duty or levy will be due, this will be to the account of the Customer.

## 4 TERMS OF PAYMENT

4.1 The invoices are due and payable within 30 (thirty) calendar days of the date of the Supplier's invoice or as indicated on the respective invoice.

4.2 Payment shall be considered as effected when the Supplier receives the applicable funds for the full amount due in its account. Any levies or bank charges that are due or may become due on the payment shall be to the account of the Customer.

4.3 The Supplier retains the right to charge daily interest on late payments from the Due Date specified in clause 4.1 at a rate equal to 5% (five percent) per annum.

4.4 In addition to further remedies according to this Agreement, if by the Due Date the invoice still remains unpaid, the Supplier retains the right to immediately suspend Service according to clause 9.1 (d).

4.5 The Supplier shall have the right to request an

unconditional and irrevocable bank guarantee or an equivalent thereof at an amount determined by the Supplier.

4.6 There shall be no offsetting. In case the Customer becomes or declares Bankruptcy or Insolvency the Supplier may offset any amounts due.

## 5 DISPUTES AND ESCALATION PROCEDURE

5.1 A Disputed Amount shall be notified to the Supplier by the Due Date with corresponding and written proof, unless explicitly agreed differently between the Parties.

5.2 Once such period is expired, the Customer shall be considered to have irrevocably waived its rights to raise a dispute concerning such Disputed Amount. In any event the invoice shall be paid in full by the Due Date.

5.3 In case of a duly notified dispute, both Parties shall use their reasonable endeavours to settle the dispute within 10 (ten) calendar days after receipt of such notice.

5.4 If the dispute is not resolved within such 10 (ten) days period, then the dispute will be referred to the next level by either Party for resolution.

5.5 Failing resolution within a further 10 (ten) calendar days after referral, either Party may pursue any remedy at law or under this Agreement.

## 6 WARRANTY AND LIMITATION OF LIABILITY

6.1 Subject to clause 6.2, the Supplier warrants that the Services are provided in a conscientious and professional manner with the reasonable skill and care of a competent telecommunications service provider.

6.2 The Supplier does not warrant the Services to be fault free, however it will promptly repair any faults in accordance with proper engineering practices recognised in the telecommunications industry.

6.3 Both Parties accept unlimited liability for direct damage which has been caused to the other party wilfully or as a result of gross negligence.

6.4 Neither Party is liable, either in contract, tort or otherwise, for any other direct or indirect damage, including loss of revenue or damage resulting from any destruction of data except as stated in clauses 6.3 and 6.6.

6.5 The Supplier shall not be liable to the Customer for failure to supply the Service except as defined in the applicable Service Level Agreement (SLA) document.

6.6 The Supplier shall have no liability or responsibility for the content of any communications transmitted via the Service, and the Customer shall defend and hold harmless the Supplier for any and all claims related to such content. (Customer agrees that it shall make no claim against the Supplier related to the content of the Internet or respecting any information, product, service or software accessed through the Service.)

6.7 No action or proceeding against the Supplier shall be commenced more than 1 (one) year after the event which is the basis for the action or proceeding is rendered, and Customer acknowledges that this limitation constitutes an express waiver of any rights under any applicable law.

## 7 USE OF THE SERVICE

7.1 It is Customer's responsibility to obtain and keep in force any license necessary for the Customer to use the Service in any country in which it is provided.

7.2 The Service must not be used by the Customer in any way that:

(a) does not comply with the terms of any legislation or any licence applicable to the Customer; or  
(b) does not comply with any instructions given by the Supplier under clauses 2.3(c) and 11.1 or by any other competent authority, in any country where the Service is provided.

The Supplier has to inform the Customer in writing about any case as stated under clause 10.1 (a) or (b).

7.3 The Customer must indemnify the Supplier against any claims or legal proceedings which are brought or threatened against the Supplier by a third party because the Service is used in breach of this Agreement.

## 8 MINIMUM SERVICE PERIOD AND TERMINATION

8.1 Either Party may terminate the Services or the Agreement at any time by providing the other party with at least 3 (three) months' written notice, such termination to take effect at the end of the month of such notice period.

8.2 In the event of termination before the end of the Minimum Service Period, the Charges under this Agreement for the Minimum Service Period as set out in the Service Order Form or applicable schedule are due and non-refundable. The Customer shall pay outstanding Charges as invoiced by the Supplier.

8.3 This Agreement may be terminated by either Party immediately upon written notice, if the other Party: (a) should become insolvent or starts negotiations about composition with its creditors or a petition in bankruptcy should be filed by or against it or it makes an assignment for the benefit of its creditors; or (b) should fail to fulfil any of its obligations under this Agreement and (in case of a failure capable of being remedied) such failure is not remedied within 30 (thirty) calendar-days from having received a written request for such remedial action from the first Party; or (c) should fail to pay the invoices by the Due Date; or (d) fails to provide the bank guarantees or equivalent thereof according to this Agreement within 15 (fifteen) days.

8.4 If the Agreement is terminated, in whole or in relation to a Service or Services, the Customer shall forthwith upon such termination pay the Supplier any reasonable outstanding costs due for the remainder of the term of any Agreements concluded with any third party (including an Access Provider of local or international telecommunications circuits) specifically in relation to the supply of the Service or Services, subject to the Supplier's obligation to mitigate its losses.

**Provided always** that the Supplier undertakes to exercise any right of early termination which may exist in such Agreements.

## 9 SUSPENSION

9.1 The Supplier may, whether or not terminating this Agreement, immediately suspend all or part of the Services provided until further notice if:

- (a) the Supplier would be permitted to terminate this Agreement under clause 8.3;
- (b) the Supplier is obligated to comply with an order, instruction or request of Government, or emergency services organization, or other competent administrative authority;
- (c) the Supplier needs to carry out work for operational reasons according to clause 2.3;
- (d) the Customer fails to comply with payment obligations until such time as the Customer has paid all outstanding amounts, including any late fees and independently of whether a dispute has been raised or not. In addition hereto, the Supplier shall have the right to ask a bank guarantee or equivalent thereof as specified in clause 4.5 and shall only be obligated to reinstate the Services until such security has been provided. The Supplier shall give the Customer notification by fax or registered letter of its intention to suspend the Service under this clause with a notice period of 5 (five) calendar days.

## 10 SUPPLIER'S EQUIPMENT

10.1 The Customer will, at its own expense, to enable the installation and use of the Supplier's Equipment: (a) obtain all necessary consents, including consents for any necessary alterations to buildings; (b) provide a suitable environment, accommodation and foundations, including all necessary trunking, conduits and in-house cabling, in accordance with the relevant installation standards;

(c) provide any electricity and connection points required by the Supplier.

All preliminaries must be completed in advance of any installation work.

10.2 The Customer is responsible for the Supplier's Equipment and must not add to, modify or in any way interfere with this equipment, nor allow anyone else (other than someone authorised by the Supplier) to do so. The Customer will be liable to the Supplier for any loss of or damage to this equipment, except where such loss or damage is due to fair wear and tear or is caused by the Supplier or anyone acting on the Supplier's behalf.

10.3 All equipment, including but not limited to access circuits, SDH equipment, ODF's, DDF's, cabling, software licenses, documentation provided by a Party in connection with this Agreement shall remain the property of this Party.

## 11 CONNECTION OF EQUIPMENT TO THE SERVICE

11.1 Any equipment connected to or used with the Service must be connected and used in accordance with any instructions, safety and security procedures applicable to the use of that equipment.

11.2 Equipment which is attached (directly or indirectly) to the Service must be technically compatible with the Service and approved for that purpose under any relevant legislation.

## 12 HEALTH & SAFETY

The Customer is responsible for reading and complying with **all** Safety warning labels on the equipment provided by the Supplier. These labels must **not** be removed or defaced in anyway. The Customer is aware that the equipment uses Mains Voltage power supplies and some may also contain Laser transmitters. The presence of such Laser transmitters being indicated by the International Black & Yellow triangular label containing the Laser symbol.

## 13 ACCESS AND SITE REGULATIONS

13.1 To enable the Supplier to carry out its obligations under this Agreement, the Customer will provide the Supplier's employees and/or anyone acting on its behalf, who produces a valid identity card, with access to the Site outside the Supplier's control where the Service is provided by the Supplier, at all reasonable times. The Supplier will normally only require access during its usual working hours but may, on reasonable notice, require the Customer to provide access at other times.

13.2 The Supplier's employees and anyone acting on its behalf will observe the Customer's reasonable Site regulations, as previously advised in writing to the Supplier. In the event of any conflict between the Site regulations and this Agreement, this Agreement will prevail.

13.3 The Customer will provide a suitable and safe working environment for the Supplier's employees or anyone acting on its behalf.

## 14 INTELLECTUAL PROPERTY RIGHTS

14.1 Where software is provided to enable the Customer to use the Service, the Supplier grants the Customer a non-exclusive, non-transferable license to use the software for that purpose during the term of this Agreement.

14.2 The Customer will not, without the Supplier's prior written consent, copy or (except as permitted by law) de-compile or modify the software, nor copy the manuals or documentation.

14.3 The Customer will sign any Agreement reasonably required by the owner of the copyright in the software to protect the owner's interest in that software.

14.4 The Supplier will indemnify the Customer against all claims and proceedings arising from infringement of any intellectual property rights by reason of the Supplier's provision of the Service to the Customer. As a condition of this indemnity the Customer must:

(a) notify the Supplier promptly in writing of any allegation of infringement;

(b) make no admission relating to the infringement;

(c) allow the Supplier to conduct all negotiations and proceedings and give the Supplier all reasonable assistance in doing so as far as it is legally allowed; and

(d) allow the Supplier to modify the Service, or any item provided as part of the Service, so as to avoid the infringement, provided that the modification does not materially affect the performance of the Service.

14.5 The indemnity in clause 14.4 does not apply to infringements caused by the use of the Service in conjunction with other equipment, software or services not supplied by the Supplier or to infringements occasioned by designs or specifications made by, or on behalf of, the Customer. The Customer will indemnify the Supplier against all claims, proceedings and expenses arising from such infringements.

14.6 The limitations and exclusions of liability contained in clause 6 do not apply to this clause.

## 15 CONFIDENTIALITY

15.1 The Parties will keep in confidence any information (whether written or oral) of a confidential nature (including software and manuals) obtained under this Agreement and will not disclose that information to any person (other than their employees or professional advisers, or sub-contractor or a Group Company who need to know the information) without the written consent of the other Party. The Parties acknowledge that this information may be subject to the relevant Clause on 'Secrecy' of the Federal Telecommunication Law or the Swiss Data Protection Rules.

15.2 This clause 15 will not apply to:

- (a) any information which has been published other than through a breach of this Agreement;
- (b) information lawfully in the possession of the recipient before the disclosure under this Agreement took place;
- (c) information obtained from a third party who is free to disclose it; and
- (d) information which a Party is requested to disclose and, if it did not, could be required by law or any regulatory authority to do so.

15.3 This clause 15 will remain in effect for 2 (two) years after the termination of this Agreement.

## 16 FORCE MAJEURE

16.1 In the event that either Party is unable to perform any obligation under this Agreement because of a matter beyond that Party's reasonable control such as lightning, flood, exceptionally severe weather, fire, explosion, war, epidemic, acts of terrorism, acts of local or central Government or other competent authorities, that Party will have no liability to the other for that failure to perform.

16.2 In the event of clause 16.1 as well as:

- (a) a refusal or delay by a third party to supply a telecommunications service to the Supplier and where there is no alternative service available at reasonable commercial cost; or
  - (b) the Supplier being prevented by restrictions of a legal or regulatory nature from supplying the Service,
- the Supplier will have no liability to the Customer for failure to supply the Service.

16.3 If any of the events detailed in clauses 16.1 or 16.2 continue for more than 3 (three) months either Party may serve notice on the other terminating the Service without further consequences.

## 17 WAIVER

The failure of either Party hereto to insist upon the strict adherence to any term of the Agreement on any occasion shall not be considered as a waiver of any right thereunder nor shall it deprive that Party of the right to insist upon the strict adherence to that term or any other term of the Agreement at some other time.

## **18 AMENDMENTS**

This Agreement may only be amended by written instrument signed by duly authorized representatives of both of the Parties.

## **19 EXPORT CONTROL**

19.1 Delivery of the Service to the Customer may be subject to export control law and regulations. The Supplier does not represent that any necessary approvals and licences will be granted. The Customer will provide reasonable assistance to the Supplier to obtain any necessary consents.

19.2 If any necessary consents are not granted, then the Supplier can terminate this Agreement or the provision of the Service under it without any liability to the Customer.

## **20 ASSIGNMENT**

Neither Party may assign or transfer any of their rights or obligations under this Agreement, without the prior written consent of the other Party, such consent not to be unduly withheld, except that the Supplier may assign its rights or obligations (or both) to a Supplier Group Company, to a sub-contractor, to creditors of Supplier, or to creditors of a Supplier Group Company without consent providing that the Supplier still retains total responsibility for the fulfilment of its obligations under this Agreement.

## **21 SEVERABILITY**

21.1 The invalidity or unenforceability for any reason of any part of this Agreement shall not prejudice or affect the validity or enforceability of the remainder of this Agreement. If any part is held by a court to be unreasonable or inapplicable, the other parts will continue to apply.

21.2 If further lawful performance of this Agreement or any part of it shall be made impossible by the final judgement or final order of any court of competent jurisdiction, commission or government agency or similar authority having jurisdiction over either party, the parties shall forthwith use their best endeavours to agree amendments to this Agreement so as to comply with such judgement or order and resume performance.

## **22 ENTIRE AGREEMENT**

22.1 This Agreement in its authentic language in English constitutes and contains the whole Agreement between the Parties and supersedes all previous written or oral Agreements relating to its subject matter.

This Agreement shall not be construed to constitute a partnership or agency relationship between the Parties. Each Party acts in its own name and operates for its own benefit and risk while performing its obligations under this Agreement.

22.2 The Parties acknowledge and agree that:

(a) they have not been induced to enter into this Agreement by any representation, warranty or other assurance not expressly incorporated into it; and

(b) in connection with this Agreement their only rights and remedies in relation to any representation, warranty or other assurance are for breach of this Agreement and that all other rights and remedies are excluded, except in the case of fraud.

## **23 NOTICES**

Notices given under this Agreement must be in writing and may be delivered by hand or by courier, or sent by registered mail to the registered office of either Party or any other notified address. Price changes may be notified by email, fax or in writing.

## **24 LAW AND JURISDICTION**

24.1 This Agreement shall be governed by and construed in accordance with Swiss law (excluding the United Nations Convention on Contracts for the International Sale of Goods).

24.2 The Parties agree that the Ordinary Courts of Zurich 1 shall be the exclusive place of jurisdiction.