

# Transcomm *Conditions for Mobitex Internet Access Service*

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## 1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement:

"Activation" means the process whereby a MAN is enabled for use on the Network. The words "Activate" and "Activated" should be construed accordingly.

"Agreement" means this agreement between Transcomm and the Customer comprising the following documents and, unless otherwise stated in the following order of precedence:

the order form;  
the Service Schedule;  
the Conditions;  
the Customer Requirements Form (if any); and  
any other documents expressly incorporated by any of these documents or by agreement between the Customer and Transcomm.

"Certified Network Package" means Interface Software, application software and equipment together certified by Transcomm for use in conjunction with the Network.

"Conditions" means these Conditions for Mobitex Internet Access Service "Customer" means the individual, partnership or company who contracts with Transcomm for the Services under the terms of this Agreement.

"Customer Equipment" means any equipment, including any software, for use with the Service that is not part of Transcomm's network and which is owned or controlled by the Customer.

"Customer Requirements Form" means the Transcomm form that sets out the requirements for the Service agreed between the Customer and Transcomm.

"Group Company" means a subsidiary or holding company including a holding company, or a subsidiary of any such holding company, all as defined by Part 38, Section 1159 of the Companies Act 2006

"Intellectual Property Rights" means any patent, petty patent, registered design, copyright, design right, database right, rights in designs, invention, semiconductor topography right, know-how, or any similar right exercisable in any part of the world and including any applications for the registration of any patents or designs.

"Interface Software" means software required to enable communication with the Network compliant with the current version of the "Mobitex Interface Specification" available to download from [http://www.mobitex.com/company/download\\_MIS.asp](http://www.mobitex.com/company/download_MIS.asp)

"MAN" means the Mobitex Access Number allocated by Transcomm to a specific piece of equipment.

"Minimum Period" means the intended minimum period over which the Service will be provided as stated in the Service Schedule, or the order/registration form, and measured from the Service Start Date.

"Network" means the radio data network operated by Transcomm.

"Party" means either Transcomm or the Customer.

"Registration" ("Register", "Registered") means the process whereby Transcomm causes the Network to provide a MAN access to those Services to which a Customer elects to subscribe.

"Service(s)" means the schedule to these Conditions that describes the Service to be provided by Transcomm or where applicable the terms of a Transcomm pricing package .

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“Service Start Date” means the date on which the Service is first made available to the Customer unless otherwise stated in the Service Schedule.

“Site” means the place(s) at which BT provides Service.

“Software” means any software and associated written and electronic documentation and data provided by Transcomm under the Agreement.

“Transcomm” means TRANSCOMM UK LIMITED whose registered office is at, 81 Newgate Street, London EC1A 7AJ.

“User” means anyone who is permitted by the Customer to use or access the Service.

“Working Day” means the hours of 0900 to 1700 on any day between Monday and Friday, excluding bank and public holidays.

1.2 The headings shall not be deemed to be part of this Agreement or be taken into consideration in its interpretation or construction. If any of the words or provisions of this Agreement are deemed to be invalid for any reason the Agreement shall be read as if the invalid provisions had to that extent been deleted and the validity of the remaining provisions of this Agreement shall not be affected.

### **2. TERM AND TERMINATION**

2.1 The Agreement begins on the date Transcomm communicates its acceptance of the Customer’s order for the Service and continues until ended by the Customer or Transcomm in accordance with this Agreement.

2.2 The Service commences on the Service Start Date.

2.3 Either party may terminate this Agreement to become effective with immediate effect by written notice to the other if:

- a) a Party breaches the Agreement and, if the breach is capable of remedy, fails to put right the breach within a reasonable time of being asked to do so. ; or
- b) bankruptcy or insolvency proceedings are brought against a Party or a Party does not make any payment under a judgement of a Court on time or a Party makes an arrangement with its creditors or a receiver, an administrative receiver or an administrator is appointed over any of a Party’s assets or a Party goes into liquidation or a corresponding event under Scottish Law.

2.4 The Agreement or the Service may be ended by either Party on 90 days written notice to the other.

2.5 The Agreement will automatically expire on 30<sup>th</sup> September 2011 if it has not been terminated by any other valid means set out in these Conditions.

2.6 If the Customer or Transcomm ends the Agreement or the Service during a Minimum Period the Customer will pay Transcomm the termination charges as set out in the Service Schedule. This clause will not apply if:

- (a) the Customer ends the Agreement or Service during the Minimum Period because Transcomm is in material breach of this Agreement; or
- (b) the Customer gives notice to end the Agreement within three months of Transcomm notifying the Customer of an increase to the charges or changes to the Conditions in either case to the Customer's significant detriment; or
- (c) Transcomm ends the Agreement or the Service for convenience.

2.7 Transcomm may terminate this Agreement upon seven days notice to the Customer in the event that any payment due to Transcomm from the Customer is overdue by 14 days or more.

2.8 Termination of this Agreement shall be without prejudice to the accrued rights of either party prior to the date of termination.

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### **3. CERTIFIED NETWORK PACKAGES**

The Customer undertakes only to use equipment application software and Interface Software which meet the requirements of Transcomm's prevailing certification procedure and agrees that if in Transcomm's opinion the performance of the Interface Software is causing the Network or Service to malfunction or is adversely affecting the performance of the Network or any part of it, then at Transcomm's request the Customer shall submit the Interface Software for testing and the Customer undertakes to remedy any defects in the Interface Software such as to enable it to meet the certification criteria and to reimburse Transcomm's reasonable costs incurred in the certification and testing of the package.

### **4. PAYMENT TERMS AND INVOICING**

4.1 The Customer shall pay to Transcomm such amounts as are due to Transcomm in accordance with the rates stipulated in the Order Form. The Customer understands and accepts the charges are calculated on a per MAN per month basis.

4.2 Transcomm will send the bills to the address notified by the Customer.

4.3 The Customer agrees to pay

- (a) in advance for subscription, rental, and other recurring charges (including inclusive usage charges); and
- (b) in arrears for connection and any other non-recurring charges. Where possible the charges will appear on the Customer's next bill but sometimes there may be a delay.

4.4 All charges are exclusive of VAT which is chargeable at the applicable rate.

4.5 Unless otherwise agreed in writing payment of any sums due to Transcomm from the Customer shall be paid within 30 days after the date of the relevant invoice.

4.6 If Transcomm does not receive payment by the due date, Transcomm may charge the Customer daily interest on late payments at a per annum rate equal to 7% above the base lending rate of the European Central Bank for the period beginning on the date on which payment is due and ending on the date on which payment is made.

### **5. Customer Equipment**

5.1 Any Customer Equipment must be:

- (a) technically compatible with the Service and not harm Transcomm's network or another customer's equipment;
- (b) connected using the applicable network termination point, unless the Customer has Transcomm's permission to connect by another means, and used in compliance with any relevant instructions, standards or laws; and
- (c) adequately protected by the Customer against viruses and other breaches of security.

### **6. THE SERVICES**

6.1 Transcomm will use reasonable efforts to provide uninterrupted Service but from time to time faults may occur, which Transcomm will arrange to be repaired as soon as reasonably practicable.

6.2 Occasionally Transcomm may:

- (a) for operational reasons, change the codes or the numbers used for the provision of the Service or the technical specification of the Service, provided that any change to the technical specification does not materially affect the performance of the Service;

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- (b) give the Customer instructions which it believes are necessary for reasons of health, safety, Network integrity or the quality of any telecommunications service provided by Transcomm to the Customer or any other customer; or
- (c) temporarily suspend the Service because of an emergency, security risk, misuse, or for operational reasons, maintenance or improvements.

6.3 The Service must not be used:

- (a) in any way that is unlawful or in contravention of any licence, code of practice, instructions or guidelines issued by a regulatory authority or a third person's rights
- (b) to send, communicate, knowingly receive, upload, download or use any material or make any transmissions (whether voice, data or otherwise) that are offensive, abusive, indecent, defamatory, obscene, menacing, cause annoyance, inconvenience, needless anxiety or are intended to deceive

6.5 The Customer acknowledges that, because of the nature of telecommunications by, it may be possible for third parties to monitor limited amounts of data traffic, and that where data transmitted is of a sensitive nature, adequate encryption techniques should be used to provide security.

6.6 The Customer acknowledges that local geographical, topographical and/or atmospheric conditions and/or other causes of physical or electromagnetic interference may from time to time adversely affect the Network.

## **7. LIABILITY**

7.1 Transcomm accepts liability as set out in the Agreement.

7.2 Neither the Customer nor Transcomm excludes or restricts its liability for death or personal injury caused by its own negligence or the negligence of its employees or agents acting in the course of their employment or agency or for fraudulent misrepresentation or to any extent not permitted by law.

7.3 Unless otherwise expressly stated in the Agreement neither the Customer nor Transcomm shall be liable to the other in contract, tort (including negligence), breach of statutory duty or otherwise for any direct loss of profit, revenue, time, anticipated savings or profit or revenue, opportunity, data, use, business, wasted expenditure, business interruption or for any other direct loss which may arise in relation to the Agreement whether or not the Customer or Transcomm was advised in advance of the possibility of such loss or damage.

7.4 Unless otherwise expressly stated in the Agreement neither the Customer nor Transcomm shall be liable to the other in contract, tort (including negligence), breach of statutory duty or otherwise for any indirect or consequential loss of profit, revenue, time, anticipated savings or profit or revenue, opportunity, data, use, business, wasted expenditure, loss of or damage to physical property, business interruption or for any other indirect or consequential loss or punitive damages which may arise in relation to the Agreement whether or not the Customer or Transcomm was advised in advance of the possibility of such loss or damage.

7.5 Subject to clauses 7.2, 7.3 and 7.4, the Customer and Transcomm accept liability to the other in contract, tort (including negligence) breach of statutory duty or otherwise for direct loss limited to £5,000 for any one incident or series of related incidents and to £25,000 for all incidents in any period of 12 months.

7.6 Clause 7.5 will not apply to any obligation to pay charges or to clause 16.

7.7 Each part of this clause operates separately. If any part of a clause is held by a Court to be unreasonable or inapplicable the rest of the clause shall continue to apply.

7.8 The Customer is responsible for reviewing whether the Customer should enter into a business continuity insurance contract.

## **8. CHANGING THE AGREEMENT**

8.1 Transcomm can change the Agreement (including the charges) at any time and will publish any change in line with clause 15 as follows.

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- (a) for changes that are to the Customer's significant detriment, at least 14 days before the change is to take effect; and
- (b) for all other changes at least one day before the change is to take effect.

### **9. REGISTRATION AND DISCONNECTION**

- 9.1 As soon as is reasonably practicable following the receipt of the relevant Customer Requirements Form duly authorised by the Customer requesting a MAN, Transcomm will activate the MAN on the Network and the Service unless Transcomm has reason to believe that such Activation will be detrimental to the Network and the Service.
- 9.2 Only those Services which the Customer specifically requests will be included within the Registration for use by the MAN.
- 9.3 Each MAN Registered under this Agreement is Registered in accordance with the option set out in the Order Form.
- 9.4 The Customer may De-Register a MAN by giving 5 Working Days notice to Transcomm. Any De-Registered MAN that is subject to a Minimum Period will be liable for termination charges in accordance with clause 2.6 of these Conditions.
- 9.5 In order to ensure the quality of the Services and similar services provided to its customers generally, Transcomm shall have the right to disconnect from the Service or the Network any equipment or application software that in Transcomm's reasonable opinion will cause or causes the Service or the Network to malfunction or adversely affects the performance of the Service or the Network.
- 9.6 If clause 2.7 applies Transcomm reserves the right to charge the Customer for re-connection at the applicable rates then chargeable for registration.

### **10. FORCE MAJEURE**

- 10.1 (a) If the Customer or Transcomm is unable to perform, or is delayed in performing, any obligation under the Agreement because of something beyond its reasonable control including act of God, lightning, flood, exceptionally severe weather, epidemic, pandemic, fire, explosion, war, civil disorder, industrial disputes or acts or omissions of local or central government or other competent authorities, or beyond the reasonable control of its suppliers, it will have no liability to the other for that failure or delay in performing.
- (b) Transcomm will not be liable for failure to or delay in supplying the Service if:
  - (i) another supplier delays or refuses the supply of an electronic communications service to Transcomm and no alternative service is available at reasonable cost; or
  - (ii) legal or regulatory restrictions are imposed that prevent Transcomm from supplying the Service.
- (c) If any of the events detailed in clauses 10.1(a) or 10.1(b) continue for more than three months the Customer or Transcomm may terminate the Agreement in whole or part by written notice to the other.

### **11. ASSIGNMENT**

- 11 The Customer and Transcomm may not transfer any of their rights or obligations under the Agreement without the written consent of the other, except that:
  - (a) the Customer may transfer its rights or obligations or both to a Group Company with the written consent of Transcomm, such consent not to be unreasonably withheld or delayed; and
  - (b) Transcomm may transfer its rights or obligations or both to a Group Company without consent provided that it notifies the Customer that it has done so.

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## 12. ENTIRE AGREEMENT

- 12.1 The Agreement contains the entire agreement between the Customer and Transcomm and replaces all previous written or oral agreements relating to its content.
- 12.2 The Customer and Transcomm agree that:
- (a) they have not been induced to enter into the Agreement by, nor have they relied on, any statement, representation, warranty or other assurance not expressly incorporated; and
  - (b) in connection with the Agreement their only rights and remedies in relation to any statement, representation, warranty or other assurance are for breach of the Agreement and that all other rights and remedies are excluded.
- 12.3 The terms of clauses 12.2(a) and 12.2(b) will not affect the rights or remedies of the Customer and Transcomm for any fraudulent misrepresentation.

## 13. WAIVER

A failure or delay by the Customer or Transcomm to exercise any right or act upon a breach under the Agreement will not be a waiver of that right or breach. If the Customer or Transcomm waives a right or breach of the Agreement, that waiver is limited to the particular right or breach.

## 14. RIGHTS OF THIRD PARTIES

A person who is not the Customer or Transcomm (including an employee, the officer, agent, representative or subcontractor of the Customer or Transcomm) has no right under Agreements (Rights of Third Parties) Act 1999 to enforce any term of the Agreement. This does not affect any right or remedy that exists or is available apart from that Act.

## 15. NOTICES

- 15.1 Notices given under the Agreement must be in writing and delivered to the following addresses unless otherwise stated in the Agreement:
- (a) to Transcomm at the address shown on the bill or any address which Transcomm provides to the Customer for this purpose; or
  - (b) to the Customer at any one or more of the following: the address to which the Customer asks Transcomm to send bills or the address of the Site or the Customer's primary email address.
- 15.2 The Customer must inform Transcomm immediately if there is any change to any of the contact information the Customer provided to Transcomm.

## 16. INTELLECTUAL PROPERTY AND CONFIDENTIALITY

### Intellectual Property

- 16.1 Except as expressly set out in the Agreement, the Customer and Transcomm do not acquire any rights or licences to the other's Intellectual Property Rights.
- 16.2 If Software is provided to enable the Customer to receive and use the Service, Transcomm grants the Customer for the duration of the Agreement a non-exclusive, non-transferable licence to use such Software for its own use. Unless otherwise agreed in writing, any licence granted by Transcomm under this clause 16.2 will end when the Agreement is terminated.
- 16.3 If the Service provides the Customer with Software licensed by third parties who require the Customer to accept their terms of use, the Customer must keep to those terms.

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- 16.4 Except as permitted by applicable law or as expressly permitted under the Agreement the Customer must not, without Transcomm's prior written consent, copy, de-compile or modify any software, copy manuals or documentation or permit anyone else to do so.
- 16.5 Transcomm will indemnify the Customer against all claims and proceedings arising from infringement of any third person's Intellectual Property Rights in the United Kingdom by the provision of the Service to the Customer. This indemnity does not apply to claims or proceedings arising from:
- (a) the use of the Service in conjunction with any equipment, software or any other service not supplied by Transcomm; or
  - (b) any modification which was not made by Transcomm or with Transcomm's prior written consent; or
  - (c) designs or specifications supplied by the Customer; or
  - (d) the use of the Service other than in accordance with the terms of the Agreement; or
  - (e) breach by the Customer of clause 16.3.
- 16.6 As a condition of this indemnity in clause 16.5 the Customer must:-
- (a) notify Transcomm promptly in writing of any allegation of infringement;
  - (b) make no admission relating to the infringement;
  - (c) allow Transcomm to conduct all negotiations and proceedings in respect of any such claims and give Transcomm all reasonable assistance in doing so (Transcomm will pay the Customer's reasonable expenses for such assistance); and
  - (d) allow Transcomm to modify the Service as set out in clause 16.7.
- 16.7 If the Service becomes, or Transcomm believes it is likely to become, the subject of a claim of infringement of any Intellectual Property Rights Transcomm, at its option and expense, may secure for the Customer a right of continued use or modify or replace the Service so that it is no longer infringing, provided that the modification or replacement does not materially affect the performance of the Service. If the indemnity in clause 16.5 applies and none of the remedies in this clause is available to Transcomm on reasonable terms, Transcomm may notify the Customer and terminate the Service without liability to the Customer.

### **Confidentiality**

- 16.8 Except to the extent any disclosure is required by law and as set out in clause 16.9 Transcomm and the Customer will keep in confidence any information, whether written or oral, of a confidential nature obtained under or in connection with the Agreement. The Customer and Transcomm will not, without the consent of the other, disclose such information to any person other than:
- (a) their Group Company employees or professional advisers who need the information in order for the Customer or Transcomm to fulfil its obligations under the Agreement; or
  - (b) in the case of the Customer, its Users to the extent that they are required to use or access the Service; or
  - (c) in the case of Transcomm, the employees or professional advisers of its suppliers who need the information in order for Transcomm to fulfil its obligations under the Agreement.
- 16.9 Information will not be treated as confidential if it is:
- (a) in the public domain other than in breach of the Agreement; or
  - (b) lawfully in the possession of the Customer or Transcomm before disclosure has taken place; or
  - (c) obtained from a third person who is free to disclose it; or

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(d) replicated independently by someone without access or knowledge of the Information.

16.10 Where the Freedom of Information Act 2000 applies to the Customer and the Customer receives a request under the Act that includes any information held by the Customer that was provided by Transcomm in connection with the Agreement the Customer will:-

(a) notify Transcomm immediately of the request; and

(b) give Transcomm at least five Working Days to make representations.

### 17. DISPUTE RESOLUTION

17.1 (a) Transcomm will try to work through any dispute that the Customer may have with Transcomm. If this does not resolve the dispute then the Customer may refer the matter to the relevant dispute resolution service as set out in clause 17.1(b) below.

(b) Any dispute must be raised in writing with the Customer's or Transcomm's representative as appropriate giving all relevant details including the nature and extent of the dispute. The Customer and Transcomm will use reasonable endeavours to resolve any dispute as follows:

(i) a dispute which has not been resolved by the Customer's or Transcomm's representative within 14 days of being raised may be referred by the Customer or Transcomm to the first level by written notice to the other; and

(ii) if the dispute is not resolved at the first level within 14 days of referral, the Customer or Transcomm may refer the dispute to the second level by written notice to the other.

The Customer's and Transcomm's representatives at the first and second levels are as notified by the Customer and Transcomm to the other from time to time.

(c) If the dispute is not resolved after the procedures detailed in clause 17.1 (b) have been followed then, if the Customer and Transcomm agree, the dispute will be settled by mediation in accordance with the procedures specified by the Dispute Resolution Service – Chartered Institute of Arbitrators ("DRS-CiArb"). If the dispute is referred to a mediator:-

(i) the mediator will be appointed by agreement of the Customer and Transcomm. If the Customer and Transcomm fail to agree within seven days of a proposal by one party, the mediator will be appointed by DRS-CiArb; and

(ii) all negotiations on the dispute and any agreement reached will be kept confidential.

(d) Nothing in this clause 17.1 shall prevent the Customer or Transcomm from exercising any rights and remedies that may be available in respect of any breach of the provisions of the Agreement.

### 18. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with English law and any dispute hereunder shall be subject to the exclusive jurisdiction of the English Courts.