

## MAM N TERMS AND CONDITIONS

### 1. Definitions and Interpretation

1.1 Except where the context otherwise requires, the following words and expressions will have the following meanings:-

<b>"Achieved Service Levels"</b>	means, in relation to any HOSTING365.IE Service, the percentage of time a HOSTING365.IE Service is actually Available during a calendar month;
<b>"Associated Services"</b>	means any installation, configuration or other services (apart from the HOSTING365.IE Services) to be provided by Hosting365.ie as indicated on the Order Form;
<b>"Available"</b>	in relation to a HOSTING365.IE Service, is as defined in the SLA relevant to that HOSTING365.IE Service and <b>"Availability"</b> will be construed accordingly;
<b>"HOSTING365.IE"</b>	means 365 Hosting Limited;
<b>"HOSTING365.IE Systems"</b>	means all software, hardware, plant, machinery, media, cabling and other equipment used by or on behalf of Hosting365.ie or any Third Party Provider to provide the HOSTING365.IE Services;
<b>"HOSTING365.IE Services"</b>	means the colocation and related services to be supplied to the Customer, as indicated on the Order Form or any Service Order;
<b>"Charges"</b>	means the charges payable by the Customer for the Services in accordance with the terms of this Agreement;
<b>"Customer Products"</b>	means the Customer System and any information and data owned or licensed by the Customer or provided by a third party on the Customer's behalf including, without limitation, any of the Customer's information and data referred to in any Schedule;
<b>"Customer Personal Data"</b>	means any data which identifies a living individual for which the Customer is a Data Controller where "personal data" has the meaning set out in the Data Protection Legislation;
<b>"Customer Premises"</b>	means premises belonging to or in the control of the Customer to which access is required by Hosting365.ie for the purposes of performing its obligations under this Agreement;

<b>"Customer System"</b>	means all software (including source code where necessary), hardware, plant, machinery, media, cabling and other equipment used by or on behalf of the Customer in connection with the HOSTING365.IE Services;
<b>"Confidential Information"</b>	means any and all trade secrets and confidential information of the other Party, including, but not limited to, Software, Charges, information concerning products, potential products, new business ideas, concepts, customers, potential customers, business accounts, financial, pricing or contractual arrangements or other dealings, transactions or affairs, reports, recommendations, advice or tests, notes, drawings or other materials relating to the design of any software, source and program object codes and development plans, whether in writing, in electronic form or otherwise, and whether designated as confidential or not;
<b>"Data Controller"</b>	has the meaning set out in the Data Protection Legislation;
<b>"Data Processor"</b>	has the meaning set out in the Data Protection Legislation;
<b>"Data Protection Legislation"</b>	means the Data Protection Act 1988 and the Data Protection (Amendment) Act 2003;
<b>"Data Subject"</b>	has the meaning set out in the Data Protection Legislation;
<b>"Dispute Resolution Procedure"</b>	means the procedure for the resolution of disputes between the parties set out in Clause 21;
<b>"Documentation"</b>	means any specifications, user guides, technical manuals or other instructions relating to use of the HOSTING365.IE Services and provided by Hosting365.ie and including any amendments to such items made by Hosting365.ie from time to time;
<b>"Effective Date"</b>	means the date upon which Hosting365.ie signs the Order Form indicating its agreement to supply Services to the Customer on the terms contained in this Agreement;
<b>"European Economic Area"</b>	means the member countries of the European Union from time to time together with Norway, Iceland and Liechtenstein;
<b>"Force Majeure"</b>	means any event outside the reasonable control of either Party affecting its ability to perform any of its obligations (other than payment) under the Agreement, including, without limitation, Act of God, fire, flood, lightning, war, revolution, act of terrorism, strikes, lock-outs or other industrial action, whether of the affected Party's own employees or others and any event designated as a 'force majeure' in any Schedule;
<b>"Individual Rights"</b>	means the rights of Data Subjects under the Data Protection Legislation;
<b>"Intellectual Property Rights"</b>	means all patents, copyrights and related rights, moral rights, design rights, trade marks, service marks, rights in databases and other rights of a like nature (whether registered or unregistered) and all applications for such rights as may exist anywhere in the world and including, without limitation, all rights to apply for any of the foregoing rights;
<b>"Order Form"</b>	means a Hosting365.ie order form setting out Services required by the Customer;

"Party"	means a party to this Agreement;
"Processing"	has the meaning set out in the Data Protection Legislation and "Process" and "Processed" will be construed accordingly;
"Products"	means the Services, the Software and any other documentation, code or other materials used, developed and/or supplied by Hosting365.ie to the Customer during the provision of the Services, to include any software licensed to Hosting365.ie for the general purpose of providing the HOSTING365.IE Service;
"Required Service Level"	means, in relation to a HOSTING365.IE Service, the percentage of time that HOSTING365.IE Service is to be Available during a calendar month, to meet the SLA relevant to that HOSTING365.IE Service;
"Service Credit"	means the sums that Hosting365.ie will apply and credit against the Charges in respect of the failure of any HOSTING365.IE Services to meet the Required Service Levels set out in any applicable SLA;
"Service Order"	means an order for additional Services provided by the Customer on a Hosting365.ie Service Order form from time to time;
"Services"	means the HOSTING365.IE Services and Associated Services or any of them as the context requires;
"Software"	means the object code of any software programs supplied to Customer by Hosting365.ie;
"Term"	means the term of this Agreement as set out in Clause 2.1;
"Third-Party Provider"	means a person to whom Hosting365.ie has sub-contracted the supply of any element of the HOSTING365.IE Systems and/or the provision of any Services;
"Unavailable"	<p>in relation to any HOSTING365.IE Service will mean time during which such HOSTING365.IE Service is not Available but will not include:</p> <ul style="list-style-type: none"><li>(a) any time in excess of the Required Service Level;</li><li>(b) time amounting to or greater than 60 consecutive minutes during which such HOSTING365.IE Service is not Available which the Customer fails to report to Hosting365.ie within four (4) Working Days of its occurrence;</li><li>(c) time during which such HOSTING365.IE Service is not Available due to or arising from:<ul style="list-style-type: none"><li>(i) scheduled maintenance of the HOSTING365.IE Systems by Hosting365.ie or any Third Party Provider of which the Customer has received at least twelve (12) hours notice;</li><li>(ii) any use of the Products by any person other than the Customer, whether authorised or not by the Customer;</li><li>(iii) the Customer System and any material or relevant replacements or modifications to the Customer System of which Hosting365.ie has not received seven (7) days prior notice and has approved for the purpose of provision of the HOSTING365.IE Services;</li><li>(iv) scheduled maintenance or upgrades of any or all of the Customer System of which Hosting365.ie has not received at least seven (7) days' prior notice, or unscheduled maintenance of any Customer Products;</li><li>(v) unreasonably denying Hosting365.ie access to the Customer System in order to remedy any</li></ul></li></ul>

- performance which has not met the Required Service Levels;
- (vi) any software, hardware, plant, machinery, media, cabling, telecoms equipment or other equipment not forming part of the HOSTING365.IE Systems;
- (vii) use of the Products for any purpose for which they are not designed;
- (viii) use of the Products other than in accordance with the Documentation and this Agreement;
- (ix) modifications that have been made to the Products by any person other than Hosting365.ie or its licensors; or
- (x) any event of Force Majeure or termination of the Agreement in accordance with Clause 19,

and "**Unavailability**" will be construed accordingly; and

**"Working Day"** means any day excluding weekends and public holidays in Ireland.

1.2 In this Agreement (except where the context otherwise requires):-

- 1.2.1 Clause headings are used for convenience only and will not affect the construction or interpretation of this Agreement;
- 1.2.2 any reference to a Clause is to the relevant clause of this Agreement;
- 1.2.3 any reference to a Schedule is to a schedule of this Agreement;
- 1.2.4 words denoting the singular include the plural and *vice versa*;
- 1.2.5 words importing a gender will include every gender and references to persons include an individual, company, corporation, firm or partnership; and
- 1.2.6 reference to any statute, enactment, order, regulation or other similar instrument will be construed as a reference to it as from time to time amended consolidated or re-enacted and includes all instruments or orders made under such enactment.

## 2. **Term**

2.1 This Agreement will commence on the Effective Date and will continue until terminated in accordance with this Agreement.

2.2 Unless and until terminated in accordance with this Agreement:

- 2.2.1 each HOSTING365.IE Service will be provided for a period of 36 calendar months from the date on which the relevant HOSTING365.IE Service commences, unless otherwise stated on the Service Order Form; and
- 2.2.2 any Associated Service will be provided until completed.
- 2.2.3 each HOSTING365.IE Service will automatically renew for recurring periods of 30 days following the initial term.

## 3. **Associated Service Hours**

3.1 Hosting365.ie will unless otherwise agreed provide Associated Services between the hours of 09:00 to 17:30 on Working Days. Associated Services provided outside of such hours may incur additional charges.

#### 4. **Provision of HOSTING365.IE Services**

4.1 Subject to the Customer's compliance with this Agreement, Hosting365.ie will provide each HOSTING365.IE Service in accordance with the SLA applicable to that HOSTING365.IE Service.

#### 5. **Provision of Associated Services**

5.1 Subject to the Customer's compliance with this Agreement, Hosting365.ie will:

5.1.1 carry out any Associated Service with due care and skill; and

5.1.2 use reasonable endeavours to perform any Associated Service within any applicable timescales (if any) set out in any Schedule.

#### 6. **The Customer's Obligations**

6.1 The Customer will at all times during this Agreement:-

6.1.1 use the Services in accordance with the Documentation;

6.1.2 perform in a timely manner any Customer responsibilities set out in any other Schedule;

6.1.3 work in a co-operative and constructive manner with employees, agents and sub-contractors of Hosting365.ie and such other third parties as Hosting365.ie may require (including, without limitation, any Third-Party Providers) to the extent necessary for the effective provision of the Services;

6.1.4 at the reasonable request of Hosting365.ie, promptly review, sign off, comment on and/or identify any issue which reasonably requires input from the Customer to facilitate the provision of the Services;

6.1.5 give Hosting365.ie at least seven (7) days prior written notice of any scheduled maintenance of the Customer System;

6.1.6 give Hosting365.ie reasonable prior written notice of any intended material or relevant changes to the configuration of or any part of the Customer System;

6.1.7 provide Hosting365.ie with access to all Customer Items in accordance with any time scales set out in any Schedule or otherwise as reasonably required by Hosting365.ie;

6.1.8 provide reasonable access to such of the Customer staff as are familiar with and knowledgeable about the Customer's business processes and systems;

6.1.9 provide access to and use of the Customer's office accommodation and other facilities at the Customer Premises as may be reasonably required to enable Hosting365.ie's employees to provide the Services;

6.1.10 take reasonable steps to ensure the health and safety of Hosting365.ie's employees while they are working at the Customer Premises; and

6.1.11 if notified by Hosting365.ie of any potential delay by Hosting365.ie in the performance of its obligations under this Agreement which is likely to be attributable to the Customer, take reasonable steps to address any issues giving rise to such potential delay.

- 6.2 If Hosting365.ie is delayed in the performance of its obligations under this Agreement as a result of any delay or failure (including unscheduled maintenance of the Customer System) by or action of any party other than Hosting365.ie, its agents or sub-contractors, Hosting365.ie will be given an extension of the time or times in any agreed timescales within which to comply with its obligations under this Agreement. Any such delay will not constitute a default by Hosting365.ie under this Agreement or Unavailability. Any additional work required to be performed by Hosting365.ie as a result of any such delay or failure will be paid for by the Customer. Any such delay lasting more than [ten] (10) Working Days will entitle Hosting365.ie to terminate this Agreement immediately upon written notice.
- 6.3 Where Hosting365.ie requires a licence to access or use any Customer Products, the Customer will grant or procure the grant (as appropriate) to Hosting365.ie of a licence to use such Customer Products as necessary to enable Hosting365.ie to provide the Services.
- 6.4 The Customer will indemnify Hosting365.ie and keep Hosting365.ie indemnified from and against any and all claims made against Hosting365.ie alleging that the use of any of the Customer Products as contemplated by this Agreement violates or infringes any third party's Intellectual Property rights (a "Claim") and such indemnity will include all losses, costs and expenses incurred by Hosting365.ie as a consequence of such Claim.
7. **Payment**
- 7.1 All Charges will be paid in euro and, unless otherwise stated, will be exclusive of value added tax which the Customer will pay in addition to the Charges at the rates in force from time to time.
- 7.2 Charges for HOSTING365.IE Services will be invoiced monthly in advance and will be due within 30 days of invoice date.
- 7.3 Charges for Associated Services will be invoiced monthly in arrears and will be due within 30 days of invoice date.
- 7.4 Charges which are not paid when due will be considered overdue and will remain payable on demand together with interest for late payment from the date due until the date of actual payment (whether before or after any judgement) at the rate of four (4) per cent per annum above the Euro Interbank Offered Rate (EURIBOR) (calculated daily).
- 7.5 Hosting365.ie will be entitled to adjust its rates for any of the Services at any time and will give the Customer thirty (30) calendar days' notice prior to the commencement of any such adjusted rates.
- 7.6 Hosting365.ie will pay any Service Credits due pursuant to this Agreement to the Customer as an adjustment to the Charges. Service Credits in respect of a calendar month (if any) shall be calculated at the end of every calendar month and, for the purposes of payment by Hosting365.ie, shall be applied to the next invoice submitted to the Customer.
- 7.7 Where it is necessary for any of the employees or representatives of Hosting365.ie to visit the Customer Premises or make any other journeys in the course of providing Services, the Customer will reimburse Hosting365.ie for all reasonable and necessary travelling and subsistence expenses properly incurred. Expenses will be invoiced to Customer monthly in arrears.
8. **Intellectual Property Rights**
- 8.1 All Intellectual Property Rights in and to the Products are owned by Hosting365.ie or its licensors (except insofar as they consist of Customer Products) and, except as specifically provided in any other provision of this Agreement, will remain vested in Hosting365.ie or its licensors (as appropriate). The Customer will not acquire any proprietary right, title or interest in or to any Intellectual Property Rights in any element of the Products (except insofar as they consist of Customer Products).
- 8.2 Hosting365.ie hereby grants to the Customer a limited, non-exclusive, non-transferable licence to use the Products (insofar as software is comprised in the Products, the object code only) for the Customer's internal business purposes and not by or on behalf of any third

party. The licence will be automatically terminated on termination of this Agreement unless otherwise specifically agreed pursuant to Clause 17.4.

- 8.3 The Customer will not alter, amend or copy any Products without Hosting365.ie's prior written consent.
- 8.4 The licence is personal to the Customer and may not be transferred, sub-licensed or assigned without Hosting365.ie's prior written consent.
- 8.5 The Customer hereby grants to Hosting365.ie and any Third-Party Provider a limited, non-exclusive licence to use, copy, manipulate, transmit and store the Customer Products only insofar as necessary to enable Hosting365.ie to provide the Services. Such licence will not be transferable by Hosting365.ie, will give Hosting365.ie no right to grant any sub-licences and will be automatically terminated on termination of this Agreement.

## 9. Intellectual Property Rights Indemnity

- 9.1 Subject to the limitations set out in Clause 15, Hosting365.ie will indemnify the Customer and keep the Customer indemnified from and against any and all claims made against the Customer alleging that the use (as contemplated by this Agreement) of any of the Products violates or infringes the Intellectual Property Rights (not including any patent rights) of a third party (a "**Claim**") and such indemnity will include all losses, costs and expenses incurred by the Customer as a consequence of such Claim.
- 9.2 Immediately upon becoming aware of anything which might give rise to any liability on Hosting365.ie to indemnify the Customer under Clause 9.1, the Customer will give written notice of the Claim to Hosting365.ie and Hosting365.ie will assume the control and conduct of the defence and settlement of the Claim. The Customer will give such assistance as may reasonably be required by Hosting365.ie in the defence or settlement of the Claim.
- 9.3 At Hosting365.ie's option and if so requested by the Customer in writing, Hosting365.ie may grant sole control of the defence or settlement of the Claim to the Customer.
- 9.4 In the event that any Claim is raised or in the reasonable opinion of Hosting365.ie is likely to be raised, Hosting365.ie, at its own expense, will have the option of:-
  - 9.4.1 procuring for the Customer the right to continue to use the Products free from infringement or allegations of infringement; or
  - 9.4.2 modifying or replacing the infringing part of the Products; orif, having used all reasonable efforts Hosting365.ie is unable to procure a licence pursuant to Clause 9.4.1 and/or modify or replace the infringing part pursuant to Clause 9.4.2, Hosting365.ie will be entitled to terminate this Agreement.

## 10. Alterations or Additions to the Services

### 10.1 Additional Services

- 10.1.1 The Customer may at any time request any additional Service by completing and forwarding a Service Order to Hosting365.ie.
- 10.1.2 On receipt of a completed Service Order, Hosting365.ie will notify the Customer as soon as reasonably possible whether it does or does not accept the Service Order.
- 10.1.3 If Hosting365.ie accepts a Service Order, it will form part of this Agreement. All additional Services are subject to the terms and conditions of this Agreement.

### 10.2 Alterations to a Service

- 10.2.1 Either party may, at any time, request in writing any changes to any Service.

- 10.2.2 Hosting365.ie will, as soon as reasonably possible, advise the Customer of the estimated effects the proposed change will have on the provision of the Service, including any revised service levels and charges.
- 10.2.3 Any changes to a Service which are agreed between the parties will be recorded in writing and once signed by authorised signatories of both parties will form part of this Agreement.
- 10.3 Hosting365.ie will have no obligation to commence work in connection with any change to the Services, and the Customer will have no obligation to make any payment in respect of any change to a Service, until the relevant change has been fully agreed, recorded in writing and signed by the authorised signatories of each of the parties.
- 11. Non-solicitation**
- 11.1 Each Party hereby undertakes that it will not at any time while this Agreement is in force and until the expiry of twelve (12) calendar months after the date of termination of this Agreement, directly or by its agent or otherwise and whether for itself or for the benefit of any other Party, employ, solicit or endeavour to entice away from or discourage from being employed by the other Party any person who is, or will have been during the period between the Effective Date and the date of termination of this Agreement, an employee of that Party.
- 11.2 Clause 11.1 will not apply to restrict either Party from employing (or offering to employ) any of the officers or employees of the other Party who have responded (without solicitation) to general recruitment advertising issued by or on behalf of that Party.
- 12. Confidentiality**
- 12.1 Each Party acknowledges that, for the purposes of this Agreement, it may receive Confidential Information belonging or relating to the other (the “disclosing Party”) and undertakes not to divulge such Confidential Information to any of its employees, agents and permitted sub-contractors who do not need to know it and to prevent its disclosure to or access by any third Party without the prior written consent of the disclosing Party.
- 12.2 Each Party will comply promptly with any and all reasonable instructions given by the disclosing Party from time to time in connection with the use of all or any of the Confidential Information of the disclosing Party.
- 12.3 Neither Party will be permitted, without the prior written consent of the other Party, to disclose the terms of this Agreement to any third Party (other than that Party’s legal or other professional advisers).
- 12.4 The provisions in this Clause 12 in respect of Confidential Information will not apply to the whole or any part of the Confidential Information to the extent that it is already in the other Party’s possession prior to its disclosure by the disclosing Party or is in the public domain other than as a result of a breach of this Clause 12 or which the other Party is required to disclose by reason of a statutory or regulatory requirement having the force of law, or by reason of an order of a court of competent jurisdiction.
- 12.5 The obligations of confidentiality under this Clause 12 will survive the termination of this Agreement until such time as the Confidential Information enters the public domain otherwise than through the fault of the receiving Party.
- 12.6 Neither Party will acquire any right in, or title to, any Confidential Information belonging to the other Party.
- 12.7 Each Party will apply no lesser security measures and degree of care in relation to the Confidential Information than those which the receiving Party applies to its own confidential information and which the receiving Party warrants as providing adequate protection of such Confidential Information from unauthorised disclosure, copying or use.
- 12.8 Neither Party will process, use or reproduce any Confidential Information belonging to the other Party in whole or in part in any form except as may be required by this Agreement.

- 12.9 Each Party will use all reasonable endeavours to maintain the security, in accordance with the directions of the other, any copies of Confidential Information provided to it by the disclosing Party.
13. **Data Protection**
- 13.1 The parties acknowledge that, for the purposes of this Agreement, Hosting365.ie acts as a Data Processor and the Customer acts as a Data Controller in respect of any Customer Personal Data Processed by Hosting365.ie in connection with this Agreement.
- 13.2 The Customer hereby appoints Hosting365.ie as a Data Processor in relation to the Customer Personal Data. The Customer further appoints Hosting365.ie as an agent of the Customer to appoint sub-Data Processors in order to Process the Customer Personal Data, provided that Hosting365.ie appoints such sub-data processors on terms equivalent to this Clause 13.
- 13.3 The instructions given by the Customer in respect of the Customer Personal Data will at all times be in accordance with the Data Protection Legislation and the Customer will indemnify Hosting365.ie against any claim arising as a result of the Customer failing to comply with the Data Protection Legislation.
- 13.4 Hosting365.ie agrees that:-
- 13.4.1 it will only Process Customer Personal Data as instructed by or agreed with the Customer from time to time;
  - 13.4.2 it has appropriate operational and technological processes and procedures in place to safeguard against any unauthorised access, loss, destruction, theft, use or disclosure of the Customer Personal Data;
  - 13.4.3 it will ensure that only such of its employees and sub-contractors who may be required by Hosting365.ie to assist it in meeting its obligations under this Agreement will have access to the Customer Personal Data;
  - 13.4.4 it will promptly assist the Customer with all notices, requests or other enquiries relating to the Individual Rights which may be received by the Customer or Hosting365.ie;
  - 13.4.5 it will not use any Customer Personal Data for any purposes which may be inconsistent with those notified to the Data Subject on or before the time of collection (provided that Hosting365.ie has been made aware of such purposes);
  - 13.4.6 it will not disclose any Customer Personal Data to a third Party except at the specific request of the Customer or where obliged to do so under any statutory requirement (in which case it will use reasonable endeavours to advise the Customer in advance of such disclosure and in any event immediately thereafter);
  - 13.4.7 it will not transfer or Process any Customer Personal Data outside of the European Economic Area without the prior written consent of the Customer;
  - 13.4.8 it has full legal authority to enter into this Agreement and commit to the data protection obligations in this Clause 13.
- 13.5 Where any notice, request or other enquiry relating to the Individual Rights which concerns Customer Personal Data is received by Hosting365.ie it will forward such notice, request or other enquiry to the Customer within five (5) Working Days of receipt by Hosting365.ie.
- 13.6 On termination of this Agreement, howsoever caused, Hosting365.ie will immediately cease Processing the Customer Personal Data and, at the Customer's option or direction, arrange for the prompt and safe return and/or destruction of all Customer Personal Data together with all copies in its possession or control and, where requested by the Customer, certify that such destruction has taken place.
- 13.7 If Hosting365.ie sub-contracts all or any of its obligations under this Agreement to any third Party, Hosting365.ie undertakes to the Customer not to disclose any Customer Personal

Data to such sub-contractor unless and until such sub-contractor has entered into an agreement with Hosting365.ie in substantially the same terms as this Clause 13.

## 14. Warranties

14.1 Subject to the Customer's use of the HOSTING365.IE Services in accordance with the terms of this Agreement, Hosting365.ie warrants that:

14.1.1 each HOSTING365.IE Service will be provided with due skill and care and will comply in all material respects with the SLA applicable to that HOSTING365.IE Service; and

14.1.2 the HOSTING365.IE Services will comply in all material respects with the Documentation.

14.2 In the event of any breach by Hosting365.ie of the warranties set out at Clause 14.1 in respect of any HOSTING365.IE Service, the Customer's sole remedy will be entitlement to Service Credits as set out in the Service Level Agreement applicable to the relevant HOSTING365.IE Service.

14.3 Notwithstanding the warranties given in Clause 14.1, Hosting365.ie does not warrant that any Software or Service will run uninterrupted or error-free.

14.4 The Customer warrants that it has obtained all licences, authorisations and consents necessary to enable Hosting365.ie to use any Customer Products.

14.5 Aside from the warranties in this Clause 14 and any other warranties expressly set out in this Agreement, neither party makes any other express warranties, representations, undertakings or conditions (statutory or otherwise) and all other warranties, representations, undertakings and conditions (statutory or otherwise), including implied warranties as to satisfactory quality or fitness for a particular purpose, are hereby excluded to the maximum extent permitted by law.

## 15. Limits of Liability

15.1 Neither Party will have any liability to the other for any claim to the extent that the same is or can be characterised as a claim arising from or for any consequential, indirect or special losses or damage, injury to reputation, loss of profits, data, business revenue, business opportunity, goodwill, or anticipated savings, or losses suffered by third parties regardless of the form of action, whether in contract, strict liability or tort (including negligence), and regardless of whether the first named Party knew or had reason to know of the possibility of the loss, injury, or damage in question.

15.2 Hosting365.ie will not be liable to the Customer under Clauses 9.1 to 9.4 or for any loss or damage arising where there has been:

15.2.1 any use of the Products by any person other than the Customer;

15.2.2 use of the Products for any purpose for which they are not designed;

15.2.3 use of the Products other than in accordance with the Documentation and this Agreement;

15.2.4 modifications that have been made to the Products by any person other than Hosting365.ie or its licensors

15.2.5 any event of Force Majeure or termination of the Agreement in accordance with Clause 18;

15.3 If in any calendar month, Service Credits are payable and paid to the Customer by Hosting365.ie because an Achieved Service Level is lower than the Agreed Service Level,

then the right to those Service Credits will be the Customer's only remedy in respect of Hosting365.ie's failure to achieve that Required Service Level in that calendar month.

15.4 Hosting365.ie's aggregate liability to the Customer in respect of loss of, or damage to, real and personal property caused:

15.4.1 by reason of any breach by Hosting365.ie of the terms of this Agreement; or

15.4.2 by Hosting365.ie (or any officer, employee, sub-contractor or agent of Hosting365.ie in connection with the performance or purported performance of Hosting365.ie's obligations under this Agreement

will be limited to and will in no circumstances whatsoever exceed the limitations as set out in the SLA's for each event or connected series of events.

15.5 Without prejudice to, but notwithstanding, Clauses 15.1 to 15.4 Hosting365.ie's aggregate liability in respect of any indemnities and all causes of action arising out of or in connection with this Agreement (whether for breach of contract, in negligence or any other tort, under statute or howsoever arising) in any period of 12 calendar months (commencing with the calendar month in which the first day of the Term occurs or any anniversary of that day) will be limited to a sum equal to all Charges paid by the Customer to Hosting365.ie during such 12 month period for the HOSTING365.IE Services in relation to which such causes of action arise.

15.6 Nothing contained in this Agreement will exclude or limit either Party's liability to the other for fraud or fraudulent misrepresentation or for death or personal injury resulting from any act, omission or negligence of that Party or its officers, agents, employees or sub-contractors, or any other liability the exclusion of which is expressly prohibited by statute.

## 16. Termination and Suspension of Services

16.1 In addition to any other rights of termination contained in this Agreement<sup>i</sup>, the Customer may terminate this Agreement:-

16.1.1 if entitled to in accordance with Clause 18; or

16.1.2 immediately by giving written notice if Hosting365.ie commits any material breach of any provision of this Agreement and fails to remedy the breach (if capable of remedy) within ten (10) Working Days (or any other remedy period set out in an applicable SLA) of service upon Hosting365.ie's receipt of a written notice specifying the breach and requiring it to be remedied; or

16.1.3 immediately on giving written notice if Hosting365.ie ceases trading, makes a voluntary arrangement with its creditors or becomes apparently insolvent or has a petition presented for its winding up, or calls a meeting to propose its winding up, or has a liquidator, receiver or examiner appointed over all or any of its assets other than for the purposes of a solvent amalgamation or reconstruction.

16.2 In addition to any other rights of termination contained in this Agreement, if the Customer:

16.2.1 commits any material breach of any provision of this Agreement and fails to remedy the breach (if capable of remedy) within ten (10) Working Days of service upon the Customer of a notice specifying the breach and requiring it to be remedied; or

16.2.2 (being a company) ceases trading, makes a voluntary arrangement with its creditors or becomes apparently insolvent or has a petition presented for its winding up, or calls a meeting to propose its winding up, or has a liquidator, receiver or examiner appointed over all or any of its assets other than for the purposes of a solvent amalgamation or; or

16.2.3 (being an individual or, where it is a firm or partnership, any of its partners or members) has a petition presented for his or her bankruptcy; or

- 16.2.4 (being a firm or partnership) proposes or has presented against it a petition for its dissolution,
- 16.2.5 fails to pay Charges when due in accordance with the terms of this Agreement; or
- 16.2.6 breaches any of the terms of this Agreement in respect of confidentiality or warranties,

Hosting365.ie may, at its option and without liability to the Customer:

- (i) suspend performance of any of the Services and/or the licence of the Software until the breach is remedied; or
- (ii) terminate the Agreement or the provision of any or all of the Services.

16.3 For the purposes of Clauses 16.1.1 and 16.2.1, a breach will be capable of remedy if the Party in breach can comply with the provisions in question in all respects other than as to the time for performance.

## 17. **Effects of Termination**

17.1 Any termination of this Agreement will be without prejudice to any other rights or remedies of either Party under this Agreement or at law and will not affect any accrued rights or liabilities of either Party at the date of termination nor will termination affect any rights or obligations of the parties which are to be observed or performed after such termination including without limitation those obligations of confidentiality and warranties as set out in this Agreement.

17.2 Upon termination of this Agreement for whatever reason:

17.2.1 all Charges and other amounts incurred up to and including the date of termination will become immediately payable by the Customer to Hosting365.ie; and

17.2.2 all Service Credits due from Hosting365.ie to the Customer up to and including the date of termination will become immediately payable by Hosting365.ie to the Customer.

17.3 Within five (5) Working Days after the date of termination of this Agreement, for whatever reason, each of the parties will deliver up to the other all property of whatever nature including, but not limited to, Confidential Information belonging to the other Party which may be in its possession or under its control at the date of termination including any copies and the Customer hereby irrevocably authorises Hosting365.ie to enter into the Customer's premises at such time or times Hosting365.ie will require, to enable it to retrieve any Hosting365.ie property and equipment located there. The Customer will provide all reasonable assistance to Hosting365.ie to facilitate the removal of any such Hosting365.ie property and Equipment.

17.4 Upon termination of this Agreement or of any HOSTING365.IE Service for whatever reason, Hosting365.ie will, for a period no longer than thirty (30) days from such termination, permit the Customer access (in accordance with Hosting365.ie's reasonable requirements) to Customer data held in the HOSTING365.IE System in order for the Customer to obtain and/or transfer such data. The Customer will pay Hosting365.ie reasonable charges for any time spent by Hosting365.ie in facilitating the Customer in this respect.

17.5 The provisions of Clauses 11, 12, 15 and 17.4 will continue to apply notwithstanding termination of this Agreement.

## 18. **Force Majeure**

18.1 Notwithstanding anything else contained in this Agreement, neither Party will be liable for any delay or failure in performing its obligations under this Agreement if such delay or failure is caused by an event of Force Majeure.

- 18.2 Subject to the Party so delaying promptly notifying the other Party in writing of the reasons for the delay or failure (and the likely duration of a delay) the performance of such Party's obligations will be suspended during the period for which the circumstances of Force Majeure persist and such Party will be granted an extension of time for performance of its obligations under this Agreement equal to the period of the delay. Save for delays caused by the acts or omissions of the other Party (in which event the rights and liabilities of the parties will be those conferred and imposed by the other terms of this Agreement and by law) any cost arising from such delay will be borne by the Party incurring the same.
- 18.3 If any delay arising from a Force Majeure event continues for more than thirty (30) days, either Party may terminate the affected Service or this Agreement immediately without resulting liability on giving written notice to the other Party.
19. **Announcements and Publicity**
- 19.1 Hosting365.ie may, subject to such reasonable conditions as the Customer may indicate, use the Customer's name as a reference or in any advertising or promotional materials relating to the business of Hosting365.ie.
20. **Set Off**
- 20.1 The Parties may set off any amount owing by one party against any amount owing by the other Party.
21. **Dispute Resolution Procedure**
- 21.1 Any dispute or difference arising out of or in connection with this Agreement will in the first instance be referred to representatives of the Customer and of Hosting365.ie whom each has nominated for this purpose for discussion and resolution as soon as reasonably possible and, in any event, within five (5) Working Days of such referral. If the matter is not resolved at this meeting, either of the parties may refer the matter in dispute to the management representatives of each Party nominated for this purpose and each Party will procure that its representative will meet with the other within the period of five (5) Working Days from the date on which the matter is so referred to attempt, in good faith, to resolve the disagreement.
- 21.2 If a dispute arises out of or in connection with this Agreement which cannot be resolved in accordance with Clause 21.2, the parties will in good faith attempt to resolve the matter by instigating and carrying out a method of alternative dispute resolution as may be recommended by the Irish Branch of the Chartered Institute of Arbitrators. Each Party will bear its own costs and expenses incurred in these proceedings unless otherwise agreed as part of any settlement arrived at as a result of the chosen dispute resolution proceedings.
- 21.3 If the parties fail to agree the terms of any settlement pursuant to Clause 21.2 within thirty (30) Working Days of the commencement of the alternative dispute resolution procedure carried out in accordance with Clause 21.2, either Party will have the option of commencing litigation in the courts. The commencement of the alternative dispute procedure is defined as the commencement of the first meeting relating to the alternative dispute resolution with the Irish Branch of the Chartered Institute of Arbitrators.
- 21.4 If the unresolved matter is having a serious effect on compliance with this Agreement, the parties will use reasonable endeavours to reduce the elapsed time in completing the process. Neither Party may initiate any legal action until the process has been completed, unless such Party has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have.
- 21.5 The foregoing provisions of this Clause 21 will not prevent either Party from applying at any time to the court for interim or injunctive relief on the grounds of breach, or threatened breach, of the other Party's obligations of confidentiality contained in this Agreement or infringement, or threatened infringement, of the applicant's Intellectual Property Rights.
22. **Entire Agreement and Variations**
- 22.1 This Agreement together with the documents referred to in it constitutes the entire agreement and understanding between the parties in relation to the subject matter of this Agreement

and supersedes all previous agreements, negotiations, representations and undertakings between the parties relating to the subject matter of this Agreement notwithstanding the terms of any previous agreement or arrangement expressed to survive termination.

22.2 Each of the parties acknowledges and agrees that in entering into this Agreement, and the documents referred to in it, it does not rely on, and will have no remedy in respect of, any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether Party to this Agreement or not) other than as expressly set out in this Agreement as a warranty. The only remedy available to it for breach of the warranties will be for breach of contract under the terms of this Agreement.

22.3 No variation of these terms and conditions will be valid unless made or confirmed in writing by authorised signatories of both parties.

22.4 In the event of any conflict between these terms and any terms set out in the special terms and conditions indicated on the Order Form as applying to this Agreement, the special terms and conditions will prevail.

## 23. **Severability**

23.1 If any provision of this Agreement will be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity, illegality or unenforceability will not prejudice the other provisions of this Agreement which will remain in full force and effect.

23.2 If any provision of this Agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question will apply with such modification as may be necessary to make it valid.

## 24. **Waiver**

24.1 Any failure to exercise or any delay in exercising a right or remedy provided by this Agreement or at law will not constitute a waiver of the right or remedy or a waiver of any other rights or remedies. A waiver of a breach of any of the terms of this Agreement or of a default under this Agreement will not constitute a waiver of any other breach or default and will not affect the other terms of this Agreement.

## 25. **Relationship of the Parties**

25.1 The relationship between the parties is that of purchaser and independent contractor. Neither Party is agent for or employee of the other, and neither Party has any authority to make any contract, whether expressly or by implication, in the name of the other Party, without that Party's prior written consent.

## 26. **Assignment and Sub-contracting**

26.1 Hosting365.ie will be entitled to assign any of its rights and obligations set out in this Agreement and the Customer undertakes to execute (at Hosting365.ie's cost) such documents necessary to effect such assignment.

26.2 Hosting365.ie may sub-contract the performance of any of its obligations under this Agreement.

26.3 This Agreement is personal to the Customer, who may not without Hosting365.ie's prior written consent, assign, transfer or dispose of any of its rights, or sub-contract or otherwise delegate any of its obligations, arising in relation to this Agreement.

## 27. **Suitability of Services**

27.1 The Customer acknowledges that it is the Customer's obligation to determine whether the Services are fit for the purposes for which the Customer has ordered them, regardless of whether the Customer has expressed such purpose to Hosting365.ie or whether Hosting365.ie could reasonably have been aware of such purpose.

## 28. **Notices**

28.1 All notices to be given under this Agreement will be in writing and may be given personally or by recorded delivery post, fax or e-mail. Notices given personally or by post will be delivered to the address of the Party in question as specified on the Order Form or as may be notified to the other Party from time to time in writing.

28.2 Any notice will be deemed to have been received:-

28.2.1 if delivered personally, at the time of delivery;

28.2.2 if posted by recorded delivery, on the expiry of forty eight (48) hours after posting;

28.2.3 if sent by fax, twelve (12) hours after the time of transmission provided that a fax confirmation is received; and

28.2.4 in the case of e-mail, at the time that the e-mail enters an information system of the intended recipient provided that no error message indicating failure to deliver has been received by the sender and provided further that within twenty four (24) hours of transmission a hard copy of the e-mail is sent by post to the intended recipient.

28.3 Service of any legal proceedings concerning or arising out of this Agreement will be effected by causing them to be addressed to the receiving Party's Company Secretary (or such other Party employee or agent notified from time to time in writing) and served at the receiving Party's registered office (if it is a registered company), or its principal place of business (if it is not a registered company), or to such other address as may have from time to time been notified in writing by the receiving Party for this purpose.

## 29. **Governing Law and Jurisdiction**

29.1 This Agreement is governed by and interpreted in accordance with Irish law.

29.2 Subject to Clause 21, the parties hereby submit to the non-exclusive jurisdiction of the Irish courts.

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