

Terms of Service

1. Scope of application

emarsys has developed a Web-based email marketing system which it shall provide to the Customer in accordance with this Agreement.

This Agreement will also apply to any other services by which emarsys assists the Customer in using the system for its purposes. The nature and scope of such services as well as the remuneration payable are specified in this Agreement.

2. Product description

(1) emarsys has developed a technically proven, Web-based software application for permission-based email-marketing.

(2) The Customer hereby agrees that emarsys has the right to restrict the scope of supply, including, without limitation, functionality, where changes in legislation make this necessary; in this event, the Customer is entitled to immediately terminate this Agreement without giving the period of notice specified in Subsection 7(2).

(3) For the software to be operated, it is necessary to install a standard Web browser, such as Microsoft Internet Explorer (5.5 or higher), to employ the hardware equipment recommended by the browser vendor, and to have access to the Internet. To ensure adequate performance, a minimum Internet bandwidth of 56 kbit/sec is recommended. It is the duty of the Customer to ensure Internet access of the required type, and the Customer hereby confirms that emarsys is in no way responsible for Customer access to the Internet or for the quality, performance and reliability of such access.

(4) Should enhancements made to the emarsys software require or entail additional software or hardware resources on the part of the Customer in order for the Customer to use the full scope or functionality, then emarsys shall notify the Customer hereof at least four weeks in advance.

3. Data protection and data security

(1) As between the Customer and emarsys, the Customer shall be the Data Controller and emarsys shall be the Data Processor in respect of any personal data provided by the Customer to emarsys ("Relevant Personal Data"). The Customer is responsible for ensuring that any disclosure of Relevant Personal Data by the Customer to emarsys is permissible under applicable law, and that any such data is collected, processed and transferred by the Customer to emarsys in a lawful manner and in compliance with all applicable laws.

(2) emarsys undertakes to use and disclose the Relevant Personal Data only in accordance with this Agreement and such other instructions as the Customer may issue from time to time. The Customer acknowledges that the security measures described in Subsections 3 (3) to 3 (7) below are appropriate, having regard to all the circumstances, including the nature of this Agreement and the kinds of personal data that emarsys may be processing.

(3) Customer data is hosted on emarsys servers within a data container reserved for that Customer, ensuring that other customers and third parties have no access to Customer data.

(4) To ensure data security, emarsys shall employ exclusively state-of-the-art technologies; emarsys shall ensure that security technology is always state-of-the-art both with regard to the further development of information technology generally and of the Internet in particular. Moreover, emarsys will ensure that all and any third-party services are provided only by suitably qualified subcontractors employing state-of-the-art technology.

(5) All emarsys servers reside in a state-of-the-art hosting facility protected by means of firewalls, with full-time operations management staff, redundant functions, back-up power generators, etc. Security guards and security cameras are provided 24 hours a day in order to safeguard the physical security of server rooms. The rooms in which emarsys servers reside are secured and only accessible to authorized personnel for the purposes of maintenance work.

(6) emarsys will monitor systems operation around the clock, and respond promptly to any disruption in operations (see Subsection 3(8)). All Customer data hosted on emarsys servers is backed up every 24 hours, with back-ups being stored at a different location; should there be any loss of data this would, therefore, only affect data which is less than 24 hours old.

(7) The Customer is provided with a user ID and a password by emarsys enabling him to access his data. The Customer acknowledges that the confidentiality of emarsys-hosted data can only be guaranteed if the Customer protects the confidentiality of the access details provided to it. Should these access details be compromised in any way, then the Customer shall inform emarsys of this fact immediately and instruct emarsys to change and/or disable access details, as emarsys otherwise cannot guarantee that the Customer has exclusive access to his data. A VPN or SSL connection can be used to ensure secure data transmission between the Customer's IT equipment and the emarsys servers. Should such a connection require action on the part of the Customer's Internet Service Provider (ISP), then the Customer shall ensure that such action is taken.

(8) In the event of a disruption to operations, emarsys shall begin problem resolution activities:

- (a) within two hours (severity level 1) where such disruption affects components which are essential to the availability of the system or its operability;

- (b) within 24 hours (severity level 2) where the disruption affects availability or operability as described by documentation but where such disruption is not critical to the Customer's work,
after the problem report is logged during normal business hours.
- (9) Customer requests for additional or modified functionality will, wherever possible, be taken into account in the next software release (severity level 3).
- (10) emarsys support can be reached as follows:
by telephone at +44(0) 207 388 0888

The Customer shall be notified without delay of successful problem resolution.

4. Anti-spam precautions and content policies

(1) The Customer shall ensure that its use of emarsys' system does not infringe applicable law. Both with respect to the collection, selection and use of addresses and other recipient data and with respect to the content to be transmitted (text, images, etc.) and hyperlinks to be embedded, the Customer shall be under an obligation to comply in particular with the provisions of data protection, antitrust, criminal and copyright laws, including, without limitation,

- to comply with applicable anti-spam laws,
- not to infringe any third party rights (including without limitation copyright, trade mark rights, patents or other intellectual property rights),
- not to incorporate any racist or extremist content, content that incites racial hatred or violence, is insulting, violates the laws concerning the protection of children and young persons or is otherwise contrary to law .

(2) The Customer must be clearly recognisable as the sender of the emails. Every email sent must contain a clearly recognisable imprint of company details, either as part of the text or accessible through a direct link. The imprint shall state the following information:

- (a) the name of the Customer;
- (b) the geographic address at which the Customer is established;
- (c) the details of the Customer, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;
- (d) where the Customer is registered in a trade or similar register available to the public, details of the register in which the Customer is entered and his registration number, or equivalent means of identification in that register;
- (e) where the provision of the Customer's services is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) where the Customer exercises a regulated profession, (i) the details of any professional body or similar institution with which the Customer is registered; (ii) his professional title and the member State where that title has been granted; and (iii) a reference to the professional rules applicable to the Customer in the member State of establishment and the means to access them; and
- (g) where the Customer is subject to VAT, his VAT number (or equivalent in any other country).

(3) The Customer shall provide a contact name, telephone number and email address for complaints. The response time shall be 24 hours on maximum during the working week.

(4) The Customer shall point out the possibility to revoke the option to receive email in every email message. Every email sent shall refer to this possibility. A recipient must in any event be able to opt out of receiving further emails without knowing any access data (e.g. login and password). Exceptions to this rule may be made in individual cases if a different procedure is required due to special features of the service offered. Opt-out requests must be processed without undue delay.

(5) The Customer shall remove an email address from the mailing list after three hard bounces have been received from it in response to sent emails.

(6) If claims should be asserted against emarsys by third parties for an infringement of Subsections (1) to (5) above, the Customer shall indemnify emarsys against such claims and undertake to bear all costs arising therefrom, including reasonable legal defence against such claims.

(7) Notwithstanding any further reaching rights, emarsys shall be entitled, in the event of unlawful failure by the Customer to comply with any of its obligations under Subsections (1) to (5) above, to block the Customer's user account.

(8) emarsys shall provide support services only upon specific instruction and at the sole responsibility of the Customer. emarsys does not verify or check the content of such support instructions in any manner. emarsys shall consider support instructions of third parties only if the Customer has named such third party as being authorised to do so.

5. Use for reference purposes

emarsys shall be entitled to refer to the Customer's name and logo for reference purposes in its own advertising including (without limitation) its website, exhibition stand, brochures and newsletters. Should such use be subject to special conditions, these shall be notified by the Customer. The Customer's name and/or logo shall be used in press releases to external distribution lists and/or in case studies only with the Customer's consent.

6. Licensing

Limited license of emarsys software

(1) emarsys hereby grants to the Customer the non-exclusive right to use the software provided by emarsys, in object code form only, for the purpose of receiving the Services (and for no other purpose) during the Contract Term. All copyright and other intellectual property rights in such software remain the exclusive property of emarsys, and the Customer shall not sub-license, share or otherwise disclose this software to third parties.

(2) The Customer may make as many back-up copies of the software as may be reasonably necessary for its lawful use PROVIDED that the Customer records the number and location of all such copies, reports such information to emarsys if requested from time to time, and takes all necessary steps to prevent unauthorised copying. Subject to subsection 6(3), if reduction of the software to human readable form (whether by reverse engineering, decompilation or disassembly) is necessary for the purposes of integrating the operation of the software with the operation of other software or systems used by the Customer, then the Customer may undertake such reduction for that purpose but for no other purpose whatsoever.

(3) The permission granted in subsection 6(1) shall not apply where emarsys itself is prepared to carry out such action at a reasonable commercial fee or to provide the information necessary to achieve such integration within a reasonable period. The Customer undertakes to request emarsys to carry out such action or to provide such information at the earliest opportunity, and agrees to meet emarsys' reasonable costs in doing so.

(4) Except as stated in subsections 6(1) to 6(3) above, the Customer has no right (and shall not permit any third party) to use, copy, adapt, reverse engineer, decompile, disassemble, modify, or make error corrections to the software provided by emarsys, in whole or in part.

Limited license of Customer data

(5) The data that reside in the database provided by emarsys remain the exclusive property of the Customer and may only be modified, deleted or supplemented by the Customer. emarsys shall not use this data for its own purposes, or the purposes of any third party, nor shall it sell or trade or disclose this data to third parties.

(6) Following termination of contract, the data shall remain available to the Customer for a period of 30 days, accessible using the access details provided to the Customer, and can be exported by the Customer by means of the module provided using comma separated values format. After the 30 days have elapsed, emarsys shall be entitled to remove the Customer's data from its servers.

7. Term and termination

(1) The Agreement shall come into force on the Contract Commencement Date and (subject to the provisions for earlier termination in the Agreement) shall remain in force for the Initial Period.

(2) On expiry of the Initial Period, the Agreement shall automatically be renewed for the same period as initial period (a "Renewal Period"), unless either party notifies the other in writing that it does not wish to renew the Agreement. Such notice must be received by the non-terminating party at least 3 calendar months before the end of the Initial Period.

(3) On expiry of any Renewal Period, the Agreement shall automatically be renewed for a further Renewal Period, unless either party notifies the other in writing that it does not wish to renew the Agreement. Such notice must be received by the non-terminating party at least 3 calendar months before the end of the then-current Renewal Period.

(4) Either party may terminate the Agreement immediately upon notice in writing to the other party if the other party commits a breach of its obligations under the Agreement and (a) such breach is material and cannot be remedied; or (b) such breach is material and possible to remedy, or is a persistent breach, and in either case that other party fails to remedy such breach within thirty (30) days of having been required in writing to remedy such breach.

(5) Either party may terminate the Agreement immediately upon notice in writing to the other party (the "Defaulting Party") if the Defaulting Party presents a petition or has a bona fide petition presented by a creditor for its winding up, or convenes a meeting to pass a resolution for voluntary winding up, or enters into any liquidation (other than for the purposes of a bona fide reconstruction or amalgamation), or calls a meeting of its creditors, or has a receiver of all or any of its undertakings or assets appointed, or is deemed by virtue of the relevant statutory provisions under the applicable law to be unable to pay its debts; or the Defaulting Party suffers or undergoes any procedure analogous to any of those specified in this Subsection 7(5) under the laws of any jurisdiction.

(6) Notwithstanding any other provision of this Agreement, with effect from the date of termination or expiry of the Agreement, the Customer shall no longer be entitled to use any part of the Software.

8. Remuneration

(1) The Customer shall pay the Charges in accordance with the Agreement, together with VAT at the applicable rate. In relation to Charges shown as one-time fees, emarsys shall invoice the Customer on the Contract Commencement Date. In relation to Charges shown as monthly fees, emarsys shall invoice the Customer for each calendar month in arrears, in accordance with the arrangements set out in Part 2 of Schedule A.

(2) Payment shall be made by the Customer without deduction, withholding or set off. All invoices issued by emarsys in accordance with the Agreement shall be due and payable by the Customer within fourteen 14 Working Days of the invoice date. All payments shall be made by the Customer in pounds sterling by electronic transfer to emarsys' bank account as notified to the Customer by emarsys from time to time, with any applicable charges on such payments being at the Customer's expense.

(3) Without prejudice to any other right or remedy of emarsys, if the Customer fails to make any payment under this Agreement by the due date for payment, then emarsys shall be entitled to charge the Customer, and the Customer shall pay emarsys on demand, interest on the unpaid amount at the rate prescribed by the Late Payment of Commercial Debts (Interest) Act 1998, from the due date for payment until the payment is received in full by emarsys.

9. Liability

(1) Notwithstanding any provision to the contrary, nothing in the Agreement shall limit or exclude emarsys' liability for: death; personal injury; fraud; fraudulent misrepresentation; and any liability which may not be lawfully limited or excluded.

(2) Subject to Subsection (1):

(a) emarsys shall not be liable in any circumstances to the Customer for consequential, special, incidental or indirect losses, or the following losses whether direct, consequential, special, incidental or indirect: loss of profits; loss of revenue; economic loss; loss of business or contracts; loss of anticipated savings or goodwill; or any losses arising from a claim by a third party for any of the preceding categories of loss in this Sub-subsection (a); in each case, whether arising under contract, statute, tort (including without limitation, negligence), or otherwise.

(b) emarsys shall be liable for loss of data and software, and their subsequent restoration, only to the extent that such loss could not have been prevented by proper precautions by the Customer (including, without limitation, one daily backup at least).

(3) Subject to Subsections (1) and (2), the aggregate liability of emarsys for all claims arising under or in connection with the Agreement in respect of physical damage to premises of the Customer or any other tangible property of the Customer shall be limited to the sum of £ 1000.

(4) Subject to Subsections (1), (2) and (3), the aggregate liability of emarsys for all claims arising under or in connection with the Agreement (whether arising under contract, statute, tort (including without limitation negligence) or otherwise) shall be limited to the sums paid by the Customer to emarsys under the Agreement subject a maximum sum of £ 10,000.

(5) The Customer acknowledges that the Charges have been calculated on the basis that emarsys will exclude and limit its liability as set out in the Agreement. The Customer agrees that the limitations and exclusions of liability contained in the Agreement are reasonable in view of the nature and extent of the obligations accepted by each party under the Agreement.

(6) Nothing in this Section 9 shall exclude or restrict the Customer's obligation to pay the Charges.

10. General Provisions

(1) The Agreement and any dispute or claim arising in connection with it shall be governed by the laws of England and Wales and shall be subject to the exclusive jurisdiction of the English Courts to which the Parties irrevocably submit.

(2) If any provision of the Agreement be prohibited by law or judged to be void or unenforceable by a court of competent jurisdiction, that provision shall, to such extent, be severed from this Agreement without prejudice to the validity and enforceability of the remainder of the provision, or of the Agreement generally. Where possible, the parties shall use reasonable endeavours to amend any such provision in such a way that it becomes valid and legal and implements the original intent of the parties as to the matter in question.

(3) The Customer hereby acknowledges and agrees that, where the Customer issues a purchase order to emarsys relating to the subject matter of the Agreement or any other emarsys products or services, these Terms of Service shall prevail over the terms of such purchase order and such purchase order, if accepted by emarsys, shall be accepted for the sole purpose of referencing invoices.

(4) The Customer shall not assign transfer or otherwise dispose of any of its rights or responsibilities under the Agreement without the prior written consent of emarsys.