



# Terms of service – version 4

Effective from 1 January 2018

[evolving.net.uk](http://evolving.net.uk)

# Terms of service

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**Please note:** The nature and sophistication of our connectivity solutions is such that our customers are typically not small business customers within the meaning of the OFCOM General Conditions (ie. typically our customers employ more than ten individuals). Therefore we will assume that you are not a small business customer and your rights (and our responsibilities) under the OFCOM General Conditions will be interpreted by us accordingly. However, we will always comply with the OFCOM General Conditions and, to assist us, you should inform Evolving Networks in writing if your business is a small business within the meaning of the OFCOM General Conditions.

### 1 The basics

- 1.1 Some of the words and phrases in these Terms of Service mean specific things. They are capitalised all the way through and explained in in the Appendix to these Terms of Service.
- 1.2 The words below have the following meanings:
  - 1.2.1 'you' and 'your' means the Customer; and
  - 1.2.2 phrases that refer to 'we', 'our', 'us', 'each of us', 'each of our', 'both of us', 'we each', 'we will each', 'we will both', 'whichever of us', 'one of us', 'neither of us', 'either of us', 'either of our', 'either one of us' or 'we both' mean one or both of Evolving Networks and the Customer, whichever makes sense in the context of the sentence.
- 1.3 The words 'include' or 'including' do not limit something to just the examples that follow.
- 1.4 Your Contract with us is made up from these Terms of Service (including the Service Specific Terms and any other documents incorporated by reference) and the Order Form.

These Terms of Service apply to any Service you purchase from us, as updated from time to time by us and made available on our website. Our updated Terms of Service will apply to all accepted Order Forms following the date of publication on our website. From time to time we also may need to make changes to Service Specific Terms or other documentation incorporated by reference into your Contract to reflect regulatory or technological changes affecting the Services. Following publication on our website or communication to you, that updated documentation will apply to all existing and new Contracts.
- 1.5 A proposal for Services which we have given to you will not be binding upon us, even if you communicate your acceptance of its terms. If you wish to progress with any proposal then you must submit an Order Form to us and we will indicate our agreement to provide the relevant Service by countersigning and returning the Order Form. Once the Contract is formed we will set up and supply the Services, and you will pay the Charges, in accordance with the terms of the Contract.
- 2.1 The Contract starts on the Commencement Date and will carry on until one of us ends it in accordance with these Terms of Service.



## 2 Duration of contract

- 2.2 Each Order Form Line Item shall commence on its First Activation Date, and shall continue until the end of its Initial Period and thereafter unless terminated in accordance with Condition 10.
- 2.3 The Initial Period for each Order Form Line Item shall run from the Commencement Date, EXCEPT THAT if the Full Activation Date does not occur until 90 days or more after the Commencement Date, then the Initial Period for each Order Form Line Item shall run from the Full Activation Date.

## 3 Service setup

- 3.1 The setting up of the Services requires both you and us to undertake certain tasks and responsibilities. These tasks and responsibilities are set out in the Service Specific Terms which each of us will perform in accordance with any supplied Project Plan.

## 4 Support and fault handling

- 4.1 We will provide our support in respect of the configuration, use and operation of the CPE and On-Going Services in accordance with the Support and Fault Handling Policy.

## 5 Service specific terms

- 5.1 The Service Specific Terms explain the Service-specific rights and responsibilities of both you and us and we recommend that you read the document carefully and raise any queries with us before submitting an Order Form to us.

## 6 General specific terms

### Standard of service

- 6.1 We will provide the Services with reasonable skill and care and in accordance with Applicable Law. We will use reasonable endeavours to provide the Services in accordance with any service levels communicated to you from time to time in writing, including as to availability, moves, adds, changes, outages and fault response times. However, it is not practical to deliver a fault free service, as much as we intend to do so.

### Specification

- 6.2 We will ensure that the Services comply with the specification set out or referred to in the Service Specific Terms, and (to the extent not otherwise stated) will be in accordance with the standard published specifications of Evolving Networks and any Evolving Networks Suppliers.

### Setup timescales

- 6.3 We will use reasonable endeavours to meet any dates and times for performance stated in any supplied Project Plan but these dates and times are estimates only and time of performance shall not be of the essence. We will use reasonable endeavours to notify you if we become aware that any date or time set out in any supplied Project Plan is likely not to be achieved and will update you on our efforts to minimise any resulting delay, where reasonably possible. Times or dates set out in any supplied Project Plan will be extended to reflect any delay in performance caused by you or any Evolving Networks Suppliers.



## Technical limits

6.4 All On-Going Services will be subject all applicable technical limitations of the technology used, including those specified by any Evolving Networks Supplier, which may not become apparent until after the On-Going Service has been installed and working for some time. Technical limitations may include incompatibility between the On-Going Services and any other telecommunications services which the Customer or any Service User is receiving or proposing to receive, incompatibility with any Customer Systems used, and technical or geographical limitations that inhibit the installation or performance of any communication line. We may cancel or terminate any On-Going Services, without liability to you, where any such technical limitations are identified. Where your local infrastructure prevents the installation of an element of the On-Going Services we will inform you and you will discuss with us, each of us acting in good faith, the use of a substitute service component or a reduction to specification of the On-Going Service (subject to a corresponding adjustment to the Charges for the altered On-Going Services) to address the local infrastructure limitation.

## IP Addresses

6.5 We will supply all IP addresses needed for the On-Going Services. All IP addresses supplied by us as part of the Services shall be and remain our property, shall not be transferrable or portable, may not be retained by you after termination of any Service or the Contract, and are provided only temporarily for the purposes of using the On-Going Services. We may, by giving not less than 30 days' prior written notice to you at any time during the term of a Contract, change the IP addresses we have supplied you with.

## Viruses

6.6 We do not guarantee that the Services will prevent viruses or other harmful or malicious software from getting onto your Customer Systems, or prevent attacks or other computer misuse in relation to the Customer Systems. You are responsible for maintaining your own protections on your Customer Systems against viruses and other malicious software and against attacks and computer misuse.

## Customer materials and internet content

6.7 We shall have no responsibility or liability for the Customer Materials or the content, approval, issue or transmission of any material or content made available on the internet or otherwise which can be accessed using the Services or CPE.

## Data protection

6.8 Where we are processing any personal data on your behalf as part of the Services, we do so as a data processor under the Data Protection Act 1998 (or successor legislation), and you are the data controller. We will carry out such processing in accordance with your reasonable instructions, and in particular we will maintain and comply with reasonably appropriate technical and organisational measures against unauthorised or unlawful processing of that personal data and against accidental loss or destruction of, or damage to that personal data. You are responsible as data controller for ensuring that we are lawfully able to process the personal data for you.



## **7 Your obligations**

### **Information**

- 7.1 You will provide in a timely manner such true and complete information as we may request from time to time, including information to enable us to: (a) provide the Services, CPE and other Evolving Networks Property; (b) provide Support and Fault Handling; (c) monitor and verify compliance with the Contract; and (d) investigate any suspected breach of the Contract.

### **Access to site**

- 7.2 You will provide to us and our representatives reasonable access to each Site to carry out installation of or other Equipment Maintenance activities in relation to the CPE and other Evolving Networks Property, to perform the Contract, and to exercise any rights under the Contract. You will obtain all permissions and consents from third parties necessary to procure such access.

### **Inform of health and safety rules**

- 7.3 You will inform us and our representatives of all health and safety rules and regulations and any other reasonable security requirements that apply at the Site.

### **Prepare site**

- 7.4 You are responsible (at your own cost) for preparing the Site (including to prepare for any set-up, installation and commissioning work, Engineering Works and Equipment Maintenance activities) and carrying out any Engineering Works which are the responsibility of the Customer, in each case in accordance with our reasonable requirements and those of the Evolving Networks Suppliers.

### **Notification of problems**

- 7.5 You will notify us of all problems or suspected problems experienced with the Services, and CPE and other Evolving Networks Property, promptly after you become aware of the same. You will notify us promptly of any suspected misuse or security breaches which come to your attention.

### **Customer systems**

- 7.6 Except for the CPE and other Evolving Networks Property, you are responsible for providing anything else necessary to make use of the On-Going Services and CPE. You will ensure that all Customer Systems are compatible with the CPE and On-Going Services and in conformity with all relevant United Kingdom standards or requirements.

### **Acceptable use policy**

- 7.7 You will comply with any Acceptable Use Policy, and acknowledge that the capacity, bandwidth and access of your connectivity may be restricted from time to time in accordance with any such policy, and in any event where determined by us or any Evolving Networks Supplier, to ensure that all customers have a fair and reasonable share of available bandwidth and capacity.

### **Permitted use**

- 7.8 Unless otherwise stated in the relevant Order Form, the Services may only be used by you for your internal business purposes, and may not be used by or resold to any other person, or used to provide the same type of service to any other person.



## No misuse

- 7.9 You will be responsible for all use made of the On-Going Services and all Customer Materials processed in connection therewith. You shall not and shall ensure that no other person shall use the On-Going Services for or in connection with: (a) sending, receiving or publishing any indecent, offensive, obscene, defamatory or otherwise unlawful materials;
- (b) sending or receiving any unsolicited email, advertising or promotional material; (c) violating any law, rule or regulation; (d) the commission of any offence or crime; (e) downloading, sharing, transmitting or publishing content that infringes the rights of others, including without limitation, any Intellectual Property Rights of third parties; (f) any fraud (including using or attempting to use On-Going Services with the intent of avoiding payment by any means or device); (g) any activity which does or is likely to result in us or any Evolving Networks Supplier having any liability to a third party, or damage to the reputation of Evolving Networks or any Evolving Networks Supplier. This provision is of the essence of the Contract, and a breach of this Condition shall be deemed to be a repudiatory and material breach of the Contract.

## Passwords

- 7.10 You are responsible for management of all passwords issued to you in connection with the On-Going Services and CPE, and shall be responsible for any use and misuse of such passwords, or any fraud committed using such passwords, unless by us or our representatives.

## Service users

- 7.11 All acts and omissions of any Service User shall be deemed to be your acts and omissions and you are responsible for ensuring that all Service Users perform and comply with your obligations under the Contract (other than obligation to pay the Charges).
- 7.12 You will indemnify us against any and all claims made by and liability which we may have to any Service User, however arising (including through breach of the Contract or breach of a duty of care or negligence arising in connection with this Contract or the Services), together with all cost and expenses (including reasonable and proper legal costs) incurred in handling, defending and settling any claims in respect of any such liability.

## 8 Our hardware

- 8.1 You shall install at the Site all CPE required for the provision of the On-Going Services.
- 8.2 All CPE, Communications Systems and Evolving Networks Property shall remain our property and is provided on a loan basis only, for the duration of the relevant Contract, inclusive in the Charges. You shall ensure that all CPE and other Evolving Networks Property is kept at the location at which it is installed or delivered, and shall not move it to any other location without our prior agreement.
- 8.3 We warrant that the CPE will be of satisfactory quality on delivery, but we do not warrant that the CPE to be at all times fault free or uninterrupted.
- 8.4 We shall be entitled to replace or perform Equipment Maintenance in relation to the CPE or other Evolving Networks Property from time to time in our absolute discretion, and you shall procure and provide to us and the Evolving Networks Suppliers all necessary access to the CPE or other Evolving Networks Property to enable this promptly on request, including physical access and remote access through a network. If we deem that any CPE requires replacement then we shall



ship the replacement CPE to you, you will replace the defective CPE promptly upon receipt of the replacement CPE and return the defective CPE to us in accordance with Condition 8.6.

- 8.5 You shall:
  - 8.5.1 take reasonable care of all CPE and other Evolving Networks Property, keep it in good condition, protect it from theft, loss or damage; and provide a UPS (Uninterruptible Power Supply) and surge protection for all CPE;
  - 8.5.2 comply with and carry out all instructions we may give you for use and care of the CPE or other Evolving Networks Property, including reasonable user maintenance procedures;
  - 8.5.3 ensure that a suitable temperature controlled and dust free environment is provided for the CPE and other Evolving Networks Property in accordance with our reasonable requirements;
  - 8.5.4 not allow the CPE and other Evolving Networks Property to be modified, repaired or maintained other than by our authorised representative;
  - 8.5.5 not remove any identification mark affixed to the CPE or other Evolving Networks Property showing that it is our property of Evolving Networks or the property of any Evolving Networks Supplier (as applicable); and
  - 8.5.6 use all CPE and all Evolving Networks Property only to use the On-Going Services.

## **Return of CPE**

- 8.6 Upon termination of the Contract, or any Service, and at any other time on request, you must return the CPE and all other Evolving Networks Property promptly on request by courier at your cost, or alternatively, if we request, permit us and our Evolving Networks Suppliers to recover and remove the CPE and other Evolving Networks Property from the Site. Evolving Networks may make an Additional Charge for the cost of recovering and removing any CPE or other Evolving Networks Property from you.
- 8.7 You will ensure that all original packaging for the CPE and other Evolving Networks Property is retained and used when returning the CPE and other Evolving Networks Property. We may send you a pre-paid parcel for returning the CPE, in which case you must put the CPE in that parcel and hand it to the relevant delivery service we are using.
- 8.8 The returned CPE must be clean, undamaged and otherwise in good condition, in full operational order and any identification marks applied by you whilst the CPE was in your possession must be removed prior to return of the CPE.
- 8.9 If you do not return any CPE to us within a reasonable time period, or in compliance with Condition 8.8, then you agree to pay to us our cost of refurbishing the CPE to ensure compliance with Condition 8.8 and, where refurbishment is not economically viable, you will pay us the full new replacement cost of such CPE as an Additional Charge.

## **Risk of theft, loss or damage**

- 8.10 You will pay to us the then full new replacement value of any CPE or other Evolving Networks Property which is stolen, lost or damaged, howsoever occurring, following installation at or delivery to a Site.



## 9 Charges

- 9.1 In return for our provision of the Services you will pay all Charges and VAT specified in the Contract. All Charges are stated exclusive of VAT (if any) which we shall add to our invoices at the appropriate rate.
- 9.2 Our Charges consist of:
- 9.2.1 Activation Charges in respect of the setting up of each On-Going Service which are stated in the Order Form. These Charges are invoiced on or after the date the relevant Order Form is signed by you;
- 9.2.2 if we start the delivery of the On-Going Services part way through a Quarter then we will pro-rate the Quarterly Charge (as defined in Condition 9.2.3 below) set out in our first invoice to reflect the percentage of the Quarter remaining and we refer to this invoice for the On-Going Services as our "Quarter Balancing Invoice";
- 9.2.3 Quarterly Charges in respect of the provision of the On-Going Services which are stated in the Order Form. Quarterly Charges will commence on the First Activation Date (and therefore subject to the Quarter Balancing Invoice referred to above) and are invoiced Quarterly in advance; and
- 9.2.4 Additional Charges which are calculated in accordance with our published tariffs, as updated from time to time and available upon request. Additional Charges are invoiced in advance (where known) or following the event which gives rise to the Additional Charge.
- 9.3 Additional Charges consist of:
- 9.3.1 cessation of, cancellation of or re-instatement of any On-Going Service;
- 9.3.2 any survey, site visit, or work required at the Site to enable the provision of the On-Going Services, including any engineering work performed in accordance with the Service Setup Guide;
- 9.3.3 any work required to repair any faults or damage to any CPE or other Evolving Networks Property at the Site, where not caused by us;
- 9.3.4 for abortive and cancelled visits, and any missed appointments, unless due to our fault, including where you fail to meet the appointment for, or cancel the appointment for, or fail to give access to the Site, or fail to adequately prepare the Site;
- 9.3.5 for investigation of and rectification of faults reported by you but no fault is actually found, or the fault is found to have been caused by you;
- 9.3.6 for work outside of Business Hours (or of any Evolving Networks Supplier normal working hours) where requested by you and agreed with us;
- 9.3.7 for any costs and expense incurred by us in providing number portability;
- 9.3.8 for any costs and expense incurred by us as a result of misuse of the On-Going Services;
- 9.3.9 (for any visit to the Site to provide support or assistance with your use of the On-Going Services, CPE or other Evolving Networks Property; and
- 9.3.10 each Evolving Networks Supplier Charge invoiced to us which was not a set-up or periodical charge taken account of in the Activation Charges or Quarterly Charges.
- 9.4 You shall pay each of our invoices, in full and in cleared funds, within 30 days of the date of the invoice. All payments shall be made in Pounds Sterling (GBP). You shall pay all Charges by electronic transfer to the bank account nominated by us from time to time. If we accept payment by cheque, such payment shall not be deemed to have been made until the cheque has been received by us and cleared.



- 9.5 You will not make any set-off, withholding, deduction or counter-claim with respect to any payments under this Contract, and shall pay all Charges in full. If you fail to make any payment to us on its due date, we shall be entitled to exercise any one or more of the following rights at our discretion at any time:
- 9.5.1 we shall be entitled to charge interest on such overdue payment from the due date for payment at the annual rate of 5% above the base lending rate from time to time of Barclays Bank Plc., accruing on a daily basis and compounded every 30 days, until such payment is made, whether before or after any judgment. Any such interest shall be paid within 14 days of demand; and/or
- 9.5.2 if you are late in paying more than three (3) invoices, we may at any time after, unilaterally reduce the credit period under Condition 9.4 to 14 days for all future invoices. If you are late in paying more than five (5) invoices, we may at any time after, unilaterally reduce the credit period to 7 days for all future invoices; and/or
- 9.5.3 we shall be entitled to suspend all or any of the Services in accordance with Condition 14. The Charges will continue to be payable during such period of suspension; and/or
- 9.5.4 if you fail to pay any overdue payment within 7 days of notice from us demanding payment, or you have been late in paying six (6) or more invoices, then this shall be deemed to be your repudiatory breach of the Contract and we shall be entitled to terminate the Contract (or at our option, some or all of the Services under the Contract) by further notice to you. This right shall not be prejudiced by any delay in us exercising it.
- 9.6 If a Contract is terminated by Evolving Networks under Condition 9.5.4 or 10.3, all invoices issued prior to the date of such termination and not yet paid shall become due immediately and any further invoices issued shall be payable by the end of the Business Day following the day of receipt.

## 10 Termination

### Termination for convenience

- 10.1 We recognise the importance of ensuring that your business does not suffer any unintended loss of connectivity and therefore if you give us notice to terminate in accordance with Condition 10.2 below then you must confirm your decision to cancel the relevant Service by completing, signing and returning to us a Service Cancellation Notice which we will provide to you promptly following receipt of your notice to terminate. The Service Cancellation Notice will identify the Services that you wish to terminate and will also identify any dependent Services that will be impacted from a service delivery perspective or will need to be co-terminated as a result of the Services that you wish to terminate. If you do not return to us a duly completed Service Cancellation Notice then we will assume that your circumstances have changed and that you no longer wish to terminate the Contract (and therefore we will continue to provide the Service as if your notice to terminate has been withdrawn with our consent).
- 10.2 As explained in Condition 2.1, the intention is that the On-Going Services will continue until either of us terminate an On-Going Service at any time on or after the expiry of the Initial Period provided that we give the other a minimum of one clear Quarter's notice. For example, if termination notice is given in February (i.e. during Quarter 1), termination shall be effective on 30th June (i.e. the end of Quarter 2) provided that you have complied with Condition 10.1 above. You may choose to terminate an On-Going Service prior to the expiry of the Initial Period but, if you choose to do so, you will need to pay us the Termination Charge calculated in accordance with Condition 10.8.



## Termination for breach or insolvency

- 10.3 Either of us can terminate the Contract in whole or in part straightaway by giving the other written notice to terminate if:
  - 10.3.1 the other materially breaches the Contract and, where it is possible, they do not put the situation right within 30 days after written notice of their breach;
  - 10.3.2 the other materially breaches the Contract and the situation cannot be put right; or
  - 10.3.3 an Insolvency Event applies to the other.
- 10.4 We may exercise our termination rights pursuant to Condition 9.5.4 in respect of non-payment of Charges.

## Other termination rights

- 10.5 If any Services include or are dependent on any third party service, then we shall be entitled to cancel or terminate those Services, or this Contract as a whole, without liability to you, if that third party service is ceased or terminated by the Evolving Networks Supplier for any reason.
- 10.6 We are entitled to terminate the Contract by notice to you with immediate effect if any authorisation, licence or other permission for Evolving Networks to provide the Services is revoked, withdrawn, or not renewed for whatever reason, or if Evolving Networks is otherwise prohibited by any exercise of any statutory power by OFCOM from providing the Services.
- 10.7 We shall have the right to terminate On-Going Service (without cause and without liability to you) at any time by notice to the Customer before the Activation of that On-Going Service.
- 10.8 If a Contract or On-Going Service is terminated (a) by you pursuant to Condition 10.1; or (b) by us pursuant to Condition 10.3, 10.4 or 11.3, then you will pay to us within 7 days of demand or invoice the amounts specified in Conditions 10.8.1 and 10.8.2 below ("Termination Charge"):
  - 10.8.1 In respect of each terminated On-Going Service, an amount equal to the Quarterly Charges that would have been payable (but for the termination) under the Contract for such On-Going Service for:
    - a) if the date of termination is within the Initial Period, the remainder of the Initial Period and, if the date of termination is within the final Quarter of the Initial Period, the first Quarter following the Initial Period; or
    - b) if the date of termination is beyond the Initial Period, the remainder of the Quarter in which the date of termination falls (after deducting pre-paid Charges for that Quarter) and the Charges for the following Quarter; and
  - 10.8.2 all early termination or other charges which we have to pay to any Evolving Networks Supplier with respect to any Resold Services which form part of or are used in respect of the terminated Services, (save to the extent such charges form part of the Quarterly Charges that are recoverable pursuant to 10.8.1).

## 11 Gaining provider led migration

- 11.1 Our connectivity solutions are a unique service comprised of multi-line virtualised network connections with a software overlay. As such there is no migration mechanism for them and they are not covered under OFCOM General Condition 22. It is accepted that some component line technologies may qualify for individual migration, depending also on whether you qualify as a "Customer" as defined by Condition 22.



- 11.2 Migration of any element of the On-Going Services away from us at any time is accepted by us if the conditions to require such Migration have been established (including satisfactory evidence that the Customer satisfies the definition of a "Customer" for the purposes of Condition 22 of the OFCOM General Conditions). On satisfaction of such conditions, we will take any action which we are obliged to take under the OFCOM General Conditions to facilitate such Migration.
- 11.3 We are entitled, at any time after the Migration, to terminate (at our option) the entire Order Form line item.
- 11.4 Until we exercise any right to terminate and claim a Termination Charge under Condition 10.9, we shall be entitled to continue to invoice and be paid the Charges for all Services, including the Services subject to a Migration, but we shall be relieved of our obligation to actually provide the Services which have been Migrated, or any dependent services.

## 12 Confidentiality

- 12.1 We each agree to keep in strict confidence all technical or commercial know-how, specifications, inventions, processes and initiatives of the other or their representatives which are of a confidential nature and have been disclosed to them by the other or their representatives, and any other information concerning the other's businesses, products or services or their representatives' which they may obtain ("Confidential Materials"). The Charges and terms of the Contract shall be confidential to us.
- 12.2 Each of us shall restrict disclosure of the Confidential Materials of the other to such of their representatives as need to use the same for the purpose of discharging any obligations under the Contract and exercising any rights under the Contract, or for the general management or enforcement of the Contract, and shall ensure that such representatives are subject to obligations of confidentiality in relation to the Confidential Materials of the other party corresponding to those in this Condition 12.
- 12.3 This Condition 12 shall not apply to any Confidential Materials received by a party which are or fall into the public domain other than through any act or omission of that party or its representatives.

## 13 General suspension right

- 13.1 We may unilaterally and with or without notice suspend, interrupt or degrade the On-Going Services or CPE in the following circumstances:
- 13.1.1 if we or an Evolving Networks Supplier is obliged or needs to do so to comply with an order, instruction or request of a court, government agency, emergency service organisation or other administrative or regulatory authority; or
- 13.1.2 in order to carry out any Equipment Maintenance to any CPE or other Evolving Networks Property or any Communications Systems; or
- 13.1.3 in order to deal with and resolve any actual or suspected security breach, virus, emergency, or attack; or
- 13.1.4 where we suspect that the On-Going Services may be being used fraudulently or illegally or in other violation of this Contract; or
- 13.1.5 in order to take any action that we or an Evolving Networks Supplier reasonably considers necessary as a reasonable and prudent provider of the Services; or
- 13.1.6 if any Evolving Networks Supplier exercises any right of suspension, interruption, or degradation, it may have against Evolving Networks at law or under any contract with Evolving Networks with respect to any Resold Service forming part of or relevant to the Services.



- 13.2 The Customer must continue to pay the Charges and all other payments in full during and with respect to any period of suspension, interruption or degradation imposed by us in accordance with Condition 13.1.

## **14 Suspension on breach**

- 14.1 If you breach, or we have grounds for suspecting that you may be breaching a Contract, then we shall be entitled to suspend the Services or any of them, as we determine and without prior notice, in accordance with this Condition 14.
- 14.2 In the case of a breach or suspected breach, the suspension will be of sufficient time to enable us to investigate the breach or suspected breach, and we will lift the suspension, without undue delay, when the breach has been remedied to our satisfaction, or the suspected breach is established not to have occurred.
- 14.3 You must continue to pay the Charges during and with respect to any period of suspension imposed under this Condition 14. We may make a reasonable Additional Charge for re-instatement including a re-charge for any Evolving Networks Supplier Charges incurred as a result of any such suspension or subsequent re-instatement.
- 14.4 Any suspension under this Condition will be without prejudice to our rights under these Terms of Service to terminate a Contract, which may still be exercised during or after any period of suspension.

## **15 Intellectual property rights**

- 15.1 As between you and us, all Intellectual Property Rights and all other rights in the Services, and CPE and other Evolving Networks Property, and Communications Systems shall be and remain the property of and vest in us (or its Evolving Networks Suppliers where provided by them) and no right, property, ownership, or interest therein is transferred to, shall vest in or is granted to you under the Contract.
- 15.2 We grant to you a non-exclusive, non-transferrable licence to operate and run the CPE for the purposes of using the On-Going Services, in accordance with the terms of the Contract, for the duration of the Contract. You will not copy, decompile, modify or reverse engineer any software provided by us (including any CPE firmware), or knowingly let anyone else do that, unless it is allowed by Applicable Law.

## **16 Our liability to you**

- 16.1 The Contract excludes, as far as the law allows, any warranties, conditions or other terms that might be implied by statute or common law.
- 16.2 Nothing in these Terms of Service or a Contract excludes or limits the liability of either of us:
- 16.2.1 for death or personal injury caused by either of us being negligent;
- 16.2.2 for fraud or fraudulent misrepresentation;
- 16.2.3 for any other liability that cannot be excluded or limited under Applicable Law; or
- 16.2.4 to pay any Charges due under the Contract.
- 16.3 You shall indemnify us, on demand, against all liability (including to any Evolving Networks Supplier), loss and damage suffered or incurred by us as a direct or indirect result of your breach of your obligations under a Contract and for any event of misuse under Condition 7.9 (No Misuse) however arising, together with all cost and expenses (including reasonable and proper legal costs) incurred in handling, defending and settling any third party claims in respect of any such liability.



- 16.4 Subject to Conditions 16.2 and 16.5, our total liability to you and Service Users, whether under contract, tort (including negligence), breach of statutory duty or misrepresentation (“Default”) per event or series of connected events, shall be limited to:
- 16.4.1 £200,000 (two hundred thousand pounds) in respect of physical property lost or damaged due to our negligence; and
- 16.4.2 in respect of all other loss or damage, the greater of £1,000 and 100% of the Charges payable in respect of the Quarter in which the event (or first of the series of events) arose.
- 16.5 Other than for those matters set out in Clause 16.2, neither of us will be held liable for any of the following losses, no matter if those losses are direct or indirect:
- 16.5.1 loss of profit, revenue or anticipated savings;
- 16.5.2 loss of business or contracts;
- 16.5.3 loss of goodwill;
- 16.5.4 loss from wasted expenditure, wasted time or business interruption;
- 16.5.5 loss, destruction or corruption of data;
- 16.5.6 liability to any third parties unless otherwise stated in these Terms of Service; and
- 16.5.7 any special, indirect or consequential loss or damage.
- 16.6 No Evolving Networks Supplier shall have any Direct Liability to you or any Service User, and you will make no claim (and shall procure that no Service User shall make a claim) against any Evolving Networks Supplier in respect of any such Direct Liability. You will indemnify us from and against any liability which we may have to an Evolving Networks Supplier in respect of any claim made by you or any Service User against any Evolving Networks Supplier in respect of Direct Liability.
- 16.7 You must initiate any legal proceedings in respect of any Default within 12 months of the date the Default arose.

## 17 Notices

- 17.1 Where anything under a Contract is to be done by notice, then such notice shall not be valid unless it complies with the following terms:
- 17.1.1 notices shall be in writing and shall be served by any one or more of the following methods: personal delivery, email, pre-paid first-class post, or pre-paid recorded delivery.
- 17.1.2 notices shall be sent to the postal address, or email address, of the other party specified in the Contract. A party may at any time unilaterally vary its postal address, or e-mail address for notices by notice to the other party under this Condition 17. Alternatively, or in addition, a notice may be sent by post to the registered office of or last known principal place of business of the other party.
- 17.2 Notice is deemed to have been served and received as follows:
- 17.2.1 if delivered personally, at the time it is handed over to the other party or any director, employee or representative of the other party of delivery or attempted delivery;
- 17.2.2 in the case of e-mail, at the time of successful completion of delivery to the mail server of the intended recipient, even if the recipient does not subsequently access their mailbox;
- 17.2.3 in the case of first class post and signed-for or recorded delivery, on the second day after the day of posting.

- 17.3 If any deemed time of service or receipt above is not within Business Hours, then the notice shall be deemed to be received on the next Business Day.
- 17.4 If we send any invoice using any method and address for notices, then such invoice shall be deemed to be received in the same way as any notice sent using such method and address.

## **18 Other contract terms**

### **Force majeure events**

- 18.1 If there is a Force Majeure Event the party whose performance is affected by a Force Majeure Event will:
- 18.1.1 not be liable for failing to do something they should have done, or for not doing it completely or on time to the extent this is caused by the Force Majeure Event; and
- 18.1.2 receive a reasonable amount of extra time to perform the obligation that is affected by the Force Majeure Event.

### **Subcontracting**

- 18.2 We may sub-contract any or all of its rights and obligations under the Contract, including procuring from a third party for resale to you any of the Services or sub-contracting any of the Services to a third party.

### **Inspection and monitoring**

- 18.3 We shall be entitled to inspect and monitor from time to time all usage being made of the Services by you, including communications being sent and received and data being hosted and processed using the Services, to verify compliance with the Contract and to perform the Services.

### **Assignment**

- 18.4 We shall be entitled to assign the benefit of the Contract and/or the benefit of any payments and rights under the Contract. You shall not assign, declare a trust over, or grant any security interest over, the Contract, or any of its rights or obligations under the Contract, or any document referred to in it, without our prior written consent.

### **Third party rights**

- 18.5 Except for any benefits conferred on any Evolving Networks Supplier in a Contract (including under Condition 16.6), the parties agree that no third party (including Service Users) shall be given any right under or be entitled to enforce any term of a Contract, and The Contracts (Rights of Third Parties) Act 1999 shall not apply. Where any third party has any right under a Contract, we may at any time unilaterally vary, amend or withdraw that right by notice to you.

### **Variations**

- 18.6 No variation to the terms of a Contract shall be valid unless agreed to in writing by our duly authorised representative.

### **Severability**

- 18.7 If any of these Conditions, or any other term, condition or provision of a Contract, is determined by a court or competent authority to be invalid, unlawful, unenforceable to any extent, then such term, condition or provision shall to that extent be deemed to be severed from the Contract and the remaining terms,

conditions or provisions of the Contract will continue to be valid to the fullest extent permitted by law.

## **Waiver**

18.8 A waiver by us of any right, Charge, breach or obligation under a Contract is only effective if it is in writing, issued by a duly authorised representative of the party giving such waiver and it applies only to the circumstances for which it is given. No failure of Evolving Networks to exercise any right or remedy under a Contract, to invoice or claim any Charges under the Contract, or to enforce any term of the Contract, and no delay by us in doing any of the same, shall constitute a waiver of such right, remedy, term or Charge.

## **Cumulative rights**

18.9 Unless specifically provided otherwise, all of our rights and remedies provided under or arising under or in connection with a Contract are cumulative and are in addition to and do not exclude any other rights or remedies provided by the Contract and any rights or remedies provided by law.

## **Whole agreement**

18.10 The Contract sets out the whole agreement between both of us and replaces any previous communication between us. Your own standard terms are not part of the Contract even if you provided them to us before signing any Order Form, or if you send them to us or refer to them in an Order Form. By agreeing the Contract, each of us acknowledges they have not relied on any representation, warranty, collateral contract or other assurance (made negligently or innocently) except for those expressly set out in the Contract.

## **Governing law**

18.11 These Terms of Service, each Contract and any cause of action, dispute or claim arising out of or in connection with it or its subject matter, including non-contractual causes of action, disputes and claims, shall be governed by, and construed in accordance with, the laws of England and Wales.

## **Jurisdiction**

18.12 The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction in relation to any cause of action, dispute or claim that arises out of or in connection with a Contract or its subject matter or formation, including non-contractual causes of action, disputes and claims.

# Appendix

## Glossary

- 1 In these Terms of Service the following expressions shall have the following meanings:
- 1.1 **“Acceptable use policy”** means any acceptable use policy published by Evolving Networks from time to time applicable to the Services;
- 1.2 **“Activation”** and **“Activated”** means when the relevant element of the On-going Service is set-up, enabled or available for live production use by you or any Service User;
- 1.3 **“Additional Charge”** means any amount payable under a Contract (in addition to the Activation Charges and Quarterly Charges) described in Condition 9.3;
- 1.4 **“Applicable law”** means the laws of England and Wales and any other laws and regulations that apply to providing or receiving the Service including the OFCOM General Conditions;
- 1.5 **“Business day”** means Monday to Friday, except for any day that is a bank or other public holiday in England and Wales;
- 1.6 **“Business hours”** means 08:30 to 18:00 local time in England and Wales on Business Days;
- 1.7 **“Charges”** means all Activation Charges and Quarterly Charges for the Services, as stated in the applicable Order Form, and any Additional Charges and Termination Charges that are payable pursuant to a Contract;
- 1.8 **“Commencement date”** means the date of signature by the Customer of the first Order Form;
- 1.9 **“Communications systems”** means all communications systems and other systems, infrastructure, networks, software, computers, and equipment of Evolving Networks and/or any Evolving Networks Supplier used to provide any On-Going Services, or on, over, through or by means of which any On-Going Services are provided, including any CPE (other than CPE which is sold by Evolving Networks) and any equipment installed on a Site;
- 1.10 **“Contract”** means the agreement between you and Evolving Networks that is made up of these Terms of Service and the Order Form; 1.11 **“CPE”** means all communications equipment which is or is to be provided (including by way of sale, loan or hire) by us or any Evolving Networks Supplier to you as part of or in connection with or in order to provide the Services, for installation at any Site;
- 1.12 **“Customer”** means the party with whom Evolving Networks contracts with to provide a Service, as identified on the relevant Order Form;
- 1.13 **“Customer materials”** means: (a) all information, data and materials provided by you in connection with a Contract (including, computer programs, data, reports, addresses and PSTN numbers, and specifications); and (b) all information, data and materials uploaded, downloaded, transmitted, hosted, stored or otherwise processed by you or any Service User using the Services;
- 1.14 **“Customer systems”** means any and all networks, computers, software, systems and other equipment which is connected by you or any Service User directly or indirectly to any Communications Systems, or which is otherwise used directly or indirectly with or to access, receive or use the Services, or which otherwise belongs to or is used by the Customer or any Service User, including any CPE which is sold to you or any Service User;
- 1.15 **“Direct liability”** means any liability (including in negligence or under any other basis of non-contractual liability) of an Evolving Networks Supplier to you or any Service User, arising with respect to the Services, CPE, or Evolving Networks Property, or arising out of anything done or omitted to be done by the Evolving Networks Supplier in connection with the Services, CPE, and Evolving Networks Property, other than liability for personal injury and death, or liability for the diminution in value of or cost of repairing, replacing or reinstating, any physical property, lost or damaged due to negligence;
- 1.16 **“Engineering works”** means:  
(a) generally any changes, building, construction, engineering, modifications, additions, or other works in relation to a Site, including to install or enable any On-Going Service or CPE, and including the routing of cables and wires and the positioning/relocation of outlets, sockets, and other apparatus constituting any CPE;  
(b) such works as are identified by us or any Evolving Networks Supplier as being required in order to provide or install any On-Going Service or CPE at any Site;
- 1.17 **“Equipment maintenance”** means installation, set-up, commissioning, inspection, variation, administration, configuration, maintenance, repair, replacement, error correction, update, fix, patch, upgrade, renewal, enabling, disabling, removal, and other activities in relation to any hardware, software or other equipment;
- 1.18 **“Evolving Networks”** means Evolving Networks Limited, registered in England and Wales, registered office Nexus House, 7 Commerce Road, Lynch Wood, Peterborough PE2 6LR, company number 6624361; and head office at Datum House, 3 Commerce Road, Lynch Wood Peterborough PE2 6LR;



- 1.19 **“Evolving Networks property”** means the following, excluding any CPE which is sold to you: (a) all Communications Systems; and (b) any equipment or other things produced or provided by us (or any Evolving Networks Supplier) to you to provide the Services or otherwise in connection with a Contract, including any materials, information, data, drawings, specifications, works, and data;
- 1.20 **“Evolving Networks supplier”** means any third party that is a direct or indirect provider, reseller, sub-contractor, operator, or supplier of any Resold Services or any element of the CPE or Communications Systems, including:
- (a) any such person in direct contract with Evolving Networks;
- (b) the ultimate owner, provider, producer, operator; or supplier of any Resold Services or any element of CPE or Communications Systems; (c) any person in any chain of sub-contracts for any Resold Services ending with a contract with Evolving Networks; and (d) any access operator;
- 1.21 **“First activation date”** means in relation to each Order Form Line Item covered by the Order Form, the following date, whichever is the first to occur: (a) the date that the first element of such Order Form Line Item is first Activated, as determined by us; or (b) if we elect to apply this alternative, the date which we reasonably determines that such first element of such Order Form Line Item would have been first Activated, but for any event outside our reasonable control, or but for any act or omission of, or breach of the Contract by, you;
- 1.22 **“Full activation date”** means in relation to all of the On-Going Services, and all Sites, covered by the Order Form, the following date, whichever is the first to occur: (a) the date that the last of all elements of such On-Going Services is Activated, as determined by us; or (b) if we elect to apply this alternative, the date by which we reasonably determine that all elements of such On-Going Services would have been first Activated, but for any event outside our reasonable control, or but for any act or omission of or breach of the Contract by you; or (c) 12 months after the Commencement Date;
- 1.23 **“Force majeure event”** means (a) acts of God; (b) war, threat of war, terrorism, hostilities, riot, civil commotion, blockade, and sabotage; (c) the act of any government or competent regulatory authority governing Evolving Networks, including OFCOM; (d) strikes, lock-outs or other industrial actions of whatever nature (whether involving the workforce of Evolving Networks or any other person); (e) lightning, fire, storm, flood, earthquake, lack of water arising from weather or environmental problems; (f) shortage of or prevention from obtaining in any way labour, parts, materials, fuel, energy or other supplies; (g) breakdown of plant or machinery, failure of power supply or other utility service, failure of transport network, failure of any third party system on which the Services are dependent; (h) malicious damage; (i) any interruption, termination or failure of any Resold Service or default of any Evolving Networks Supplier; (j) any delay or failure by any of its sub-contractors to perform their obligations; and (k) any event or circumstance which is beyond the reasonable control of Evolving Networks;
- 1.24 **“Initial period”** means the initial period which the Contract is to run for, and the Services are to be purchased and paid for by you, as stated in the Order Form, or if not so stated, 24 months. The Initial Period shall apply to the whole Contract, and all On-Going Services under it, except that where a separate initial period is stated for an Order Form Line Item in an Order Form, the Initial Period for that Order Form Line Item only shall be such separately stated initial period;
- 1.25 **“Insolvency event”** means any of the following events that occurs where one of us:
- 1.25.1 becomes the subject of a bankruptcy order;
- 1.25.2 becomes insolvent;
- 1.25.3 makes any arrangement or composition with its creditors, or assignment for the benefit of its creditors;
- 1.25.4 goes into voluntary or compulsory liquidation, except for reconstruction or amalgamation purposes;
- 1.25.5 stops trading or operating;
- 1.25.6 owns any assets that are material to the operations of all or substantially all of its business that are seized or have a receiver or administrator appointed over them;
- 1.25.7 or faces any of these situations because a notice is given, a petition is issued, a resolution is passed, or any other step is taken in their jurisdiction.
- 1.26 **“Intellectual property rights”** means all patents, rights to inventions, utility models, copyright and related rights, trade marks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database right, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications for and renewals or extensions of such rights, and all similar or equivalent rights or forms of protection in any part of the world;
- 1.27 **“Migrate”, “Migration”** and cognate expressions, means the transfer or other migration of any of the On-Going Services away from Evolving Networks to any other communications provider or other person pursuant to Condition 22 of the OFCOM General Conditions (as amended or replaced from time to time). Any reference to a “termination” of a Service (or similar expression) in these Terms of Service shall be construed to also refer to a Migration of the same Service;
- 1.28 **“Migrated service”** means any On-Going Service or part of an On-Going Service which is to be or has been subject to a Migration, with or without the involvement of Evolving Networks;
- 1.29 **“OFCOM”** means the Office of Communications or any successor body to its powers and functions with respect to services of the type covered by the Services;

- 1.30 **"OFCOM general conditions"** means the general conditions (and annotations) set by OFCOM, as modified, replaced or revoked from time to time, under Sections 45 and 48 of the Communications Act 2003;
- 1.31 **"On-going service"** means each Service, other than a one-off implementation, commissioning, or set-up service, which has a duration or continues until terminated by notice;
- 1.32 **"Order form"** means any Order Form you give to Evolving Networks that is accepted by us for a Service;
- 1.33 **"Order form line item"** means: (a) any On-Going Service which is stated in its own line item in an Order Form, or has its own separate Periodical Charge or other stated Charge; or (b) any bundle of On-Going Services which together are stated as a single line item in an Order Form or are together covered by a single combined Quarterly Charge or other stated Charge;
- 1.34 **"Project plan"** means the project plan which we agree with you and which sets out the steps that we will take to set up a Service within specified timescales;
- 1.35 **"Quarter"** means a calendar quarter commencing on 1 January, 1st April, 1st July or 1st October, and "Quarterly" shall be construed accordingly;
- 1.36 **"Resold service"** means all or any part of the Services, or the Communications Systems used to provide the Services, which we directly or indirectly procure from, loan from, license from, resell for, or sub-contract to, a third party;
- 1.37 **"Services"** means the services to be provided by us under a Contract including: (a) any initial set-up services, and Engineering Work; (b) the On-Going Services; (c) any Support and Fault Handling; and (d) the loan or hire of any CPE;
- 1.38 **"Service cancellation notice"** means a written notice to terminate the Services provided under the Contract in the form prescribed by Evolving Networks from time to time;
- 1.39 **"Service Setup Guide"** means the document located here:  
[www.evolving.net.uk/terms-and-conditions](http://www.evolving.net.uk/terms-and-conditions)
- 1.40 **"Service Specific Terms"** means the document located here:  
[www.evolving.net.uk/terms-and-conditions](http://www.evolving.net.uk/terms-and-conditions)
- 1.41 **"Service user"** means any person (other than the Customer) who is to or who in fact does at any time receive, use, resell or consume any of the Services, including: (a) the occupier of any Site; (b) any affiliate of the Customer; and (c) if the Customer is an IT service provider or reseller, any and all subsequent clients, sub-resellers or customers in the resale or contract chain, and including as stated for any Site in the Order Form;
- 1.42 **"Site"** means any Customer site, at which any Connectivity Line to be provided under this Contract (or which is managed by the Services provided under the Contract) terminates or is to terminate;
- 1.43 **"Support and fault handling"** means the support provided by us in connection with your use of the On-Going Services, as described in the Support and Fault Handling Policy;
- 1.44 **"Support and Fault Handling Policy"** means the document located here:  
[www.evolving.net.uk/terms-and-conditions](http://www.evolving.net.uk/terms-and-conditions)
- 1.45 **"Termination charges"** has the meaning given in Condition 10.8;
- 1.46 **"VAT"** means value added tax chargeable under the law of England and Wales for the time being and any similar consumption or sales tax.



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