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XER Schedule Toolkit

Subscription Software Services Terms & Conditions

THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THE PROVISIONS OF **CLAUSE 15 (LIMITATION OF LIABILITY)**.

1. Interpretation

The following definitions and rules of interpretation apply in these Conditions.

1.1 Definitions:

Activity: each individual line of any Gantt chart(s) used by the Customer as part of its use of the Software Services.

Admin User Subscription: a User Subscription granting administrative editorial rights in respect of the use of Software by the Customer under the Contract.

Authorised Users: those employees, agents and independent contractors of the Customer who are authorised by the Customer to use the Services and the Documentation, as further described in clause 3.2(d).

Business Day: a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

Change of Control: the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and **controls**, **controlled** and the expression **change of control** shall be construed accordingly.

Commencement Date: has the meaning given in clause 2.2.

Conditions: these terms and conditions as amended from time to time in accordance with clause 18.

Contract: the contract between the Supplier and the Customer for the supply of Services, comprising the XER Online Contract Summary and these Conditions.

Confidential Information: information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in clause 13.6 or clause 13.7.

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Controller, processor, data subject, personal data, personal data breach, processing and appropriate technical and organisational measures: as defined in the Data Protection Legislation.

Customer: the Customer identified in the XER Online Contract Summary receiving the benefit of the Services.

Customer Data: the data inputted by the Customer, Authorised Users, or the Supplier on the Customer's behalf for the purpose of using the Services or facilitating the Customer's use of the Services.

Data Protection Legislation: all applicable data protection and privacy legislation in force from time to time in the UK including the UK GDPR; the Data Protection Act 2018; the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended; 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); and the guidance and codes of practice issued by the relevant data protection or supervisory authority and applicable to a party.

Documentation: the document made available to the Customer by the Supplier online via <https://xer-online.com> (or such other web address notified by the Supplier to the Customer from time to time) which sets out a description of the Services and the user instructions for the Services.

Initial Subscription Term: the initial term of the Contract as set out in the XER Online Contract Summary, being either:

- (a) one year where the Customer has an annual Software Subscription; or alternatively
- (b) one month where the Customer has a monthly Software Subscription.

Normal Business Hours: 8.00 am to 6.00 pm local UK time, each Business Day.

Order: the Customer's order for Services as set out in the Customer's purchase order form, the Customer's written acceptance of a quotation by the Supplier, as the case may be.

Renewal Period: the renewal period of the Contract as described in clause 16.1, being either:

- (c) one year where the Customer has an annual Software Subscription; or alternatively
- (d) one month where the Customer has a monthly Software Subscription.

Services: the subscription Software services provided by the Supplier to the Customer under the Contract via <https://xer-online.com> (or any other website notified to the

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Customer by the Supplier from time to time), as more particularly described in the Documentation.

Software: the XER Online Schedule Toolkit software applications provided by the Supplier as part of the Services.

Subscription Fees: the subscription fees payable by the Customer to the Supplier for the User Subscriptions, as set out in the XER Online Contract Summary.

Subscription Term: has the meaning given in clause 16.1 (being the Initial Subscription Term together with any subsequent Renewal Periods).

Supplier: means XER Limited, registered in England and Wales with company number 08710782 whose registered office is at One Humber Quays, Hull, HU1 2BN.

Support Services Policy: the Supplier's policy for providing support in relation to the Services as made available at <https://xer-online.com> or such other website address as may be notified to the Customer from time to time.

UK GDPR: has the meaning given in section 3(10) (as supplemented by section 205(4)) of the Data Protection Act 2018.

User Subscriptions: the user subscriptions purchased by the Customer pursuant to clause 11.1 which entitle Authorised Users to access and use the Services and the Documentation in accordance with the Contract (to include Admin User Subscriptions and other User Subscriptions identified in the XER Online Contract Summary).

Virus: any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

Vulnerability: a weakness in the computational logic (for example, code) found in software and hardware components that when exploited, results in a negative impact to the confidentiality, integrity, or availability of the Services, and the term Vulnerabilities shall be interpreted accordingly.

XER Online Contract Summary: the Supplier's Order Confirmation (or if no Order Confirmation is issued, the Supplier's Quote) issued to the Customer setting out (amongst other things) the Services, the Initial Subscription Term, Subscription Fees, additional User Subscription Fees and excess storage fees.

1.2 Interpretation

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- (a) A reference to a statute or statutory provision is a reference to it as amended or re-enacted. A reference to a statute or statutory provision includes all subordinate legislation made under that statute or statutory provision.
- (b) Any words following the terms **including, include, in particular, for example** or any similar expression, shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- (c) A reference to **writing** or **written** includes email but not fax.

2. Basis of contract

- 2.1 The Order constitutes an offer by the Customer to purchase Services in accordance with these Conditions.
- 2.2 The Order shall only be deemed to be accepted when the Supplier issues written acceptance of the Order and the XER Online Contract Summary at which point and on which date the Contract shall come into existence (**Commencement Date**).
- 2.3 Any samples, drawings, descriptive matter or advertising issued by the Supplier, and any descriptions or illustrations contained in the Supplier's catalogues or brochures, are issued or published for the sole purpose of giving an approximate idea of the Services described in them. They shall not form part of the Contract or have any contractual force.
- 2.4 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 2.5 Any quotation or cost/price proposal given by the Supplier shall not constitute an offer, and is only valid for a period of 3 months from its date of issue.

2.6 Business and consumer customers

The Services are designed and supplied primarily for business use. If the Customer purchases the Services wholly or mainly for purposes relating to its trade, business, craft or profession, the Customer is treated as a business customer.

If the Customer purchases the Services as a consumer, nothing in these Conditions excludes or limits any statutory rights or remedies that cannot lawfully be excluded or limited, including any applicable cancellation or refund rights under consumer protection legislation.

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3. User subscriptions for the Service

3.1 Subject to the Customer purchasing the User Subscriptions in accordance with clause 4.3 and clause 11.1, the restrictions set out in this clause 3 and the other terms and conditions of the Contract, the Supplier hereby grants to the Customer a non-exclusive, non-transferable right, without the right to grant sublicences, to permit the Authorised Users to use the Services and the Documentation during the Subscription Term solely for the Customer's internal business operations.

3.2 In relation to the Authorised Users, the Customer undertakes that:

- (a) the maximum number of Authorised Users that it authorises to access and use the Services and the Documentation shall not exceed the number of User Subscriptions it has purchased from time to time;
- (b) it will not allow or suffer any User Subscription to be used by more than one individual Authorised User unless it has been reassigned in its entirety to another individual Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Services and/or Documentation;
- (c) each Authorised User shall keep a secure password for his use of the Services and Documentation, that such password shall be changed no less frequently than quarterly and that each Authorised User shall keep his password confidential; and
- (d) if any password has been provided to any individual who is not an Authorised User, then without prejudice to the Supplier's other rights, the Customer shall promptly disable such passwords and the Supplier shall not issue any new passwords to any such individual.

3.3 The Customer shall not access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that:

- (a) is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;
- (b) facilitates illegal activity;
- (c) depicts sexually explicit images;
- (d) promotes unlawful violence;
- (e) is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or
- (f) is otherwise illegal or causes damage or injury to any person or property;

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and the Supplier reserves the right, without liability or prejudice to its other rights to the Customer, to disable the Customer's access to any material that breaches the provisions of this clause.

3.4 The Customer shall not:

- (a) except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties and except to the extent expressly permitted under the Contract:
 - (i) attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or
 - (ii) attempt to de-compile, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
- (b) access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or
- (c) use the Services and/or Documentation to provide services to third parties; or
- (d) subject to clause 23.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except the Authorised Users; or
- (e) attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this clause 3; or
- (f) introduce, or permit the introduction of, any Virus or Vulnerability into the Services or the Supplier's network and information systems.

3.5 The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, promptly notify the Supplier.

3.6 The rights provided under this clause 3 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

4. Additional user subscriptions

4.1 Subject to clause 4.2 and clause 4.3, the Customer may, from time to time during any Subscription Term, purchase additional User Subscriptions in excess of the number set out in the XER Online Contract Summary and the Supplier shall grant access to

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the Services and the Documentation to such additional Authorised Users in accordance with the provisions of the Contract.

- 4.2 If the Customer wishes to purchase additional User Subscriptions, the Customer shall notify the Supplier in writing. The Supplier shall evaluate such request for additional User Subscriptions and respond to the Customer with approval or rejection of the request (such approval not to be unreasonably withheld). Where the Supplier approves the request, the Supplier shall activate the additional User Subscriptions as soon as reasonably practicable, and in any event within 5 Business Days of its approval of the Customer's request.
- 4.3 If the Supplier approves the Customer's request to purchase additional User Subscriptions, the Customer shall, within 30 days of the date of the Supplier's invoice, pay to the Supplier the relevant fees for such additional User Subscriptions as set out in the XER Online Contract Summary and, if such additional User Subscriptions are purchased by the Customer part way through the Initial Subscription Term or any Renewal Period (as applicable), such fees shall be pro-rated from the date of activation by the Supplier for the remainder of the Initial Subscription Term or then current Renewal Period (as applicable).

5. Fair Usage

- 5.1 In order to maintain the performance and availability of the Services for all customers, the Customer acknowledges and agrees that the total number of Activities permitted under the Contract shall be limited to fifty thousand (50,000) Activities at any one time per Admin User Subscription forming part of the Customer's Services subscription. For clarity:
- (a) the Activities limit in this clause 5.1 shall apply in aggregate across all active projects and schedules within the Customer's Services subscription at the relevant time. By way of example, where the Customer has purchased four (4) Admin User Subscriptions, the maximum permitted usage shall be two hundred thousand (200,000) Activities in total at any one time; and
 - (b) the Activities limit in this clause 5.1 shall not apply to Customers holding an enterprise licence version of the Services subscription, to which an unlimited number of Activities applies.
- 5.2 Where the Customer exceeds the applicable Activities limit specified in clause 5.1, the Supplier reserves the right to charge excess storage fees to the Supplier pursuant to clause 11.5, or suspend the Customer's ability to upload additional projects or schedules using the Services, until such time as the Customer:
- (a) removes or archives sufficient projects to reduce the total Activity count below the applicable Activities limit; or

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- (b) purchases sufficient additional Admin User Subscriptions pursuant to clause 4.3.

The Customer shall comply with any reasonable instructions issued by the Supplier under this clause 5.2.

- 5.3 The Supplier may vary the Activities limit in clause 5.1 on not less than thirty (30) days' written notice, provided that any such variation is reasonable and necessary to safeguard the performance and availability of the Services.

6. Services

- 6.1 The Supplier shall, during the Subscription Term, provide the Services and make available the Documentation to the Customer on and subject to the terms of the Contract.

- 6.2 The Supplier shall use commercially reasonable endeavours to make the Services available 24 hours a day, seven days a week, except for:

- (a) planned maintenance carried out during the maintenance window of 10.00 pm to 2.00 am UK time; and
- (b) unscheduled maintenance performed outside Normal Business Hours, provided that the Supplier has used reasonable endeavours to give the Customer at least 6 Normal Business Hours' notice in advance.

- 6.3 The Supplier will, as part of the Services and at no additional cost to the Customer provide the Customer with the Supplier's standard customer support services during Normal Business Hours in accordance with the Supplier's Support Services Policy in effect at the time that the Services are provided. The Supplier may amend the Support Services Policy in its sole and absolute discretion from time to time. The Customer may purchase enhanced support services separately at the Supplier's then current rates.

- 6.4 The Customer acknowledges that the Services comprise a standard commercial software platform made available on a subscription basis. The functionality, features and capabilities of the Services are those made available by the Supplier at the Commencement Date and as subsequently updated by the Supplier from time to time. The Customer is responsible for assessing whether the Services are suitable for its intended use prior to entering into the Contract.

- 6.5 The Supplier welcomes suggestions for new features and improvements. However, unless expressly agreed in writing, the Contract does not oblige the Supplier to develop, modify or customise the Services to meet the Customer's individual

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requirements. Any bespoke development, integrations, consultancy or custom functionality requested by the Customer shall be subject to separate discussion, the Supplier's development capacity, commercial agreement and any applicable additional charges.

7. Customer data

- 7.1 The Customer shall own all right, title and interest in and to all of the Customer Data that is not personal data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all such Customer Data.
- 7.2 The Supplier shall follow its archiving procedures for Customer Data as set out in its Back-Up Policy available at <https://xer-online.com> (or such other website address as may be notified to the Customer from time to time), as such document may be amended by the Supplier in its sole discretion from time to time. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy against the Supplier shall be for the Supplier to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by the Supplier in accordance with the archiving procedure described in its Back-Up Policy. The Supplier shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party (except those third parties sub-contracted by the Supplier to perform services related to Customer Data maintenance and back-up for which it shall remain fully liable under clause 7.9).
- 7.3 The Supplier shall, in providing the Services, comply with its Privacy Policy relating to the privacy and security of the Customer Data available at <https://xer-online.com> (or such other website address as may be notified to the Customer from time to time), as such document may be amended from time to time by the Supplier in its sole discretion.
- 7.4 Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 7 is in addition to, and does not relieve, remove or replace, a party's obligations or rights under the Data Protection Legislation.
- 7.5 The parties acknowledge that:
- (a) if the Supplier processes any personal data on the Customer's behalf when performing its obligations under the Contract, the Customer is the controller and the Supplier is the processor for the purposes of the Data Protection Legislation.
 - (b) the personal data may be transferred or stored outside the EEA or the country where the Customer and the Authorised Users are located in order to carry out the Services and the Supplier's other obligations under the Contract.

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- 7.6 Without prejudice to the generality of clause 7.4, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the personal data to the Supplier for the duration and purposes of the Contract so that the Supplier may lawfully use, process and transfer the personal data in accordance with the Contract on the Customer's behalf.
- 7.7 Without prejudice to the generality of clause 7.4, the Supplier shall, in relation to any personal data processed in connection with the performance by the Supplier of its obligations under the Contract:
- (a) process that personal data only on the documented written instructions of the Customer unless the Supplier is required by the laws of any member of the European Union or by the laws of the European Union applicable to the Supplier and/or Domestic UK Law (where **Domestic UK Law** means the Data Protection Legislation and any other law that applies in the UK) to process personal data (**Applicable Laws**). Where the Supplier is relying on Applicable Laws as the basis for processing personal data, the Supplier shall promptly notify the Customer of this before performing the processing required by the Applicable Laws unless those Applicable Laws prohibit the Supplier from so notifying the Customer;
 - (b) not transfer any personal data outside of the European Economic Area and the United Kingdom unless the following conditions are fulfilled:
 - (i) the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;
 - (ii) the data subject has enforceable rights and effective legal remedies;
 - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any personal data that is transferred; and
 - (iv) the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the personal data;
 - (c) assist the Customer, at the Customer's cost, in responding to any request from a data subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
 - (d) notify the Customer without undue delay on becoming aware of a personal data breach;
 - (e) at the written direction of the Customer, delete or return personal data and copies thereof to the Customer on termination of the Contract unless required

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by Applicable Law to store the personal data (and for these purposes the term "delete" shall mean to put such data beyond use); and

- (f) maintain complete and accurate records and information to demonstrate its compliance with this clause 7 and immediately inform the Company if, in the opinion of the Supplier, an instruction infringes the Data Protection Legislation.
- 7.8 Each party shall ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the other party, to protect against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting personal data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to personal data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it).
- 7.9 The Customer consents to the Supplier appointing Amazon Web Services (or any successor service provider from time to time) as a third-party processor of personal data under the Contract. The Supplier confirms that it has entered or (as the case may be) will enter with such the third-party processor(s) into a written agreement incorporating terms which are substantially similar to those set out in this clause 7 and in either case which the Supplier confirms reflect and will continue to reflect the requirements of the Data Protection Legislation. As between the Customer and the Supplier, the Supplier shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this clause 7.
- 7.10 Either party may, at any time on not less than 30 days' notice, revise this clause 7 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to the Contract).

8. Third party providers

The Customer acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. The Supplier makes no representation, warranty or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into

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by the Customer, with any such third party. Any contract entered into and any transaction completed via any third-party website is between the Customer and the relevant third party, and not the Supplier. The Supplier recommends that the Customer refers to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. The Supplier does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.

9. Supplier's obligations

- 9.1 The Supplier undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.
- 9.2 The undertaking at clause 9.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to the Supplier's instructions, or modification or alteration of the Services by any party other than the Supplier or the Supplier's duly authorised contractors or agents. If the Services do not conform with the foregoing undertaking, Supplier will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in clause 9.1. Notwithstanding the foregoing, the Supplier:
- (a) does not warrant that the Services will meet all of the Customer's individual business processes, operational requirements or intended outcomes, except where expressly agreed in writing; and
 - (b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 9.3 The Contract shall not prevent the Supplier from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under the Contract.
- 9.4 The Supplier warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under the Contract.

10. Customer's obligations

The Customer shall:

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- (a) ensure that the terms of its Order are complete and accurate;
- (b) provide the Supplier with:
 - (i) all necessary co-operation in relation to the Contract; and
 - (ii) all necessary access to such information as may be required by the Supplier;

in order to provide the Services, including but not limited to Customer Data, security access information and configuration services;
- (c) without affecting its other obligations under the Contract, comply with all applicable laws and regulations with respect to its activities under the Contract;
- (d) carry out all other Customer responsibilities set out in the Contract in a timely and efficient manner. In the event of any delays in the Customer's provision of such assistance as agreed by the parties, the Supplier may adjust any agreed timetable or delivery schedule as reasonably necessary;
- (e) ensure that the Authorised Users use the Services and the Documentation in accordance with the terms and conditions of the Contract and shall be responsible for any Authorised User's breach of the Contract;
- (f) obtain and shall maintain all necessary licences, consents, and permissions necessary for the Supplier, its contractors and agents to perform their obligations under the Contract, including without limitation the Services;
- (g) ensure that its network and systems comply with the relevant specifications provided by the Supplier from time to time; and
- (h) be, to the extent permitted by law and except as otherwise expressly provided in the Contract, solely responsible for procuring, maintaining and securing its network connections and telecommunications links from its systems to the Supplier's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.

11. Charges and payment

- 11.1 The Customer shall pay the Subscription Fees to the Supplier for the User Subscriptions in accordance with this clause 11 and the XER Online Contract Summary.
- 11.2 The Customer shall on the Commencement Date provide to the Supplier valid, up-to-date and complete credit card details or approved purchase Order information acceptable to the Supplier and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides:

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- (a) its credit card details to the Supplier, the Customer hereby authorises the Supplier to bill such credit card:
 - (i) on the Commencement Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
 - (ii) subject to clause 16.1, on the commencement of each Renewal Period for the Subscription Fees payable in respect of that Renewal Period;
 - (b) its approved purchase Order information to the Supplier, the Supplier shall invoice the Customer:
 - (i) on the Commencement Date for the Subscription Fees payable in respect of the Initial Subscription Term; and
 - (ii) subject to clause 16.1, prior to the commencement of each Renewal Period for the Subscription Fees payable in respect of that Renewal Period,

and the Customer shall pay each invoice within 1 month after the date of such invoice.
- 11.3 If the Supplier has not received payment within 30 days after the due date, then without prejudice to any other rights and remedies of the Supplier:
 - (a) the Supplier may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and the Supplier shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
 - (b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 3% over the then current base lending rate of the Supplier's bankers in the UK from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.
- 11.4 All amounts and fees stated or referred to in the Contract:
 - (a) shall be payable in pounds sterling;
 - (b) are non-cancellable and non-refundable, except as expressly provided in clause 11.7 or as otherwise required by applicable law; and
 - (c) are exclusive of value added tax, which shall be added to the Supplier's invoice(s) at the appropriate rate.
- 11.5 If, at any time whilst using the Services, the Customer exceeds the applicable Activities limit specified in clause 5.1, or the amount of disk storage space specified in the Documentation, the Supplier shall charge the Customer, and the Customer shall pay, the Supplier's then current excess data storage fees. The Supplier's excess data

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storage fees current as at the Commencement Date are set out in the XER Online Contract Summary.

- 11.6 The Supplier shall be entitled to increase the Subscription Fees, the fees payable in respect of the additional User Subscriptions purchased pursuant to clause 4.3 and/or the excess storage fees payable pursuant to clause 11.5 at the start of each Renewal Period upon prior notice to the Customer and the XER Online Contract Summary shall be deemed to have been amended accordingly.

11.7 **Refunds, cancellations, upgrades and downgrades**

For the purposes of clause 11.4(b), for business customers, and unless expressly stated otherwise in the XER Online Contract Summary or required by applicable law:

- (a) all Subscription Fees, renewal fees, upgrade fees, additional User Subscription fees and other charges are final, non-cancellable and non-refundable once paid;
- (b) cancellation of a subscription takes effect at the end of the then-current Initial Subscription Term or Renewal Period and does not entitle the Customer to any refund, credit or reduction for unused time, unused functionality, reduced usage, downgraded plans, or unused User Subscriptions;
- (c) where the Customer upgrades its subscription, purchases additional User Subscriptions, or otherwise increases its subscription level during a Subscription Term, the applicable additional fees are payable for the relevant period and are non-refundable once paid;
- (d) if the Customer subsequently downgrades, reduces User Subscriptions, or removes paid functionality, the change will take effect from the next Renewal Period unless the Supplier agrees otherwise in writing, and no refund or credit will be due for the remainder of the current Subscription Term;
- (e) the Supplier may, in its sole discretion, issue a refund, credit or account adjustment in exceptional circumstances, including duplicate payments, billing errors, or other circumstances accepted by the Supplier, but any such refund, credit or adjustment shall not create any obligation to provide a refund, credit or adjustment in any other case; and
- (f) nothing in this clause limits any remedy that cannot lawfully be excluded.

12. **Proprietary rights**

- 12.1 The Customer acknowledges and agrees that the Supplier and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, the Contract does not grant the Customer any rights to, under or in, any patents, copyright, database right, trade secrets, trade names, trade marks (whether

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registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.

- 12.2 The Supplier confirms that it has all the rights in relation to the Services and the Documentation that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of the Contract.

13. Confidentiality

- 13.1 Each party may be given access to Confidential Information from the other party in order to perform its obligations under the Contract. A party's Confidential Information shall not be deemed to include information that:

- (a) is or becomes publicly known other than through any act or omission of the receiving party;
- (b) was in the other party's lawful possession before the disclosure;
- (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure; or
- (d) is independently developed by the receiving party, which independent development can be shown by written evidence.

- 13.2 Subject to clause 13.4, each party shall hold the other's Confidential Information in confidence and not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of the Contract.

- 13.3 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of the Contract.

- 13.4 A party may disclose Confidential Information to the extent such Confidential Information is required to be disclosed by law, by any governmental or other regulatory authority or by a court or other authority of competent jurisdiction, provided that, to the extent it is legally permitted to do so, it gives the other party as much notice of such disclosure as possible and, where notice of disclosure is not prohibited and is given in accordance with this clause 13.4, it takes into account the reasonable requests of the other party in relation to the content of such disclosure.

- 13.5 Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.

- 13.6 The Customer acknowledges that details of the Services, and the results of any performance tests of the Services, constitute the Supplier's Confidential Information.

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- 13.7 The Supplier acknowledges that the Customer Data is the Confidential Information of the Customer.
- 13.8 No party shall make, or permit any person to make, any public announcement concerning the Contract without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.
- 13.9 On termination or expiry of the Contract, each party shall:
- (a) destroy or return to the other party all documents and materials (and any copies) containing, reflecting, incorporating or based on the other party's Confidential Information;
 - (b) erase all the other party's Confidential Information from computer and communications systems and devices used by it, including such systems and data storage services provided by third parties (to the extent technically and legally practicable); and
 - (c) certify in writing to the other party that it has complied with the requirements of this clause, provided that a recipient party may retain documents and materials containing, reflecting, incorporating or based on the other party's Confidential Information to the extent required by law or any applicable governmental or regulatory authority. The above provisions of this clause 13 shall survive termination of the Contract, however arising.

14. Indemnity

- 14.1 The Customer shall defend, indemnify and hold harmless the Supplier against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's use of the Services and/or Documentation provided that:
- (a) the Customer is given prompt notice of any such claim;
 - (b) the Supplier provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and
 - (c) the Customer is given sole authority to defend or settle the claim.
- 14.2 The Supplier shall defend the Customer, its officers, directors and employees against any claim that the Customer's use of the Services or Documentation in accordance with the Contract infringes any United Kingdom patent effective as of the Commencement Date, copyright, trade mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:

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- (a) the Supplier is given prompt notice of any such claim;
 - (b) the Customer provides reasonable co-operation to the Supplier in the defence and settlement of such claim, at the Supplier's expense; and
 - (c) the Supplier is given sole authority to defend or settle the claim.
- 14.3 In the defence or settlement of any claim, the Supplier may procure the right for the Customer to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate the Contract on 2 Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.
- 14.4 In no event shall the Supplier, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:
- (a) a modification of the Services or Documentation by anyone other than the Supplier; or
 - (b) the Customer's use of the Services or Documentation in a manner contrary to the instructions given to the Customer by the Supplier; or
 - (c) the Customer's use of the Services or Documentation after notice of the alleged or actual infringement from the Supplier or any appropriate authority.
- 14.5 The foregoing and clause 15.3(b) state the Customer's sole and exclusive rights and remedies, and the Supplier's (including the Supplier's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trademark, database right or right of confidentiality.

15. Limitation of liability

- 15.1 Except as expressly and specifically provided in the Contract:
- (a) the Customer assumes sole responsibility for results obtained from the use of the Services and the Documentation by the Customer, and for conclusions drawn from such use. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the Supplier by the Customer in connection with the Services, or any actions taken by the Supplier at the Customer's direction;
 - (b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from the Contract; and
 - (c) the Services and Documentation are provided on an "as is" and "as available" basis. Except where expressly agreed in writing, the Customer acknowledges

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that it is responsible for determining whether the Services are suitable for its intended use.

15.2 Nothing in the Contract excludes the liability of the Supplier:

- (a) for death or personal injury caused by the Supplier's negligence; or
- (b) for fraud or fraudulent misrepresentation.

15.3 Subject to clause 15.1 and clause 15.2:

- (a) the Supplier shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under the Contract; and
- (b) the Supplier's total aggregate liability in contract (including in respect of the indemnity at clause 14.2), tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to the total Subscription Fees paid for the User Subscriptions during the 12 months preceding the date on which the claim arose (or where less than 12 months has elapsed during the Subscription Term, limited to the total Subscription Fees paid during the full period of the Subscription Term preceding the date on which the claim arose).

16. Term and termination

16.1 The Contract shall, unless otherwise terminated as provided in this clause 16, commence on the Commencement Date and shall continue for the Initial Subscription Term and, thereafter, shall be automatically renewed for successive periods equal to the Initial Subscription Term excluding ENTERPRISE customers (each a **Renewal Period**), unless:

- (a) either party notifies the other party of termination, in writing, before the end of the Initial Subscription Term or any Renewal Period, in which case the Contract shall terminate upon the expiry of the applicable Initial Subscription Term or Renewal Period; or
- (b) otherwise terminated in accordance with the provisions of the Contract;

and the Initial Subscription Term together with any subsequent Renewal Periods shall constitute the **Subscription Term**.

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16.2 Without affecting any other right or remedy available to it, either party may terminate the Contract with immediate effect by giving written notice to the other party if:

- (a) the other party fails to pay any amount due under the Contract on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment;
- (b) the other party commits a material breach of any other term of the Contract which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;
- (c) the other party repeatedly breaches any of the terms of the Contract in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of the Contract;
- (d) the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the Insolvency Act 1986;
- (e) the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (f) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (g) an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other party;
- (h) the holder of a qualifying floating charge over the assets of that other party has become entitled to appoint or has appointed an administrative receiver;
- (i) a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
- (j) a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;

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- (k) any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 16.2(d) to clause 16.2(j) (inclusive); or
- (l) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

16.3 On termination of the Contract for any reason:

- (a) all licences granted under the Contract shall immediately terminate and the Customer shall immediately cease all use of the Services and/or the Documentation;
- (b) each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;
- (c) the Supplier may destroy or otherwise dispose of any of the Customer Data in its possession in accordance with clause 7.7(c), unless the Supplier receives, no later than ten days after the effective date of the termination of the Contract, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. The Supplier shall use reasonable commercial endeavours to deliver the back-up to the Customer within 30 days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by the Supplier in returning or disposing of Customer Data; and
- (d) any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination shall not be affected or prejudiced.

17. Force majeure

The Supplier shall have no liability to the Customer under the Contract if it is prevented from or delayed in performing its obligations under the Contract, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport or telecommunications network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Customer is notified of such an event and its expected duration.

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18. Variation

No variation of the Contract shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

19. Waiver

No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

20. Rights and remedies

Except as expressly provided in the Contract, the rights and remedies provided under the Contract are in addition to, and not exclusive of, any rights or remedies provided by law.

21. Severance

- 21.1 If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of the Contract.
- 21.2 If any provision or part-provision of the Contract is deemed deleted under clause 21.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

22. Entire agreement

- 22.1 The Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 22.2 Each party acknowledges that in entering into the Contract it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Contract.
- 22.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in the Contract.

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22.4 Nothing in this clause shall limit or exclude any liability for fraud.

23. Assignment

23.1 The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

23.2 The Supplier may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

24. No partnership or agency

Nothing in the Contract is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

25. Third party rights

The Contract does not confer any rights on any person or party (other than the parties to the Contract and, where applicable, their successors and permitted assigns) pursuant to the Contracts (Rights of Third Parties) Act 1999.

26. Notices

26.1 Any notice required to be given under the Contract shall be in writing and shall be delivered by hand, by email, or sent by pre-paid registered delivery service to the other party at its address set out in XER Online Contract Summary or such other address as may have been notified by that party for such purposes.

26.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first business day following delivery). A correctly addressed notice sent by pre-paid registered delivery service shall be deemed to have been received at 9.00 am on the fifth Business Day after posting or at the time recorded by the delivery service.

26.3 Notices by email shall be sent to the following addresses (or an address substituted in writing by the party to be served):

- (a) Supplier: support@xertoolkit.com
- (b) Customer: the Customer's email address set out in XER Online Contract Summary

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A notice sent by email shall be deemed to be received at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume. In this clause 26.3, business hours means 9.00am to 5.00pm Monday to Friday on a day that is not a public holiday in the place of receipt.

- 26.4 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

27. Language

These Conditions and the Contract is drafted in the English language, and if translated into any other language, the English language version shall prevail. Any notice given under or in connection with the Contract shall be in the English language. All other documents provided under or in connection with the Contract shall be in the English language, or accompanied by a certified English translation. The English language version of the Contract and any notice or other document relating to the Contract shall prevail if there is a conflict except where the document is a constitutional, statutory or other official document.

28. Governing law

The Contract and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

29. Jurisdiction

- 29.1 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with the Contract or its subject matter or formation (including non-contractual disputes or claims).
- 29.2 Each party irrevocably consents to any process in any legal action or proceedings under clause 29 above being served on it in accordance with the provisions of the Contract relating to service of notices. Nothing contained in the Contract shall affect the right to serve process in any other manner permitted by law.
- 29.3 Nothing in this clause 29 shall limit the right of the Supplier to take proceedings against the Customer in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdiction preclude the Supplier from taking proceedings in any other jurisdiction, whether concurrently or not, to the extent permitted by the law of such other jurisdiction.

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30. Counterparts

- 30.1 The Contract may be executed in any number of counterparts, each of which shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 30.2 Transmission of an executed counterpart of the Contract (but for the avoidance of doubt not just a signature page) by email (in PDF, JPEG or other agreed format) takes effect as the transmission of an executed "wet ink" counterpart of the Contract.
- 30.3 No counterpart shall be effective until each party has provided to the other at least one executed counterpart.