EMaaS: Terms of Service

Last Modified: 14 November 2014

1. Introduction

1.1 These terms and conditions (the “Terms”) together with the following documents make up the contract that is formed between Client and Dimension Data when Dimension Data accepts an Order (the “Agreement”):

- **these Terms.** The Terms are mainly legal in nature. The Terms may include a Data Processing Addendum.
- **all applicable Orders.** Each Order sets out Service specific information including volumes and charges.
- **Third Party Software Terms.** The Services include software components provided to Dimension Data by other companies and these companies require certain terms and conditions to be included in the Agreement.
- **AUP.** The Acceptable Use Policy prohibits certain types of activity e.g. hacking and spamming, and sets out general rules that apply to use of the Services.
- **Usage Pricing Terms.** Prices and charges.
- **Service Description (including, if applicable, the SDOS).** This document describes the features and functions of the Services.
- **Service Level Terms.** The performance and other metrics applicable to the Services. The Service Level Terms are included in the Service Description.

1.2 The Agreement governs Dimension Data’s provision and Client’s use of the Services.

2. Definitions

2.1 In these Terms:

**Administrator** means the single employee, agent or independent contractor authorised by Client, to provision, manage and administer the Services.

**API** means the application programming interface made available by Dimension Data in connection with the Services, including the associated technical and administrative specifications, standards, requirements, procedures and communication protocols published by Dimension Data.

**AUP** or **Acceptable Use Policy** describes obligations associated with use of the Services, located at http://cloud.dimensiondata.com/saas-solutions/about/legal/acceptable-use-policy.

**Client** means the entity ordering Services from Dimension Data, as identified in the applicable Order(s).

**Client Content** means all content, materials or data that Client uses, installs, uploads or hosts on the Services.

**Confidential Information** has the meaning given in Section 8.

**Credentials** mean a unique log in and password for the Administrator or a Sub-Administrator to access and use the Services.
**Dimension Data** means the Dimension Data entity (identified in the applicable Order) providing Services to Client.

**Documentation** means the developer guides, getting started guides, user guides, quick reference guides, and other documentation for the Services that Dimension Data provides or makes available to Client.

**Effective Date** of an Order means the date that Dimension Data accepts the Order under Section 3.

**Emergency Incident** means an Incident that renders the Services inoperative or causes a complete failure of the Services and impacts a large number of users and for which an effective workaround is not available.

**Excusing Event** means any of:

(a) Client’s acts or omissions or those of a third party for which Client is responsible, including failure to supply accurate, complete, and timely information when requested;

(b) a Force Majeure Event (as defined in Section 16.9);

(c) scheduled maintenance of the Services (as described in Section 7.1), any other scheduled downtime agreed to by the parties or emergency or unscheduled maintenance of the Services (as described in Section 7.1);

(d) defects in Third Party Software or Dimension Data’s loss of license rights or restrictions imposed by third party licensors with respect to Third Party Software;

(e) unavailability of necessary technology or other resources on commercially reasonable terms;

(f) issues including configuration issues with any operating system, database, application, network, hardware, infrastructure, or other code or materials not provided by Dimension Data;

(g) any act or omission of a third party or that is not caused by Dimension Data (for example, hacking, denial of service attacks and the introduction of malware), provided that Dimension Data uses reasonable efforts to maintain current versions of Software patches;

(h) compliance with any applicable law or requests of governmental entities, in each case that adversely affects Dimension Data’s ability to provide the Services.

**Fees** mean the fees payable by Client to Dimension Data for the Services, as described in Section 12 and the applicable Order.

**Geography** means a geographic region in which Dimension Data maintains one or more Locations. The Geographies for a Service are set out in the Service Description.

**Incident** means a failure of the Services to conform in a material respect with the applicable Service Description(s).

**Incident Correction** means a bug fix, patch, or other modification or addition that brings the Services into material conformity with the applicable Service Description.

**Location** means a physical location from which Dimension Data provides Services or in which Dimension Data maintains an MCP necessary to provide the Services.

**MCP** or **Managed Cloud Platform** means the computing hardware and Software including Dimension Data’s automation and orchestration tools used by Dimension Data to provide Services to Client.

**Minimum Commitment Plan** means a Plan that includes a Minimum Commitment Term.

**Minimum Commitment Term** means a period of consecutive months during which Client commits to pay a minimum Fee for Services, as indicated in the applicable Order.
**Minimum Usage Commitment** means the minimum Fee that Client commits to pay each month during the Minimum Commitment Term.


**Order** means an order for Services submitted by Client and accepted by Dimension Data.

**Other Incident** means any Incident other than an Emergency Incident.

**Plan** means a plan for Services selected by Client in the applicable Order and includes Minimum Commitment Plans and Usage-Based Plans.

**Public Software** means open source software as that term is defined by the Open Source Initiative. Public Software includes software distributed under the GNU General Public License, GNU Lesser General Public License, Apache License, Mozilla Public License, BSD License, MIT License, Common Public License, or derivatives or similar licences.

**Services** means the information technology resources and services indicated in the applicable Order and described in the applicable Service Description(s).

**Service Commencement Date** means the time indicated in the applicable Order from when Dimension Data will commence providing the Services being either: (i) a calendar date; or (ii) the occurrence of an event or completion of a milestone. Client is deemed to have access to the Services when Dimension Data sends to Client via email the Welcome Pack containing Credentials.

**Service Description** means, as applicable, the Service Description for EMaaS or the SDOS.

**Service Level Credit** means a percentage rebate from the Fees that Client may receive if Dimension Data fails to meet a Service Level, calculated as set out in the Service Level Terms.

**Service Level Failure** means, for a particular Service Level during a particular calendar month, a failure by Dimension Data to meet that Service Level (excluding any failure comprising or caused by an Excusing Event).

**Service Levels** mean the service levels (if any) applicable to the Services as set out in the Service Level Terms.

**Service Level Terms** describe the Service Levels and Service Level Credits. The Service Level Terms are set out in the Service Description.

**Service Portal** means a portal accessed by the Administrator or a Sub-Administrator in order to manage and administer certain functions of the Services. The URL for the Service Portal is included in the Welcome Pack.

**Service Request** means a request by Client to Dimension Data for Technical Support.

**Software** means the software (including the API) that Dimension Data makes available for Client’s use as part of the Services, including both Dimension Data’s software and Third Party Software.

**Sub-Administrator** means an employee, agent, independent contractor or automated application account of Client whom the Administrator authorises to access and use the Services.

**Support** means Incident Correction and Technical Support.

**Technical Support** means answering questions and providing information to Client regarding the Services but excludes Incident Correction.

**Terms** means the terms and conditions in this document.
**Third Party Software** means Public Software and other software owned by third parties that Dimension Data uses or makes available to Client in connection with the Services.

**Third Party Software Terms** means the terms and conditions applicable to use of Third Party Software located at [http://www.dimensiondata.com/Services/CloudServices/Legal/ThirdPartySoftwareTerms](http://www.dimensiondata.com/Services/CloudServices/Legal/ThirdPartySoftwareTerms).

**Usage** means a Client's monthly usage or consumption of Services.

**Usage-Based Plan** means a Plan under which Client pays for Services based on Client's Usage.

**Usage Pricing Terms** means the pricing and rates for Services based on Usage. The Usage Pricing Terms are set out in the Order or available to Client via the Service Portal.

**User(s)** has the meaning given in the Acceptable Use Policy.

**Welcome Pack** means the materials including Administrator's Credentials and access instructions that Dimension Data provides to Client to allow Client to access the Services.

### 3. Orders

**Ordering Services**

3.1 Client may order Services and Optional Services by submitting Orders. Orders may be submitted on-line, in electronic or paper format. They must include the applicable Fees and be in a form approved by Dimension Data.

**Ordering Optional Services**

3.2 Dimension Data's provision of an Optional Service is subject to the availability of and Dimension Data's capacity to provide the applicable Optional Service. Dimension Data may reject an Order for Optional Services for any reason. Optional Services may also be subject to additional Fees, including Set-Up Fees, Usage Fees and other Optional Service Fees, or Minimum Commitment Terms, as indicated in the SDOS or elsewhere.

**Acceptance of Orders**

3.3 An Order is only binding on Dimension Data once accepted as follows:

(a) in the case of Client's first Order for Services, the earlier of when Dimension Data: (i) countsigns a paper Order; and (ii) sends the Welcome Pack containing Credentials to Client by email; and

(b) in the case of subsequent Orders for Services and Orders for Optional Services, the earlier of when Dimension Data: (i) sends to Client an email confirming acceptance of the Order; (ii) countsigns a paper Order; and (iii) commences performing the applicable Services.

**Appointment of Administrators**

3.4 In its first applicable Order for Services Client will designate one Administrator. The Administrator is authorised by Client to provision Services, order additional Services, manage Client's use of Services, appoint Sub-Administrators and issue Credentials. Client may also automate the provisioning, ordering and management of Services through the API. Any and all actions, requests and Orders made using Credentials or through the API will be deemed to have been authorised by Client and Client will be responsible for the associated Fees.

**Sub-Administrators**
3.5 The Administrator may designate one or more Sub-Administrators. Sub-Administrators may perform all acts of the Administrator other than appointing Sub-Administrators. Appointment of Sub-Administrators may constitute additional Usage and be subject to additional Fees as described in the Usage Pricing Terms.

Client Responsibility for Credentials

3.6 Client is responsible for: (i) maintaining the security of Credentials; (ii) ensuring Credentials are only used by the Administrator or Sub-Administrators; and (ii) the acts and omissions of the Administrator, all Sub-Administrators and any person using Client's Credentials.

3.7 Client will notify Dimension Data immediately in writing if it becomes aware of: (i) any loss, theft, or unauthorised use of Credentials; or (ii) any breach of this Agreement by the Administrator or a Sub-Administrator.

Commencement of Services

3.8 Following acceptance of an Order, Dimension Data will perform the Services from the Services Commencement Date.

Selecting Locations and Geographies

3.9 Client will access the Services from, and store and process all Client Content in, the Location and Geography designated in the Order.

3.10 Locations and Geographies may be changed as follows: (i) for Services allowing a change of Location within Geography via the Service Portal, Client may request the change(s) via the Service Portal; or (ii) in other cases, Client must request access to a different Location or Geography in writing to Dimension Data, and if Dimension Data approves the request, a new Order will be agreed and the Location(s) available in the new Geography will then be available to Client.

3.11 Client acknowledges that the addition of Locations may affect the calculation of Client’s Usage, Fees and Service Level Credits.

4. Access to and use of the Services

Access to the Services

4.1 Subject to: (i) Client’s payment of all Fees; and (ii) the other terms and conditions of the Agreement, Dimension Data grants to Client a limited, non-exclusive, non-transferable, non-sublicenseable right and license during the term of each applicable Order for Client to access and use the Services as described in the applicable Service Description(s). This license includes the right to use the Documentation and APIs in connection with the Services.

Restrictions on use of the Services

4.2 Except as expressly permitted by the Agreement, Client will not and will ensure that Users do not:

(a) reproduce, download, frame, mirror, or create derivative works from the Services;

(b) decompile, disassemble, or otherwise reverse engineer any Services;

(c) access or use any Services in order to build any competing product or service;

(d) license, sub-license, sell, rent, lease, transfer, assign, distribute, disclose, or otherwise make available any Services to any third party, or use any Services on a service bureau basis however, nothing in this paragraph (d) prohibits Client from providing access to any Client Content to Users;

(e) access or use any Services in violation of the AUP or any law or regulation;
(f) remove, obscure or alter any trademarks, brand names, or other proprietary notices appearing on or contained within the Third Party Software, APIs or any of the Services;

(g) use or access any Services other than as expressly permitted by the Agreement.

**API**

4.3 Client may access the Services either through a web-based user interface or via the API. Dimension Data may modify and republish the API from time to time and Client must ensure their systems are compatible with the then current API. If Dimension Data removes or changes a material feature or function of the API, Dimension Data will use commercially reasonable efforts to maintain backwards compatibility with the previous version of the API for twelve (12) months from the date of the change.

**Third Party Software**

4.4 The Services may include Third Party Software in which case the Third Party Software Terms will apply. If there is any conflict or inconsistency between the Third Party Software Terms and the other documents comprising this Agreement with respect to Third Party Software, then the Third Party Software Terms will prevail to the extent of the conflict or inconsistency.

**No Other Rights**

4.5 As between the parties, Dimension Data is the owner of all right, title and interest (including intellectual property rights) in and to the Services. Subject only to the rights of use and licenses granted in this Agreement, Client will not acquire or claim any right, title or interest (including intellectual property rights) in or to the Services, whether by implication, operation of law or otherwise.

**US Export Controls**

4.6 Client will comply with all applicable export laws and regulations in its use of the Service. No part of the Services may be downloaded or otherwise exported or re-exported: (i) into any country for which the United States has a trade embargo, or (ii) to anyone on the U.S. Treasury Department’s list of Specially Designated Nationals, which is currently maintained at http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx, or the U.S. Commerce Department’s Denied Persons List, which is currently maintained at http://www.bis.doc.gov/dpl/thedениallist.asp. Client represents and warrants that it is not located in, under the control of, or a national or resident of any such country or on any such list.

**5. Client Content**

5.1 Client may install and use Client Content on the Services. Client is solely responsible for: (i) ensuring that Client has the necessary rights, permissions and licences to install and use the Client Content on the Services; (ii) the acts and omissions of any users of the Client Content; (iii) the functionality and operation of the Client Content; and (iv) the support and maintenance arrangements for the Client Content.

5.2 As between the parties, Client is the owner of all right, title and interest (including intellectual property rights) in and to the Client Content. Client grants to Dimension Data a limited, non-exclusive, non-transferable, non-sublicenceable right and license during the term of each applicable Order to use and host the Client Content solely in connection with providing the Services and performing its obligations under the Agreement.

**6. Service Levels and Service Level Credits**

**Service Levels**

6.1 The Service Levels are set out in the Service Level Terms. Client is entitled to Service Level Credits as set out in the Service Level Terms and this Section 6. Failure to meet Service Levels is not a breach of the Agreement by Dimension Data and Service Level Credits are Client’s sole and exclusive remedy and Dimension Data’s sole and exclusive liability for failure to meet Service Levels.
Service Level Credits

6.2 Client must request Service Level Credits in writing by sending an email to cloudcredits@dimensiondata.com within 30 days of the first event giving rise to the applicable Service Level Failure. Following receipt of the request, Dimension Data will review the request and determine whether Client is eligible for the applicable Service Level Credit. If Dimension Data determines that Client is eligible for the Service Level Credit, then Dimension Data will apply the Service Level Credit to Client’s invoice for the calendar month following the calendar month in which Client requested the Service Level Credit. If Dimension Data determines that Client is not eligible for the Service Level Credit and Client then disputes this determination, then if the dispute is resolved in Client’s favour, Dimension Data will apply the Service Level Credit to Client’s invoice for the calendar month following the calendar month in which the dispute is resolved. The invoice to which the Service Level Credit is applied by Dimension Data is called the “Service Level Credit Invoice.”

6.3 Service Level Credits may only be applied against the Service Level Credit Invoice, may not be applied against any other invoices and may not be redeemed for cash. Following expiration or termination of the applicable Order, Service Level Credits that have not been redeemed will be treated as follows:

(a) if the Order expired in accordance with its terms, then Client will be entitled to apply the unused Service Level Credit against purchases of Services by Client during the twelve (12) months following the month during which the Service Level Credit was incurred;

(b) if Client terminated the Order for Dimension Data’s breach in accordance with the Terms, then Dimension Data will pay the Service Level Credit to Client; and

(c) if Dimension Data terminated the Order for Client’s breach, then on termination, the Service Level Credit will expire and will no longer be redeemable by Client.

6.4 Any Service Level Credits not requested or not redeemed by Client will automatically expire.

6.5 In order to be eligible for Service Level Credits, Client must be current on all outstanding invoices both at the time the Service Level Credits would otherwise have accrued and at the time the Service Level Credits would otherwise be payable.

7. Maintenance and Support

Maintenance

7.1 Dimension Data performs scheduled maintenance on the Services including maintenance related to the Software, MCP and other equipment and materials used for providing the Services. Occasionally Dimension Data may need to perform emergency or unscheduled maintenance. Maintenance may cause interruptions to the Services although Dimension Data will use reasonable efforts to inform Client in advance about maintenance related Service interruptions including the likely duration. Additional information about maintenance is set out in the Service Description.

Dimension Data Community

7.2 Dimension Data will provide Client with access to Dimension Data’s online community forum, located at http://www.dimensiondata.com/Services/CloudServices/Community (“Community Forum”). Client may use the Community Forum to ask questions about the Services. Client may also use the Community Forum to receive online Technical Support and, in some circumstances, guidance for self-administering Incident Corrections. Dimension Data reserves the right to review and remove any content posted to the Community Forum, including any content that Dimension Data believes, in its sole discretion, to be:

(a) illegal, inappropriate or in violation of the AUP; or

(b) the subject matter of a complaint by any client.

Client acknowledges and agrees that all content that Client posts to the Community Forum is not confidential and will not be treated as such.
7.3 Client will retain ownership of content that Client posts to the Community Forum ("Client Community Content"). Client grants to Dimension Data a worldwide, non-exclusive, transferable, sublicenceable (including to other clients in the Community Forum), royalty-free right and license to use, reproduce, publicly display, distribute and otherwise exploit the content. Client may use the content posted in the Community Forum during the term of this Agreement solely for the purpose of accessing and using the Services.

7.4 Dimension Data makes no warranty with respect to the accuracy, completeness or usefulness of any content found on the Community Forum, whether posted by Dimension Data or other clients. Client further agrees that Dimension Data is not liable for any losses or damages Client may suffer resulting from:

(a) any use or access by Dimension Data or other clients of Client Community Content; and

(b) any content posted to the Community Forum by Dimension Data or clients.

Global Service Centre

7.5 In addition to using the Community Forum, Client may also obtain support via Dimension Data’s 24-hour help desk (“Global Service Centre” or “GSC”). Dimension Data will provide Client with access to phone and email support from the GSC 24 hours per day, seven days per week. The contact details for the GSC are included in the Welcome Pack.

7.6 When speaking with a GSC representative, Client will report all Incidents and make all Service Requests in sufficient detail to enable the GSC representative to: (i) classify and handle the Incident or Service Request; and (ii) pass the Incident or Service Request to the appropriate technical support specialists.

7.7 Dimension Data will classify each call as an Emergency Incident, Other Incident or Service Request. Dimension Data may reclassify a call and respond accordingly based on the circumstances.

7.8 On each call, the GSC representative will assign a unique ticket number to Client, which Client can use to track the Incident or Service Request.

8. Confidentiality

8.1 “Confidential Information” means all information (whether in written, oral, electronic, or other form) that is disclosed or otherwise made available by one party (the “Disclosing Party”) to the other party (the “Receiving Party”) in connection with this Agreement or the Services. To be Confidential Information the information must be identified as being confidential or proprietary or a reasonable person would assume, under the circumstances, that it is confidential. Confidential Information of Dimension Data includes any non-public Services, Documentation and pricing information. Confidential Information of Client includes all Client Content. The Agreement is deemed to be the Confidential Information of both parties. Confidential Information does not include information that: (i) is lawfully in the public domain when the Receiving Party received it; (ii) lawfully becomes part of the public domain afterwards; (iii) was already known to the Receiving Party before receiving it from the Disclosing Party; (iv) is given to the Receiving Party by a third person who is allowed to reveal it; or (iv) is independently created by the Receiving Party without reference to the Disclosing Party’s Confidential Information.

8.2 Subject to Section 8.4, the Receiving Party agrees to protect the interests of the Disclosing Party in the Confidential Information and will: (i) not disclose the Confidential Information except to its employees, contractors or agents that need it, and only give them as much as they need; (ii) protect the Confidential Information of the Disclosing Party with at least the same degree of care it uses to protect its own Confidential Information; (iii) get promises of confidentiality from those employees, contractors or agents who need access to the Confidential Information; (iv) not reveal the Confidential Information to anyone else; and (v) not use it for any purposes other than as required by the Services and this Agreement.

8.3 The Receiving Party must promptly advise the Disclosing Party in writing of any loss, wrongful disclosure or access, breach of confidentiality or misappropriation or misuse of the Disclosing Party’s Confidential Information of which the Receiving Party becomes aware.

8.4 The Receiving Party may disclose Confidential Information if required by law or judicial or other order. However, the Receiving Party must take all reasonable steps to: (i) promptly notify the Disclosing Party of
any required disclosure; (ii) allow intervention by the Disclosing Party, and will cooperate with the Disclosing Party to contest or minimise the scope of the disclosure.

8.5 Each party acknowledges that damages may not be a sufficient remedy for unauthorised disclosure or use of the other party’s Confidential Information and that the other party will be entitled, without waiving any other rights or remedies, to seek injunctive or other equitable relief to protect its Confidential Information.

9. Privacy, Data Protection and Data Security

Client security obligations

9.1 Client acknowledges that it is responsible for using the Services properly and for determining and taking appropriate technical and organisational measures to maintain the security of Client Content. Client is responsible for selecting the Location(s) in which Client Content will be hosted. Client will comply with all applicable laws with respect to Client Content and Client’s use of the Services.

Privacy, Data Protection and Client Content

9.2 Before any information related to an identified or identifiable individual (“Personal Data”) is included in the Client Content or used in connection with the Services, Client must obtain from the relevant individual or data subject consent sufficient to allow Dimension Data to perform the Services and use the Personal Data as described in the Service Description and this Agreement.

Dimension Data security obligations

9.3 Dimension Data will secure the integrity of Client Content (including any personal information) in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent: (i) loss of, damage to or unlawful or unauthorised destruction of Client Content; and (ii) unlawful or unauthorised access to or processing of Client Content. In order to give effect to this Section 9.3, Dimension Data will, having regard generally accepted information security practices and procedures and the cost of implementing any such measures: (i) identify reasonably foreseeable internal and external risks to Client Content in its possession or under its control; (ii) establish and maintain appropriate safeguards against the risks identified; (iii) ensure that the safeguards are regularly updated in response to new risks or deficiencies in previously implemented safeguards; and (iv) regularly verify that the safeguards are effectively implemented.

9.4 The parties will comply with their respective rights and obligations as set out in the Data Processing Addendum.

10. Representations and Warranties

Mutual Warranties

10.1 Each party represents and warrants to the other that: (i) it has the full power and authority to enter in and perform this Agreement; (ii) it will comply with all applicable laws, rules, regulations and ordinances in the performance of this Agreement; and (iii) its performance of this Agreement does not put it in breach of any other agreement.

Dimension Data Warranty

10.2 Dimension Data represents and warrants to Client that it will perform the Services materially in accordance with the applicable Service Description(s).

Third Party Software

10.3 Dimension Data will pass on to Client the benefit of any warranties and indemnities it receives under the Third Party Software Terms to the extent Dimension Data has the right to do so. Otherwise Dimension Data makes no, and expressly disclaims all, representations and warranties with respect to Third Party Software and Client’s use of Third Party Software is at Client’s sole risk.
Other Warranties Excluded

10.4 The Services are provided on an “as is” and “as available” basis. Except for the representations and warranties in this Agreement, Dimension Data expressly disclaims all other representations, warranties and conditions whether express or implied including as to merchantability, satisfactory quality, fitness for a particular purpose, non-infringement, title, that the Services will meet Client requirements or be timely, uninterrupted, error free or secure. No advice, results or information obtained by Client from Dimension Data or through the Services, any documentation or the Community Forum, will create any warranty, condition or obligation on Dimension Data.

11. Indemnification

Dimension Data Indemnification

11.1 Dimension Data will defend Client from any third party claim, suit, action or proceeding, and will pay all related damages, costs, expenses, judgments, settlement amounts, and other liabilities (including reasonable attorney’s fees and costs) finally awarded against Client by a court or tribunal of competent jurisdiction, arising from any allegation that the Services, when used as authorised by the Agreement, in the form provided by Dimension Data, infringe any copyright, patent, trade secret, trademark or other intellectual property rights of a third party. If Client seeks indemnification under this Section 11.1, it must:

(a) provide Dimension Data with prompt notice of the claim;

(b) give Dimension Data sole control of the defence and related settlement negotiations; and

(c) reasonably cooperate with Dimension Data, at Dimension Data’s expense, in defending or settling the claim.

11.2 Despite the foregoing, Client may participate with Dimension Data in (but not control) the claim using counsel of its choice at its own expense. Dimension Data will not enter into any settlement or other compromise of the claim that materially affects Client without Client’s written approval. The approval will not be unreasonably withheld.

Client Indemnification

11.3 Client will defend Dimension Data from any third party claim, suit, action or proceeding, and will pay all related damages, costs, expenses, judgments, settlement amounts, and other liabilities (including reasonable attorney’s fees and costs) finally awarded against Dimension Data by a court or tribunal of competent jurisdiction, to the extent arising from:

(a) any violation (or alleged violation) of applicable law by Client or any Client Content or Client Community Content;

(b) any allegation that any Client Content or Client Community Content infringes, misappropriates or violates any copyright, patent, trade secret, trademark or other intellectual property rights of a third party;

(c) any dispute with third party licensors or providers of any Client Content or Client Community Content; or

(d) any act or omission of Users or of Client’s customers or their respective end-users, including any breach of the license restrictions set out in Section 4.2.

Exclusions

11.4 Dimension Data has no obligation to Client under this Section 11 in connection with:

(a) any modification of the Services by anyone other than Dimension Data;

(b) any Third Party Software;
(c) any combination of the Services with any Client Content or information, data, software, hardware, network, infrastructure, or other materials not provided by Dimension Data if the claim would not have arisen but for that combination;

(d) use of the Services other than as permitted by the Agreement or contrary to the applicable Service Description(s); or

(e) Client’s continued use of the Services after notice of the alleged or actual infringement.

Additional Remedies

11.5 If the Services are the subject of an infringement claim (or Dimension Data reasonably believes that the claim is likely), then Dimension Data may at its option and expense:

(a) procure for Client the right to continue to use the Services;

(b) modify the Services to be non-infringing or provide non-infringing substitutes with substantially similar functionality; or

(c) if Dimension Data cannot accomplish (a) or (b) using commercially reasonable efforts, terminate the Services and refund to Client the unused portion of any Fees paid in advance for the affected Services.

12. Fees and Payment

Fees Generally

12.1 Client will pay the Fees to Dimension Data. Unless otherwise specified in the applicable Order: (i) Fees are due immediately upon invoice; and (ii) Client will make all payments by credit card.

12.2 Fees are calculated based on the Usage Pricing Terms in effect on the date of each applicable invoice. Any changes to the Usage Pricing Terms will take effect from the last day of the full calendar month after publication.

Types of Fees

12.3 The following types of Fees apply to the Services:

(a) **Set-up Fee**: A one-time Fee for activation of Services as described in the applicable Order.

(b) **Usage Fees**: The Fees payable by Client each month based on Client’s Usage. Client will pay the Minimum Usage Commitment in advance (“Minimum Usage Fee”) and will pay Fees for any Usage over the Minimum Usage Commitment in arrears (“Overage Fee”).

(c) **Optional Service Fees**: The Fees payable by Client each month for Optional Services. Depending on the Optional Service, those Fees are payable either in advance or in arrears as indicated in the Service Description for Optional Services (“SDOS”), and are included in the applicable Optional Services Order, or available upon request from Dimension Data or as otherwise described in the SDOS.

Invoices

12.4 Dimension Data will invoice Client as follows:

(a) For Minimum Commitment Plans and Orders for Optional Services, on or after the Effective Date of an Order, Dimension Data will deliver an invoice for the first calendar month’s Minimum Usage Fees (adjusted pro-rata for the remainder of the then current calendar month), if applicable; the first calendar month’s Optional Service Fees, if applicable (adjusted pro-rata for the remainder of the then current calendar month); and the Set-Up Fee, if applicable. Each subsequent month, Dimension Data will deliver an invoice for: (i) the Minimum Usage Fees for the month; (ii) for Optional Service Fees that are required to be paid in advance, the applicable Optional Services Fees for such month; and (iii) the Overage Fees and, for Optional Services that are required to be paid in arrears, the applicable Optional Service Fees, in each case for the
immediately preceding calendar month (and prior calendar months, if such Fees have accrued but have not yet been invoiced).

(b) For Usage-Based Plans, Dimension Data will deliver an invoice each month for the Usage Fees that accrued in the previous billing month. The date on which the first and each subsequent invoice will be delivered depends on the Effective Date of the applicable Order.

Payment and Taxes

12.5 Any Client-specific payment terms, including currency, dates and manner of payment, interest rates on late payment, and taxes, will be described in the applicable Order.

Additional Fees

12.6 Dimension Data may charge Client additional Fees on a time and materials basis at Dimension Data’s then current rates for any of the following: (i) re-establishment of Services (whether following suspension under Section 14 or otherwise); (ii) Service Requests or assistance requested by Client outside the scope of the applicable Order; or (iii) Support, where Dimension Data determines on reasonable grounds that Client’s request was not related to an Incident.

12.7 Additional Fees will be invoiced in arrears.

Fees for Additional Service Offerings

12.8 Where Dimension Data adds a new offering to the Services (which was: (i) not available for purchase and (ii) not included in the Usage Pricing Terms in effect on the Effective Date of the applicable Order) the Fees payable for such new offering will be based on the then current Usage Pricing Terms, regardless of whether Client was on a Minimum Commitment Plan for previously existing Services.

Unforeseen Fee Increase

12.9 Notwithstanding anything to the contrary in this Agreement, Dimension Data may increase the Fees in an Order (including for Minimum Commitment Plans) if the costs or charges incurred by Dimension Data for electricity or Third Party Software materially increase. Dimension Data will promptly notify Client in the event of such an increase in the Fees in an Order, and such increased Fees will go into effect on the last day of the calendar month immediately following such notice. Notwithstanding anything to the contrary in this Agreement, if Client does not agree to such a price increase for a particular Order, Client may terminate such Order at any time prior to the effective date of such increase by providing Dimension Data with written notice of such termination. Failure to terminate in accordance with the foregoing will constitute acceptance of such Fee increase.

Other Payment Terms

12.10 Dimension Data may apply any payment received from Client under any Order towards any amounts that Client owes to Dimension Data under this Agreement or otherwise. Client gives Dimension Data permission to provide any registered credit bureau with information about the payment of amounts Client makes under this Agreement.

12.11 Subject to Section 12.2, Client may not withhold payment of any amount due to Dimension Data for any reason.

12.12 If Client has raised a genuine dispute regarding an invoice, it may withhold payment of the disputed amount pending resolution of the dispute but must pay the undisputed part before the due date.

13. Limitation of Liability

13.1 Notwithstanding anything in this Agreement to the contrary, except for Client’s obligations under Section 11 (Indemnification) or Client’s breach of Section 4.2 (Restrictions), to the full extent permitted by applicable law:
(a) neither party will be liable for any indirect, incidental, consequential, special, punitive, or exemplary damages arising out of or related to the Services or this Agreement, including damages for interruption of business, loss of profits, loss of goodwill, or loss or corruption of data, regardless of the form of action, whether in contract, tort (including negligence), strict liability or other legal theory, even if the party was advised in advance of the possibility of those damages and even if those damages were foreseeable; and

(b) in no event will either party’s maximum aggregate liability to the other arising out of or related to the Services or this Agreement exceed the amounts paid by Client during the twelve (12) month period preceding the event or circumstances giving rise to that liability. For avoidance of doubt, the foregoing limitation of liability does not apply to Client’s obligation to pay fees.

14. Suspension

14.1 Dimension Data reserves the right to suspend or restrict Client’s or any User’s access to and use of the Services if:

(a) Client or any User breaches this Agreement;

(b) Client or any User fails to cooperate with any reasonable investigation by Dimension Data of a suspected breach of this Agreement;

(c) Dimension Data reasonably determines that suspension is necessary to prevent or mitigate damage or disruption to Dimension Data’s systems or networks;

(d) Client fails to pay any Fees when due;

(e) there is an unusual spike or increase in Client’s use of the Services that impacts Dimension Data’s ability to deliver the Services; or

(f) as the result of any Excusing Event, (collectively “Service Suspensions”).

Dimension Data will use commercially reasonable efforts to provide: (i) prior notice of a Service Suspension; and (ii) updates regarding resumption of Services following a Service Suspension.

14.2 Client Content hosted on the Services may be unavailable during a Service Suspension. Without limiting Section 13, Dimension Data will have no liability for any damages, liabilities, or losses resulting from a Service Suspension.

15. Term and Termination

Term

15.1 This Agreement commences on the Effective Date of Client’s first Order and, unless terminated earlier, continues until the last expiration or termination date of any of Client’s Orders. The initial term of each Order will be stated in the Order. Subject to the terms of the applicable Order, each Order with a Minimum Commitment Plan will automatically renew for an additional twelve (12) month period (each a “Renewal Term”) upon expiration of the initial term or the then-current Renewal Term, unless either party provides written notice of termination at least 90 days prior to the expiration date of the Order.

Limited Termination for Convenience

15.2 A party may terminate for convenience an Order by written notice to the other party with termination to be effective: (i) for Usage-Based Plans, no later than seven days following the notice; or (ii) for Orders with Minimum Commitment Plans, at the end of the Minimum Commitment Term.
Termination for Cause

15.3 Either party may terminate this Agreement (and all Orders) or any individual Order upon notice to the other party if the other party materially breaches any term or condition of this Agreement or any Order and fails to correct the breach within fifteen (15) days following notice specifying the breach. Without limitation, Client’s failure to pay Fees on time and Client’s (or any User’s) noncompliance with Section 4.2 will constitute material breaches. In addition, Dimension Data may immediately terminate any Order or particular Services under an Order by notice to Client if continuing to provide the applicable Services to Client becomes infeasible as the result of a Force Majeure Event.

Effect of Termination

15.4 Upon expiration or termination of this Agreement or any Order:

(a) Dimension Data will cease providing and Client’s rights to access the applicable Services will stop

(b) all outstanding invoices will become immediately due;

(c) the remainder of all monthly Fees for the remaining Minimum Commit Term (if applicable) will become immediately due (termination by Client due to Dimension Data’s breach excepted); and

(d) Dimension Data will not be required to maintain or store, and may delete, Client Content hosted in connection with the terminated Services, unless otherwise agreed in the applicable Order.

15.5 Either party’s termination of this Agreement or any Order will be without prejudice to any other remedies that it may have at law or otherwise, and will not relieve either party of breaches occurring prior to the effective date of termination. The following Sections of these Terms will continue and survive after any expiration or termination: Sections 2, 4.2, 4.4, 4.5, 8, 10.4, 11, 12, 13, 15.4, 16, and Error! Reference source not found.

16. General

Severability

16.1 If the application of any provision of this Agreement to any particular facts or circumstances is held to be invalid or unenforceable by a court or tribunal of competent jurisdiction, then:

(a) the validity and enforceability of that provision as applied to any other particular facts or circumstances and the validity of other provisions of this Agreement will not in any way be affected or impaired thereby, and

(b) the provision will be enforced to the maximum extent possible so as to effect the intent of the parties and be deemed to have been amended without further action by the parties to the extent necessary to make the provision valid and enforceable.

Governing Law and Jurisdiction

16.2 This Agreement will be governed by the applicable laws of the State of New York, USA, excluding any conflict of laws rules that may apply in such state. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement or any Order issued under this Agreement.

Notices

16.2 Any notice, request, demand or other communication required or permitted by these Terms will:

(a) be in writing;

(b) reference this Agreement and the applicable Order; and

(c) be directed to the recipient’s address or email address (or facsimile number if applicable) specified in the applicable Order by prepaid registered post, hand delivery, or facsimile, and will be deemed to be properly
given when received. In addition, Dimension Data may provide general notices related to the Services (including updates to these Terms, the Service Descriptions and the Service Level Terms) via http://www.dimensiondata.com/Services/CloudServices/Notices, and the parties may communicate regarding support-related issues via the Community Forum and the Global Service Centre.

Assignment

16.3 Neither party may assign, delegate or otherwise transfer, whether voluntarily or involuntarily, by operation of law or otherwise, this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other party, except that:

(a) Dimension Data may assign this Agreement without the prior written consent of Client to an affiliate or in connection with a merger, consolidation, or sale of all or a portion of Dimension Data’s assets or business; and

(b) Dimension Data may have any of the Services performed on its behalf by its affiliates or other third parties.

16.4 Subject to the foregoing, the rights and liabilities of the parties are binding on, and will inure to the benefit of, the parties and their respective successors and permitted assigns. Any attempted assignment, delegation or other transfer other than in accordance with Section 16.4 will be ineffective.

Dispute Resolution

16.5 If a dispute ("Dispute") arises out of this Agreement or in connection with the Services the parties will attempt to settle it by negotiation. A party may initiate Dispute negotiations by emailing a demand for Dispute resolution ("Dispute Notice") as follows: (i) for Client, to the email address notified to Client; (ii) for Dimension Data, to Client’s email address as indicated in the applicable Order. Within five (5) days of a Dispute Notice the parties must refer the matter to a committee of four (4) consisting of two (2) representatives from each party (the “Committee”). The Committee will meet and attempt to resolve the Dispute within 30 days of referral. The Committee will determine its own procedures and any decision of the Committee will be binding on the parties. If the parties are unable to resolve the Dispute they may commence legal proceedings in the relevant court having jurisdiction (as determined by the table at Section Error! Reference source not found.17.1) but nothing in this Agreement prevents a party from seeking interim or provisional relief concerning a Dispute, including a temporary restraining order or preliminary injunction.

Right to Reference

16.6 Unless Client advises Dimension Data otherwise in writing, Client consents to Dimension Data using its name in any of Dimension Data’s marketing, sales materials, press releases, public announcements and case studies.

Waiver

16.7 Any waiver by either party of a breach of or a default under any provision of this Agreement must be in writing and will not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor will any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have under the Agreement operate as a waiver of any right or remedy.

Feedback

16.8 If Client provides suggestions for changes or improvements or other feedback ("Feedback") about the Services or any of Dimension Data’s products or services, Dimension Data may use the Feedback for any purpose without obligation or payment of any consideration and Client assigns to Dimension Data all right, title and interest (including intellectual property rights) in and to the Feedback.

Force Majeure
16.9 Except for the payment of Fees, neither party will be liable to the other for failure or delay in performing its obligations under the Agreement if the failure or delay is due to circumstances beyond its reasonable control, including acts of any governmental body, war, insurrection, sabotage, embargo, fire, flood, strike or other labour disturbance, interruption of or delay in transportation, interruption of or delay in telecommunications or third party services, unanticipated product development problems, or inability to obtain raw materials, supplies or power used in or equipment needed for provision of the Services (each, a “Force Majeure Event”).

Relationship of the Parties

16.10 Nothing contained in this Agreement will be deemed or construed as creating a joint venture, partnership, agency, employment, or fiduciary relationship between the parties. Neither party, nor either party’s agents, have any authority of any kind to bind the other party in any respect whatsoever, and the relationship of the parties is, and at all times will continue to be, that of independent contractors.

No Third Party Beneficiaries

16.11 Nothing in this Agreement, express or implied, confers or is intended to confer on, any person other than the parties and the respective successors or permitted assigns of the parties, any rights, remedies, obligations or liabilities.

Changes to the Terms

16.12 Subject to Section 16.13, Dimension Data may change these Terms from time to time including when required by law or governmental entities (a “Regulatory Change”). Dimension Data will provide notice to Client of changes including by posting the updated version of these Terms at http://www.dimensiondata.com/global/services/cloud-services/pages/notices.aspx. Client’s continued use of the Services following a change will be deemed acceptance by Client of the change provided that any material change to these Terms will not apply retrospectively to a claim or dispute between Client and Dimension Data in connection with these Terms that arose prior to the date of the change.

16.13 If Client is using Services under an Order with a Minimum Commitment Term, then Client may, on giving Dimension Data notice within ten (10) business days of the applicable change, elect not to have the change apply and to continue to use the Services for the remainder of the Minimum Commitment Term under the previously existing Terms.

No Presumptions

16.14 If an ambiguity or question of interpretation arises the Agreement will be construed as if drafted jointly by the parties and no presumption or burden of proof based on authorship will arise favouring one party over the other. Client waives any claims or defences regarding the validity or enforceability of this Agreement arising from the fact of electronic submission or presentation of the Agreement to Client.

Entire Agreement and Precedence

16.15 This Agreement is the entire agreement of the parties on the subject matter and supersedes any previous understanding or agreements. Except as otherwise provided with respect to updating of certain terms by Dimension Data, no modifications, additions, or amendments to this Agreement will be effective unless set out in a writing referencing this Agreement and signed by a duly authorised representative of each Party.

16.16 If there is any conflict or inconsistency between these Terms and the terms in any other document that forms the Agreement then:

(a) the terms in an Order will take precedence and resolve the conflict or inconsistency solely with respect to the specific variable terms included in the Order concerning pricing, payment, term, termination, or specific Services ordered; and

(b) these Terms will take precedence with respect to all other matters.
Interpretation

16.17 Headings are inserted for reference purposes only and do not affect the interpretation of the Agreement. For the purposes of interpreting this Agreement unless the context otherwise requires:

(a) the singular includes the plural, and the plural includes the singular;

(b) the words “include” and “including” will not be construed as terms of limitation, and will mean “including without limitation”;

(c) the words “writing” or “written” mean reduced to writing whether in electronic or hard copy form;

(d) references to the parties will refer to their permitted successors and assigns; and

(e) references to any document, agreement, instrument or statute mean that document, agreement, instrument or statute as amended from time to time.