

## 1. DEFINITIONS AND INTERPRETATION

### Defined Terms

1.1 Unless the context requires otherwise, the following phrases shall have the following meanings in this Agreement:

**“Bulk SMS Service”** means the Service Messages sent in bulk by the Client to Customers using the Platform.

**“Commercial Schedule”** means Schedule 1 to the Agreement.

**“Code of Practice”** means any and all codes of practice, rules of procedure, standards (including without limitation any voluntary codes of practice, any standards laid down by the Open Mobile Alliance and any amendments made to such standards), guidelines, directions, policies, and other requirements (including without limitation any of the above issued by ComReg whether existing now or in the future, and whether relating to Short Messages or Multimedia Messages or both) and shall include (without limitation) all decisions, adjudications, orders made under any of them which apply or relate to the Bulk SMS Service.

**“ComReg”** is the statutory body responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector in Ireland.

**“Customer”** means a person who has agreed with the Client, that they consent to receiving Service Messages sent on behalf of the Client.

**“Data Protection Legislation”** means all applicable data protection and privacy legislation in force from time to time in Ireland including the General Data Protection Regulation ((EU) 2016/679); the Data Protection Acts 1988, 2003 and 2018; the European Communities (Electronic Communications Networks & Services)(Privacy & Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011); any other European Union legislation relating to personal data and all other legislation and regulatory requirements in force from time to time which apply to a Party relating to the use of Personal Data (including, without limitation, the privacy of electronic communications).

**“Effective Date”** means the latest date of signature of this Agreement by the Customer.

**“Emergency”** means a situation posing an immediate risk to health, life, property, or environment.

**“Emergency Services”** means organizations which ensure public safety and health by addressing different types of Emergency.

**“Fees”** means the several tariffs set out in Schedule 1 payable by Customers for Service Messages.

**“Force Majeure”** has the meaning given in Clause 11.

**“Free Text Service”** means a service offering of 3ROI whereby the Client can avail of Platform to enable Customers to send SMS messages to the Client free of charge to the sender.

**“Informational Paper”** means the Informational Paper for service providers in setting up Bulk SMS connections over SMPP, the latest version of which has been provided to the Client and which may be revised from time to time by 3ROI in accordance with clause 2.3 to take account of changes in the protocol or specifications for Service Messages.

**“Intellectual Property Rights”** means patent rights, registered and unregistered design rights, copyrights including rights in computer software, extraction rights in relation to databases, rights relating to software, rights relating to registered and unregistered trademarks or service marks or logos, jingles, get-up, livery, trade names; domain names, applications or rights to apply for any of the foregoing, any similar rights to any of the foregoing anywhere in the world, and rights of confidentiality in information of any kind.

**“month”** means calendar month.

**“Multiple Request”** means a request from a Customer (capable of Validation as originating from such Customer) to the Client to prompt a certain (or indefinite) number of Service Messages to be sent to such Customer’s mobile phone at predetermined intervals, or upon the occurrence of predetermined events.

**“Network”** means the mobile telephone network in Ireland operated by 3ROI.

**“Platform”** means the service offering provided by 3ROI whereby the Client can avail of the facility of volume short message peer to peer protocol connection (SMPP) over a direct TCP/IP connection from the Client’s computer application to 3ROI’s SMSC via either a Frame Relay Link or Internet VPN (IPSEC) Connection, backed up by an ISDN dial-up line.

**“Pricing Guide”** 3ROI’s price list for SMPP partners as amended from time to time as set out at Section 1 of the Fees.

**“Regulations”** means such regulations as may be passed by ComReg from time to time regulating the use, registration, management or supply of Bulk SMS Services in any way.

**“Service Level Agreement”** means the service level agreement which may be set out at Schedule 2.

**“Service Message”** means an A2P SMS message sent from a web application to a mobile subscriber.

**“Service Request”** means a Single Request or a Multiple Request.

**“Single Request”** means a request from a Customer (capable of Validation as originating from such

Customer) to the Client to prompt a single Service Message to be sent to such Customer's mobile phone.

**"SMPP Connection"** means a Short Message Peer to Peer Protocol (SMPP) connection which gives the Client the possibility to send and receive SMS messages at a greater volume than mobile originated to mobile terminated messages. This is achieved over a direct TCP/IP connection from the Client's computer application to the 3ROI SMS-C via either a frame relay link, an Internet VPN (IPSEC) Connection or an ISDN dial-up line;

**"SMS Application"** means a software application that:

- a) conforms with the requirements of the Platform;
- b) conforms with the specifications and protocol set out in the Informational Paper;
- and
- c) enables the Client to perform appropriate Validation on Service Requests.

**"Subcontractors"** means any third party used by the Client in the provision of Bulk SMS Services to Customers.

**"Territory"** means the Republic of Ireland (excluding Northern Ireland).

**"3ROI Mobile Numbers"** means an Irish mobile number composed of 10 digits and which format is 08x(xxxxxxx).

**"Unbillable Customer"** means a Customer who is not a Billable Customer.

**"Validation"** means a process by which the Client can prove that a Service Request originated from the Customer to whom the relevant Service Messages are to be sent.

**"Working Day"** means a working day in the Territory excluding Saturdays, Sundays and Bank or Public Holidays.

1.2 Words in the singular shall be held to include the plural and vice versa, and words of one gender shall be held to include the other genders as the context requires. The terms "hereof," "herein," and "herewith" and words of similar import shall, unless otherwise stated, be construed to refer to this Agreement as a whole (including the Schedule hereto) and not to any particular provision of this Agreement.

1.3 Any reference in this Agreement to 'writing' or cognate expressions includes a reference to facsimile transmission or comparable means of communication.

1.4 The headings in this Agreement are for convenience of reference only and shall not affect its interpretation. References to Recitals, Clauses and Schedule are references to Recitals and Clauses of

and Schedule to this Agreement.

1.5 Any Schedule to this Agreement are and shall be construed as integral parts hereof and references to this Agreement shall be deemed to include references to the Schedule hereto.

1.6 Any reference to a Clause or Schedule shall, unless clearly expressed to the contrary, be a reference to a Clause or Schedule of this Agreement.

## **2. BULK SMS SERVICES**

### **Use of appropriate Equipment and Protocols**

2.1 The Client shall connect to the 3ROI SMSC infrastructure in accordance with the Informational Paper.

2.2 The Client shall be entitled to use any SMS Application to communicate with the Network in connection with the Bulk SMS Services. Only Service Messages that follow the protocol and specifications laid out in the Informational Paper will generate charges from Billable Customers. The Client is solely responsible for ensuring its SMS Applications and all Service Messages follow this protocol accurately. Notwithstanding 3ROI's other rights, breach of this Clause by the Client will entitle 3ROI, acting reasonably, to suspend all the Platform which enables the Bulk SMS Services run by the Client under this Agreement provided that Client fails to remedy such breach within ten (10) days of receipt of a written notice sent by 3ROI giving the full particulars of such breach and requesting that it be remedied. If Client fails to remedy such breach within the timeframe set forth above 3ROI shall have the right to suspend immediately the Platform provided to the Client under this Agreement until such time as the relevant breach has been remedied.

2.3 3ROI may from time to time, on notice in writing to the Client, update or amend the Informational Paper to take account of changes in the specifications or protocol for Service Messages. 3ROI shall provide as much notice as is reasonably possible in the event that there is a change required in the specifications or protocol for Service Messages and in the Informational Paper. 3ROI shall provide support reasonably required by the Client in the event of a change in the specifications or protocol and in the Informational Paper. Any such change will be subject to Client's prior review and approval.

### **Use of the Platform**

2.4 While 3ROI will use reasonable efforts to make the Platform continuously available, due to the nature of mobile telecommunications, it is impossible to provide a fault-free service. 3ROI is not liable to the Client (or to the Client's clients) for any direct, indirect, special, incidental or

consequential loss (including loss of profit) (whether or not foreseeable) suffered as a result of the Platform not being operational, or for any failure, delay, suspension, restriction or interruption of the Platform due to factors outside 3ROI's reasonable control. Notwithstanding anything else in the Agreement the provision of the Platform by 3ROI to the Client shall be subject to the criteria set out in the Service Level Agreement (if applicable).

2.5 Unless otherwise agreed in writing to protect the integrity of the network the maximum number of SMS messages which can be sent by the Client in one hour using the Volume SMS Service is 7,200.

2.6 To use the Bulk SMS Service the Client must establish a leased line or IP connection into the SMSC in the Network.

2.7 3ROI can at any time throttle back the capacity on the SMPP Connection to protect the integrity of the Network.

2.8 The Client acknowledges that Fees charged to the Client for the transmission of SMS messages which at any stage of their transmission are sent to or via a third party telecommunications network, may not be in accordance with the Fees prescribed by this Agreement. The Client agrees to pay any such undisputed charges to 3ROI in accordance with any invoice raised with respect thereto. In the event that the Client wishes to query any Fees charged pursuant to this paragraph 2.8, then the Client shall submit its written query to 3ROI within seven (7) days of receipt of the relevant invoice. 3ROI shall present to the Client evidence of the Fees required to be paid to the relevant third party network operator which are subject of the Client's written query. Following presentation of such evidence, the Client shall pay the relevant invoice in accordance with Schedule 1. However, in the event that Client reasonably disputes an invoice, the Client may withhold the payment for the that portion of the invoice which relates to disputed charges, and the Parties agree to seek in good faith to resolve any dispute arising out of this Agreement before commencing any arbitration or court proceedings in accordance with the provisions set forth in the Agreement.

#### **Matters relating to the sending of Services Messages**

2.9 The Client shall not provide any services to Customers which would have the effect of placing 3ROI in breach of the Regulations and/or any other laws, rules and regulations applicable to the Bulk SMS Services. Notwithstanding 3ROI's other rights, breach of this Clause by the Client will entitle 3ROI to suspend the Platform provided to the Client under this Agreement provided that Client fails to remedy such breach within ten (10) days of receipt of a written notice sent by 3ROI giving the full

particulars of such breach and requesting that it be remedied. If Client fails to remedy such breach within the timeframe set forth above 3ROI shall have the right to suspend immediately all the Platform provided to the Client under this Agreement until such time as the relevant breach has been remedied.

#### **Fair Treatment of Customers**

2.10 The Client shall be responsible for ensuring that adequate support (for instance, the provision of a telephone support help line relevant to the Bulk SMS Services to be operational during business hours) is provided for all Customers in relation to the Bulk SMS Services and shall be required to inform Customers of any related routes of contact in relation to the Bulk SMS Services.

2.11 If a Customer contacts 3ROI in relation to the Bulk SMS Services 3ROI shall either (i) redirect or transfer such Customer to the support facilities of the Client or (ii) if this is not possible for any reason (including but not limited to any unwillingness by the Customer to be redirected to the Client) deal with the query or complaint. For the avoidance of doubt 3ROI shall be responsible for providing customer care support to Customers that relates to normal usage and billing for their mobile telephone service.

#### **Association of Bulk SMS Services with 3ROI**

2.12 The Client must not state or imply any approval by 3ROI of the Bulk SMS Services or refer to 3ROI without the express and prior approval in writing of 3ROI. Notwithstanding the foregoing, the Client is entitled to refer to 3ROI and its services to the extent necessary in order to inform Customers or potential Customers about the Bulk SMS Services and their use and in order to fulfil its obligations under this Agreement, applicable laws and/or regulations.

#### **Network Issues**

2.13 The Client must:

(a) consult with 3ROI (at 3ROI's request) with a view to ensuring that the number of attempted Service Requests and Service Messages at any time does not significantly exceed the Network's SMS capacity. In any event, should the capacity be exceeded, or should 3ROI believe, acting reasonably, that the Network capacity is likely to be exceeded, 3ROI may notify in writing the Client as soon as is reasonable practicable and the Client must promptly take all reasonable steps to prevent such excess within ten (10) days from the date of such notification. If the Client fails to take reasonable steps to prevent such excess within the timeframe set forth above, 3ROI may take whatever action is necessary to prevent such

excess, including temporarily suspending or limiting the availability of the Platform to Customers.

(b) not send (without the prior written consent of 3ROI) more than 5 Service Messages per second per Customer or more than the maximum number of Service Messages that can be sent in one hour.

### **Nature of the Bulk SMS Services**

2.14 The Client must ensure that (whether textual, visual or audio) all content which forms part of the Bulk SMS Services does not contain any information or material any part of which would, or the sending of which over the Network would, be a criminal offence, or otherwise unlawful in the Territory or in any other jurisdiction where the Service Messages are being sent. Alternatively, where content created by Customers forms part or all of the Bulk SMS Services the Client must ensure that appropriate controls (including legal terms and conditions) are placed on such Customer. In particular the Network must not be used to send Service Messages that are offensive, indecent, menacing, a nuisance or a hoax.

### **Obligations**

2.15 Each Party shall indemnify the other Party against all liabilities arising for that other Party and against actions, proceedings, claims and demands (including out-of-pocket expenses reasonably incurred) made by any third party arising directly or indirectly out of or in connection with a breach of clauses 2.17, 2.18, 2.19 and 2.20.

2.16 The provision of the Platform is dependent on the Client complying with any additional reasonable requirements which may be notified to it from time to time by the 3ROI which are relevant to the supply of the Bulk SMS Service.

### **Compliance with Laws & Codes of Practice**

2.17 The Client has the right to determine the nature of the Bulk SMS Services delivered and is solely responsible for its content. The Client is solely responsible for ensuring that it is fully licensed, authorised and permitted to provide the Bulk SMS Services and that any Bulk SMS Services offered conform to any applicable laws, regulations and codes of conduct (including but not limited to the Code of Practice) and the laws in the Territory (including the Data Protection Legislation).

2.18 3ROI will ensure the Platform complies with any relevant and applicable laws, regulations and codes of conduct (including but not limited to the Code of Practice) in the Territory or where the Service Messages are being sent.

## **Data Protection**

2.19 Controller, Processor, Data Subject, Personal Data, Processing, Supervisory Authority and appropriate technical and organisational measures shall have the meanings given to them in the Data Protection Legislation.

2.20.1 The parties shall comply with their responsibilities under the Data Protection Acts in connection with any activities carried out under this Agreement. Without prejudice to the generality of the foregoing to the extent that the provision of the services under this Agreement involves the Processing of Personal Data which has been transferred from the Client to 3ROI, the Client agrees to use its best endeavours to ensure it and its Customers comply with data privacy restrictions and regulations applicable to each in the Territory.

2.20.2 3ROI for the purposes of performing the services under this Agreement, acknowledges that the Client is the Controller in respect of any Personal Data that 3ROI processes in the course of providing the services to the Client and that 3ROI is the Processor

2.20.3 This Agreement constitutes the complete instructions to 3ROI as Processor at the time of signature. 3ROI will comply with other reasonably documented instructions provided that those instructions are consistent with the terms of the Agreement and in accordance with applicable Data Protection Legislation, including in particular:

- a) the adoption of appropriate technical and organisational measures to ensure the security of the Personal Data;
- b) informing the Client without undue delay in the event of a breach of any Personal Data processed under this Agreement ("Security Incident") which comes to 3ROI's attention;
- c) notifying the Client of any request it has received from Data Subjects relating to Personal Data for the Client to resolve and assisting the Client in fulfilling its obligations to respond to Data Subjects' requests to exercise their rights, taking into account the nature of the processing;
- d) ensuring that 3ROI personnel processing Personal Data under the Agreement have committed themselves to confidentiality; and
- e) at the cost of the Client, 3ROI will make available reasonable information necessary to demonstrate compliance with this clause, which shall include, once per calendar year on giving 28 days' notice, the right for the Client to conduct a reasonable audit of 3ROI to satisfy



the Client that 3ROI is in compliance with this clause. Where any instances of non-compliance are confirmed, the Client's sole remedy shall be to request 3ROI to remediate

such non-compliance within a reasonable timeframe;

f) Where requested to do so in writing, and at the cost of the Client, 3ROI will assist the Client, so far as it is reasonably necessary, in ensuring compliance with the following obligations, taking into account the nature of the data processing and the information available to 3ROI:

1. the obligation to carry out an assessment of the impact of the envisaged processing operations on the protection of Personal Data (a 'data protection impact assessment') where a type of processing is likely to result in a high risk to the rights and freedoms of natural persons;
2. the obligation to consult the competent Supervisory Authority prior to Processing where a data protection impact assessment indicates that the Processing would result in a high risk in the absence of measures taken by the Controller to mitigate the risk;
3. the obligation to ensure that Personal Data is accurate and up to date, by informing the Controller without delay if the Processor becomes aware that the Personal Data it is Processing is inaccurate or has become outdated; and
4. the obligations in Article 32 Regulation (EU) 2016/679.

2.20.4 Client acknowledges that 3ROI shall transfer Personal Data to third party Subcontractors (including group companies) to whom disclosure is reasonably necessary in order for 3ROI to carry out the Services and hereby provides its general authorisation to such transfers. When requested to do so in writing 3ROI shall make available a list of third party Subcontractors. Client further agrees that 3ROI shall transfer Personal Data disclosed pursuant to the Agreement to such Subcontractors based outside the European Economic Area but only where adequate safeguards are put in place by 3ROI or such Subcontractors to protect such Personal Data as required under Data Protection Legislation.

2.20.5 Without prejudice to any other provision of this Agreement relating to termination, on termination of this Agreement, 3ROI shall, when requested to do so in writing by the Client and at its cost, either delete or return all personal data processed as part of the Agreement to the Client unless 3ROI is subject to an overriding legal, regulatory or other requirement to retain such Personal Data.

#### 2.21 The Client agrees that

(a) notwithstanding 3ROI's other rights, any breach of clauses 2.17 and 2.20.1 by the Client or a Subcontractor will entitle 3ROI to suspend the provision of the Platform under this Agreement, such suspension will be lifted once the Client remedies such breach within thirty (30) days of receipt of a written notice sent by 3ROI giving the full particulars of such breach and requesting that it be remedied; and

(b) subject to clauses 2.21 and 2.22 it accepts 3ROI's interpretation of the Code of Practice as the correct interpretation of the Code of Practice or Regulations in any dispute between 3ROI and the Client as to the meaning of any provisions within the Code of Practice or Regulations; and

2.22 If 3ROI suspends the Platform in accordance with paragraph 2.21(a), and a Regulator legally invested with the capacity to determine and adjudicate on the issue in question subsequently determines that there was no breach of the Code of Practice or Regulations by the Client, then 3ROI shall re-instate the Platform as soon as reasonably possible and: (i) provided 3ROI shall have acted reasonably; and (ii) subject always to clause 8 of this Agreement, 3ROI shall have no liability in respect of any losses suffered by the Client as a result of the suspension of the Platform.

#### **General**

2.23 The Client must not send, nor have anyone send on the Client's behalf Bulk Messaging other than at intervals, which 3ROI considers to be reasonable in order to test that the Platform is operating correctly.

### **3. SUBCONTRACTORS**

Both parties may subcontract the performance of support services or other service obligations hereunder to one or more Subcontractors. The appointment of Subcontractors will not relieve either party of any of its obligations as primary obligor under this Agreement.

### **4. CHARGES**

#### **Fee**

4.1 The Client shall pay to 3ROI the Fee set out in the Pricing Guide with respect to the set-up of each SMPP connection.

#### **Payment queries**

4.2 In the event of a disagreement as to the number of Service Messages delivered during any period, the Client shall prepare and provide to 3ROI a report detailing the number of Service

Messages that it contends have been so delivered. 3ROI shall seek to validate this report with its own information the basis of which, it shall explain to the Client. If the figures still fail to agree, the Client's figures shall, in the absence of manifest error, be deemed conclusive, provided, however, that such figures being deemed conclusive shall not constitute a waiver by both Parties of any right under this Agreement.

4.3 Subject to both Parties' determination of the number of Service Messages sent, if either party has reasonable cause to believe that there has been an underpayment or overpayment of Fees in respect of a particular month, it shall give notice in writing to the other party as soon as is practically possible.

4.4 Upon receipt of such a notice the parties shall conduct a review of all relevant information to determine if there is a basis in fact of the error in payment. The Client shall have the right, during the term of this Agreement, to appoint a mutually acceptable independent accounting firm to inspect the books and records of 3ROI relating to Fees from time to time to verify their accuracy. However:

- (a) the accounting firm may not be paid on a contingency or other basis related to the outcome of the inspection;
- (b) the accounting firm shall execute a confidentiality agreement with 3ROI in a form acceptable to 3ROI that prohibits the accounting firm from disclosing information obtained in connection with the inspection other than disclosure to the Client of the amount of any underpayment or overpayment;
- (c) The Client shall maintain in confidence any information obtained in connection with the inspection;
- (d) any such inspection shall be conducted during regular business hours, in such a manner as not to interfere with the normal business activities of 3ROI, and shall be at the Client's expense.

4.5 Prompt adjustment shall be made to correct for any underpayments or overpayments disclosed by such inspection.

#### **Set-off**

4.6 Whenever any money is due to the Client under this Agreement any or all of it may be set-off against any amount due or otherwise owing to 3ROI under this Agreement or in consequence of any undisputable breach by 3ROI of the terms of this Agreement. As and when mutually agreed.

### **5. RIGHTS AND OBLIGATION**

5.1 The Client agrees that it will:

- (a) not use or allow its employees to use the 3ROI Bulk SMS Service for any improper, immoral or unlawful purpose; and
- (b) provide 3ROI with such information as 3ROI reasonably requests in connection with this Agreement; and
- (c) ensure that the Bulk SMS Services it provides in conjunction with or using the 3ROI Bulk SMS Service are of a quality and kind which 3ROI considers are not likely to bring 3ROI into actual and material disrepute.

5.2 The Client shall ensure that all services it provides in conjunction with or using the 3ROI Bulk SMS Service shall not include as part of those services:

- (a) anything that violates the rights of a third party including, but not limited to, privacy, publicity, copyright or patent;
- (b) material that could reasonably be interpreted as offensive, obscene, defamatory or libellous; or
- (c) anything that is likely in the light of generally prevailing standards of decency and propriety to cause offence.

5.3 The Client shall;

5.3.1 not resell or transfer 3ROI Mobile Numbers in any way;

5.3.2 use the 3ROI Mobile Numbers in accordance with Applicable Laws including but not limited to those relating to nuisance-call, spam-messaging, CLI screening, numbering conditions of use, fraud prevention measures and Data Protection Legislation;

## **6. MARKETING**

6.1 The Client shall be solely responsible for marketing the Services.

6.2 3ROI shall, at its discretion, review proposals for joint marketing of services to Customers although nothing in this Agreement shall place 3ROI under any obligations to participate in such joint marketing.

6.3 Subject to Clause 2.12, Clause 9 and Clause 12.11, both parties shall have the right to mention the existence of this Agreement, after the Effective Date and whilst the Agreement remains in force, in their marketing materials. This right is given on the condition that any such marketing materials accurately reflect the nature of the business relationship created by this Agreement and

that each party has given permission in writing for any such inclusion. The parties agree that any such permission shall not be unreasonably withheld or delayed.

## **7. INTELLECTUAL PROPERTY RIGHTS**

7.1 Neither party will create any advertising or other materials that use or include the Intellectual Property Rights of the other party unless it has the prior written consent of that other party as to the form and content of any such materials. Each party acknowledges that it will not acquire any rights in any other party's Intellectual Property Rights or any goodwill associated therewith.

7.2 Neither party will issue any publicity, promotional, advertising or packaging material expressly referencing the other party except in a form and in a manner previously approved by the other party in writing.

7.3 Neither party shall use the Intellectual Property Rights of the other party without the prior written consent of that other party. Each party acknowledges that it will not acquire any rights in the Intellectual Property Rights or any goodwill associated therewith, of the other party

7.4 This Agreement does not operate as an assignment by or to either party of any copyright, registered design, trademark or any other Intellectual Property Rights of whatever nature.

## **8. INDEMNIFICATION & LIMITATION ON LIABILITY**

8.1 Each Party shall indemnify the other Party against all liabilities, actions, proceedings, claims and demands (including out-of-pocket expenses reasonably incurred) made by any third party arising directly or indirectly out of or in connection with or arising from (i) the use of the Bulk SMS Service by either Party or any person authorised by either Party in violation of any applicable laws, rules and regulations in the Territory, (ii) the infringement of any third party's intellectual property rights, or (iii) any undisputable breach, act of gross negligence or wilful misconduct by either Party in its performance under this Agreement.

8.2 The Client hereby indemnifies 3ROI in respect of all and any third party undisputable costs howsoever arising, including but not limited to repayment of Customer charges or refunds arising out of the use of the 3ROI Bulk SMS Service by the Client to send unsolicited messages.

8.3 While 3ROI will use reasonable efforts to make the 3ROI Bulk SMS Service continuously available, due to the nature of mobile telecommunications, it is impossible to provide a fault-free service. 3ROI is not liable to the Client (or to the any third party content provider) for any direct, indirect, special, incidental or consequential loss (including loss of profit) (whether or not

foreseeable) suffered as a result of the Network or the 3ROI Bulk SMS Service not being operational, or for any failure, delay, restriction or interruption of the Network or the 3ROI Bulk SMS Service due to circumstances outside 3ROI's reasonable control. 3ROI's duty in performing its obligations under this Agreement is only to exercise the reasonable skill and care of a competent wireless telecommunications services provider.

8.4 SAVE AS PROVIDED FOR IN CLAUSES 8.6(A)-(D), IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY WHATSOEVER FOR ANY INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF ANTICIPATED PROFITS, REVENUE, OR OTHER ECONOMIC LOSS IN CONNECTION WITH, OR ENSUING FROM THE SERVICES TO BE FURNISHED PURSUANT TO THIS AGREEMENT, REGARDLESS OF WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE BY THE PARTIES.

8.5 The express terms of this Agreement are in lieu of all warranties, conditions terms, undertakings and obligations implied by statute, common law, custom, trade usage, course of dealing or otherwise, all of which are hereby excluded to the fullest extent permitted by law.

8.6 Nothing in this Agreement shall exclude or restrict the liability of either party for:

- (a) death or personal injury resulting from that party's negligence;
- (b) breach of confidentiality pursuant to clause 9;
- (c) any other liability that cannot be excluded or limited under applicable law;
- (d) fraud or fraudulent misrepresentation; or
- (e) breach of Data Protection requirements as set out in Clause 2.20.

8.7 SAVE AS PROVIDED FOR IN CLAUSES 8.6(A)-(E), IN NO EVENT AND UNDER NO SET OF CIRCUMSTANCES SHALL THE TOTAL AGGREGATED LIABILITY OF EITHER PARTY TO THE OTHER OR ANY THIRD PARTY CLAIMING THROUGH THE OTHER PARTY IN CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE ARISING OUT OF OR UNDER THIS AGREEMENT EXCEED THE GREATER OF €100,000 OR FEES PAID BY THE CLIENT IN THE PREVIOUS 12 MONTHS OF THE AGREEMENT, FOR ANY ONE INCIDENT OR SERIES OF RELATED INCIDENTS AND SUBJECT TO A MAXIMUM CUMULATIVE LIABILITY OF €100,000 OR DOUBLE THE FEES PAID BY THE CLIENT IN ANY 12 MONTH PERIOD, WHICHEVER IS THE GREATER.

8.8 Each provision of this Clause 8 operates separately. If any part is held unreasonable or inapplicable in any circumstances the other parts shall continue to apply.

## **9. CONFIDENTIALITY**

9.1 3ROI and the Client will keep in confidence any information of a confidential nature obtained pursuant to this Agreement and will not divulge the same to any person (other than their employees who need to know the information) nor for any purpose other than a purpose contemplated under this Agreement, without the consent of the other party.

9.2 This Clause will not apply to:

- (a) any information in the public domain other than as a result of a breach of this Agreement;
- (b) information in the possession of the receiving party before such divulgence has taken place;
- (c) information obtained from a third party who is free to divulge the same; and
- (d) any information requested on foot of applicable laws or Regulations, including any investigation or information gathering exercise carried out by ComReg.

9.3 These obligations of confidentiality will cease to have effect 2 years after the termination of this Agreement.

9.4 The obligations of confidentiality imposed by Clause 9.1 upon the Parties shall not preclude:

- (a) either party disclosing any information to its professional advisers from time to time provided that prior to such disclosure such professional advisers shall be subject to obligations of confidentiality that are no less stringent than those contained herein;
- (b) either party from disclosing any information to its Affiliates to the extent that such affiliate needs to know provided that such party shall remain primarily liable for any effective breach of this Agreement by its Affiliates. For the purposes of this Agreement "Affiliate(s)" shall mean any corporation or other entity which, directly or indirectly, through stock ownership or through any other arrangement, controls, is controlled by or is under common control with the party. The term "control" shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of such entity, whether by reason of ownership of voting stock or other equity interests, by contract or otherwise; or
- (c) either party from giving access only to those of its officers and employees, who need to know such information for the purposes of this Agreement and who have been advised of the obligations assumed herein.

## **10. TERM AND TERMINATION**

10.1 This Agreement shall commence on the Effective Date and shall continue in force until terminated in accordance with Clause 10.3, 10.4, 10.5 or 10.6.

10.2 Any bulk SMS services agreement previously entered into between the parties as the same may have been amended or varied from time to time (the "Previous Agreement") is hereby terminated. This Agreement supersedes the Previous Agreement and all other previous agreements in respect of the Bulk SMS Services, or similar services, between the parties.

10.3 This Agreement may be terminated forthwith in accordance with the following provisions, by either party:

- (a) giving notice in writing to the other party in the event the other party is in material breach of this Agreement and (if capable of remedy) has failed to remedy such breach within thirty (30) days of receipt of written notice thereof from the other party;
- (b) giving notice in writing to the other party should the other party file a petition of any type as to its bankruptcy, be declared bankrupt, become insolvent, make an assignment for the benefit of creditors, go into liquidation or receivership, or otherwise lose legal control of its business;
- (c) giving notice in writing to the other party should an event of Force Majeure continue for more than thirty consecutive calendar days;
- (d) by mutual written consent with the other party.

10.4 In the event of amendment of the Fees set out in Schedule 1 by 3ROI in accordance with clause 2.24 the Client has the right to terminate the Agreement with an immediate effect by giving 3ROI written notice of the same during the thirty (30) days' notice period.

10.5 Either Party may terminate this Agreement with immediate effect should the other Party be in breach of paragraph 2.19 (a), 2.19 (b) and 2.19 (c), paragraph 5 or any provision contained paragraph 2.4 of Schedule 1 attached hereto.

10.6 Either party may terminate this Agreement at any time after the Minimum Term of the Agreement as set out in the Commercial Schedule by providing thirty (30) days prior written notice to the other party and this Agreement will terminate at the end of such notice period.

#### Suspension of the Services

10.7 3ROI may, where reasonable, suspend the provision of the Services to the Client in any of the following circumstances without prejudice to its rights hereunder, provided that it shall use reasonable endeavours to restore the Services as soon as reasonably practicable:



- (a) during any technical failure, modification or maintenance of the telecommunications systems by which the Services are provided; and/or
- (b) if the Client fails to comply with the terms of this Agreement and fails to remedy such failure in the respective timeframes as provided for in this Agreement after being given written notice by 3ROI; and/or
- (c) because of an Emergency or upon instruction by Emergency Services or ComReg.

#### **Rights and Obligations on Termination**

10.8 In the event of termination of this Agreement for any reason, the parties will have the following rights and obligations:

- (a) termination of this Agreement will not release either party from the obligation to make payment of all amounts that shall have accrued up to the date of termination; and
- (b) the obligations hereunder which by their terms or clear intent extend beyond termination of this Agreement, including, without limitation, the obligations hereunder pursuant to Clause 7 (Intellectual Property), Clause 8 (Indemnification and Limitation on Liability) and Clause 9 (Confidentiality) will survive termination of this Agreement.

#### **11. FORCE MAJEURE**

Neither party shall be liable for any breach of this Agreement, if, and to the extent that, such breach arises as a result of any act of God, governmental or other administrative act or omission, sabotage, riot, explosion, controls, restrictions, prohibition or other acts of any local or national government or other competent regulatory authority, telecommunications network operators or any industrial action (unless such force majeure event was the result of any act or omission of a party) or any other matter beyond its reasonable control. In the event that a party continues to be affected by such an event for a continuous period of 30 days, the party not so affected shall be entitled to terminate this Agreement forthwith.

#### **12. MISCELLANEOUS**

##### **Governing Law**

12.1 This Agreement shall be governed by and construed and interpreted in accordance with Irish Law, irrespective of choice of laws principles, as to all matters, including matters of validity, construction, effect, performance and remedies.

##### **Relationship**

12.2 Nothing contained in this Agreement shall be construed to give either party the power to

direct or control the day-to-day activities of the other party, nor to assume or create any obligation or responsibility, express or implied, on behalf of or in the name of the other party. In fulfilling its obligations under this Agreement, each party will be acting as an independent contractor.

#### **Entire Agreement**

12.3 This Agreement and the Schedules hereto contain the entire agreement between the parties with respect to the subject matter hereof and supersede all previous agreements, negotiations, discussions, writings, understandings, commitments and conversations with respect to such subject matter, and there are no agreements or understandings between the parties other than those set forth or referred to herein.

12.4 Except as expressly provided herein, this Agreement may only be amended only by an instrument in writing signed by duly authorised representatives of each of the parties.

#### **Assignment**

12.5 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Neither party may assign or otherwise transfer its rights or obligations under this Agreement, in whole or in part, without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

#### **Compliance with Applicable Laws**

12.6 The Client and 3ROI each agree to comply with all applicable national, regional and local laws and regulations in the Territory relating to the Services and to the performance of their respective obligations under this Agreement.

#### **Waivers of Default**

12.7 Waiver by any party of any default by another party of any provision of this Agreement shall not be deemed a waiver by the waiving party of any subsequent or other default, nor shall it prejudice the rights of the other party.

#### **Severability**

12.8 If any of the provisions of this Agreement is or becomes invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired. The parties shall nevertheless negotiate in good faith in order to agree the terms of a mutually satisfactory provision, achieving so nearly as possible the same commercial effect, to be substituted for the provision so found to be void or unenforceable.

#### **Notices**

12.9 Any notice required or authorised by this Agreement to be given by either party to the other may be given by hand or sent (by registered post, facsimile transmission, or comparable means of communication) to the other party at the address referred to at the beginning of this Agreement. Any notice given by hand shall be deemed to have been given on actual delivery; any notice given by post shall be deemed to have been received on the second day after the envelope containing the same was so posted. Any notice sent by facsimile transmission or comparable means of communication shall be deemed to have been received on the date of transmission, provided that a confirming copy thereof is sent by pre-paid post to the other party at the address referred to at the beginning of this Agreement within 24 hours after transmission.

### **Reporting**

12.10 3ROI may from time to time request basic management reports from the Client with regard to the Bulk SMS Services.

### **Press Statements**

12.11 Neither party shall make any press release or announcement concerning the subject matter of this Agreement without the prior written consent of the other.

### **Counterparts**

12.12 This Agreement may be executed in any number of counterparts, and by the parties to it on separate counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument