

## **Emailiq Terms and Conditions July 2020**

Please read these Email Marketing Terms and Conditions carefully, as they set out our and your legal rights and obligations in relation to our email marketing services. You will be asked to agree to these Email Marketing Terms and Conditions before using our service.

You should print a copy of these Email Marketing Terms and Conditions for future reference. We will not file a copy specifically in relation to you, and they may not be accessible on our website in future.

### **1. Definitions and interpretation**

#### 1.1 In the Agreement:

**"Agreement"** means the agreement between the Provider and the Customer incorporating these Email Marketing Terms and Conditions, the Registration Information and the Anti-Spam Policy, and any amendments to it from time to time;

**"Anti-Spam Policy"** means the anti-spam policy published on the website of the Provider from time to time;

**"Billing Cycle"** means the period between two consecutive payments for a given service;

**"Business Day"** means any week day, other than a bank or public holiday in England;

**"Business Hours"** means between 09:00 and 17:30 on a Business Day;

**"Charges"** means the amounts payable by the Customer to the Provider under or in relation to the Agreement, calculated in accordance with Clause 7;

**"Confidential Information"** means:

- (a) any email marketing list or database supplied by the Customer to the Provider or generated by the Customer using the Platform; and
- (b) any other information disclosed (whether disclosed in writing, orally or otherwise) by the Customer to the Provider that at the time of disclosure:
  - (i) is marked as "confidential";
  - (ii) is described by the Customer as "confidential";
  - or (iii) should have been reasonably understood by the Provider to be confidential;

**"Confirmation Email"** means, if the Customer is an Online Customer, the email sent by the Provider to the Customer following the submission of the Services registration form by the Customer, that states that the Customer has been accepted as a customer for the Services;

**"Credits"** means pay-as-you-go credits that may be purchased by the Customer from the Provider and may be redeemed against Services;

**"Customer"** means the customer for services under the Agreement as specified in the Registration Information;

**"Customer Materials"** means all those works and materials supplied by or on behalf of the Customer to the Provider for use in connection with the Services, including text, logos and graphics, but excluding any email marketing list or database;

**"Customer Websites"** means the websites and/or web services promoted by or on behalf of the Customer through the Services;

**"Effective Date"** means:

- (a) if the Customer is an Online Customer, the date when the Provider sends to the Customer it's the Confirmation Email; and
- (b) if the Customer is an Invoice Customer, the date when the Provider creates the Customer's account on the Platform;

**"Force Majeure Event"** means an event, or a series of related events, that is outside the reasonable control of the party affected (including failures of or problems with the internet or a part of the internet, hacker attacks, denial of service attacks, virus or other malicious software attacks or infections, power failures, industrial disputes affecting any third party, changes to the law, disasters, explosions, fires, floods, riots, terrorist attacks and wars);

**"Intellectual Property Rights"** means all intellectual property rights wherever in the world, whether registered or unregistered, including any application or right of application for such rights (and the "intellectual property rights" referred to above include copyright and related rights, moral rights, database rights, confidential information, trade secrets, know-how, business names, trade names, trademarks, service marks, passing off rights, unfair competition rights, patents, petty patents, utility models, semi-conductor topography rights and rights in designs);

**"Invoice Customers"** means customers of the Provider whose accounts on the Platform are created on their behalf by the Provider;

**"Online Customers"** means customers of the Provider who sign up for the Services via the Platform;

**"Personal Data"** has the meaning given to it in the Data Protection Act 1998;

**"Platform"** means the Provider's web-based email marketing platform;

**"Provider"** means Kinexus Internet Limited, a company incorporated in England (registration number 3926786) having its registered office at Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, SN5 6QR;

**"Registration Information"** means:

- (a) if the Customer is an Online Customer, the information in the registration form completed by the Customer and all information on the web page incorporating that form; or
- (b) if the Customer is an Invoice Customer, the information used by the Provider to create the Customer's account using the Platform;

**"Services"** means email marketing services and related services provided or to be provided by the Provider to the Customer under the Agreement, which shall be

specified in the Registration Information, and may be varied from time to time in accordance with Clause 3.2; and

**"Subscription"** means the chosen package describing the number of Subscribers an account can store at any given time.

**"Term"** means the term of the Agreement.

1.2 In the Agreement, a reference to a statute or statutory provision includes a reference to:

(a) that statute or statutory provision as modified, consolidated and/or re-enacted from time to time; and

(b) any subordinate legislation made under that statute or statutory provision.

1.3 The Clause headings do not affect the interpretation of the Agreement.

1.4 The ejusdem generis rule is not intended to be used in the interpretation of the Agreement.

## **2. Agreement and Term**

The Agreement will come into force on the Effective Date and will continue in force unless and until terminated in accordance with its express provisions.

## **3. Services**

3.1 From the Effective Date, the Provider shall make the Platform available to the Customer via the internet, enabling the Customer to create and manage email marketing lists and email marketing campaigns.

3.2 The scope of the Services may be varied as follows:

(a) if the Customer is an Online Customer, the Customer may request a variation using the Platform interface - such variation being effective immediately; and

(b) if the Customer is an Invoice Customer, the Customer may request a variation by sending a written request to the Provider - such variation being effective upon the updating of the Customer's account on the Platform by the Provider.

3.3 The Customer acknowledges that changes to the scope of the Services may affect the Charges payable under the Agreement.

## **4. Customer responsibilities**

4.1 Save to the extent agreed in writing otherwise by the Provider, the Customer shall be responsible for supplying:

(a) all those Customer Materials specified in the Registration Information (if any); and

(b) all titles, text, logos and images to be included in marketing emails sent through or as a part of the Services,

and the Customer must supply these Customer Materials to the Provider within a reasonable period following a request from the Provider for the materials.

- 4.2 The Customer will be responsible for obtaining suitable licences of third party software (such as web browser software and email client software) which are required for the full use of the Services.
- 4.3 The Customer will give to the Provider all co-operation, information and documentation reasonably required by the Provider for the provision of the Services.

## **5. Legality and spam**

- 5.1 The Customer must not use the Platform:

- (a) to host, store, send, relay or process any material; or
- (b) for any purpose or in any way,

which is unlawful, illegal, fraudulent, or which breaches any applicable laws, regulations or legally binding codes, or infringes any third-party rights, or may give rise to any form of legal action against the Provider or the Customer or any third party, or which breaches the Anti-Spam Policy.

- 5.2 The Customer warrants that each email address and email marketing list provided by the Customer, or on behalf of the Customer, to the Provider in connection with the Services will have been collected and collated in accordance with all applicable laws and regulations and the Provider's Anti-Spam Policy, and that the use of any such list by the Provider for the purposes of the Services will not:
  - (a) breach any applicable laws (including the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003, and in relation to matters where US law may apply, the US CAN-SPAM Act of 2003);
  - (b) infringe any third party's legal rights;
  - (c) give rise to any cause of action whether against the Provider, the Customer, or any other person; or
  - (d) breach the Anti-Spam Policy.
- 5.3 Where the Provider reasonably suspects that there has been a breach of the provisions of this Clause 5, the Provider may suspend any or all of the Services and/or the Customer's access to any or all Services while it investigates the matter.
- 5.4 Any breach by the Customer of this Clause 5 will be deemed to be a material breach of the Agreement.
- 5.5 The Customer hereby indemnifies and undertakes to keep indemnified the Provider against any and all liabilities, damages, losses, expenses and costs (including legal expenses and amounts paid in settlement of any claim or legal action) arising, directly or indirectly, out of any breach or alleged breach by the Customer of this Clause 5.

## **6. Intellectual Property Rights**

- 6.1 The Customer grants to the Provider a non-exclusive licence to use the Customer Materials to the extent required for the Provider to perform its obligations and exercise its rights under the Agreement.
- 6.2 All Intellectual Property Rights in any works arising out of the performance of the Services by the Provider will be the property of the Provider.
- 6.3 Where the Provider modifies the Customer Materials in the process of providing the Services, the Provider hereby grants to the Customer an irrevocable non-exclusive transferable royalty-free licence to use such modifications.

## **7. Charges and payment**

- 7.1 The Customer will pay to the Provider:
  - (a) Charges in respect of Credits;
  - (b) other one-off or recurring Charges specified on the Platform in relation to the Services for which the Customer signs-up; and
  - (c) any one-off or recurring Charges specified in the Registration Information or otherwise agreed between the parties.
- 7.2 The Provider will issue invoices and/or receipts to the Customer in respect of the Charges from time to time during the Term.
- 7.3 All Charges must be paid in advance of the provision of the Services to which they relate, unless:
  - (a) the Customer is an Invoice Customer; and
  - (b) the Provider has agreed in writing that the Customer may pay the relevant Charges in arrears,in which case the Customer will pay the Charges due under an invoice to the Provider within 30 days of the date of issue of the invoice.
- 7.4 All Charges stated in or in relation to the Agreement are stated exclusive of VAT, unless the context requires otherwise. Applicable VAT will be payable by the Customer to the Provider.
- 7.5 The Provider may deduct Credits from the account of the Customer on the Platform in payment for Services. Unless the Provider deducts Credits in this way, Charges must be paid by debit or credit card, direct debit, bank transfer or by cheque (using such payment details as are notified by the Provider to the Customer from time to time).
- 7.6 If the Customer does not pay any amount properly due to the Provider under or in connection with the Agreement, the Provider may:
  - (a) charge the Customer interest on the overdue amount at the rate of 5% per year above the base rate of Barclays Bank Plc. from time to time (which interest will accrue daily from the due date until the date of actual payment and be compounded quarterly); or

- (b) claim interest and statutory compensation from the Customer pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

7.7 From time to time the Provider may advertise on its website offers allowing the use of the Platform for free during a trial period or within specified limits. Where the Customer qualifies for such an offer on the Effective Date, then:

- (a) no Charges will be payable under this Clause 7 in accordance with the terms of the offer (providing that such Charges will be payable once the offer expires or the Customer's use of the Platform ceases to be within the specified limits);
- (b) the Provider may vary the terms of the offer in its sole discretion at any time by posting revised offer terms on its website;
- (c) the Provider may terminate the Agreement at any time by giving at least 7 days' written notice of termination to the Customer; and
- (d) the other terms of the Agreement apply in full.

7.8 At any time during the Term or for a period of 30 days thereafter, the Customer may request, in writing, a refund of any Charges paid by the Customer to the Provider in respect of Credits, and providing:

- (a) those Credits have not been redeemed against Services;
- (b) the Customer has at least GBP 10 in its Credit account; and
- (c) the Customer does not in the opinion of the Provider owe any amounts to the Provider under the Agreement or any other contract,

then the Provider will refund the Charges in respect of such Credits to the Customer promptly following receipt of the Customer's request.

7.9 At any time during the Term, the Customer may cancel their Subscription. The cancellation will come into effect at the end of the current billing cycle and the Customer will retain full access to the platform at the current Subscription levels until that point.

7.10 At any time during the Term, the Customer may upgrade their Subscription to a higher number of allowed Subscribers by completing the process provided on the Platform.

7.11 At any time during the Term, the Customer may downgrade their Subscription to a lower number of allowed Subscribers by completing the process provided on the Platform, however that downgrade will not become applicable until the end of the billing cycle and the current Subscription price will continue to be charged until the end of the current billing cycle.

## **8. Warranties**

8.1 The Customer warrants to the Provider that it has the legal right and authority to enter into and perform its obligations under the Agreement.

8.2 The Provider warrants to the Customer:

- (a) that it has the legal right and authority to enter into and perform its

obligations under the Agreement; and

- (b) that it will perform its obligations under the Agreement with reasonable care and skill.

8.3 The Customer acknowledges that:

- (a) the Provider does not guarantee that any specific email sent via the Platform will reach its destination, or be opened by the recipient, or have its contents acted on by the recipient;
- (b) the Provider does not warrant or represent that the Customer's emails sent via the Platform will not be treated or flagged as spam by third party anti-spam systems or email recipients; and
- (c) the Provider does not warrant or represent that any particular results will be achieved through the Services.

8.4 All of the parties' liabilities and obligations in respect of the subject matter of the Agreement are expressly set out in the terms of the Agreement. To the maximum extent permitted by applicable law, no other terms concerning the subject matter of the Agreement will be implied into the Agreement or any related contract.

## **9. Limitations and exclusions of liability**

9.1 Nothing in the Agreement will:

- (a) limit or exclude the liability of a party for death or personal injury resulting from negligence;
- (b) limit or exclude the liability of a party for fraud or fraudulent misrepresentation by that party;
- (c) limit any liability of a party in any way that is not permitted under applicable law; or
- (d) exclude any liability of a party that may not be excluded under applicable law.

9.2 The limitations and exclusions of liability set out in this Clause 9 and elsewhere in the Agreement:

- (a) are subject to Clause 9.1; and
- (b) govern all liabilities arising under the Agreement or in relation to the subject matter of the Agreement, including liabilities arising in contract, in tort (including negligence) and for breach of statutory duty.

9.3 The provider will not be liable to the other in respect of any loss of profits, income, revenue, use, production or anticipated savings.

9.4 The provider will not be liable to the other for any loss of business, contracts or commercial opportunities.

9.5 The provider will not be liable to the other for any loss of or damage to goodwill or reputation.

- 9.6 The provider will not be liable to the other in respect of any loss or corruption of any data, database or software.
- 9.7 The provider will not be liable to the other in respect of any special, indirect or consequential loss or damage.
- 9.8 The provider will not be liable to the other for any losses arising out of a Force Majeure Event.
- 9.9 The Provider's liability to the Customer in relation to any event or series of related events will not exceed the greater of:
- (a) GBP 1,000; and
  - (b) the total amount paid and payable by the Customer to the Provider under the Agreement during the 12-month period immediately preceding the event or events giving rise to the claim.
- 9.10 The Provider's aggregate liability to the Customer under the Agreement will not exceed the greater of:
- (a) GBP 3,000; and
  - (b) the total amount paid and payable by the Customer to the Provider under the Agreement.

## **10. Data protection**

- 10.1 The Customer warrants that it has the legal right to disclose all Personal Data that it does in fact disclose to the Provider under the Agreement, and that the processing of that Personal Data by the Provider for the purposes of and in accordance with the terms of the Agreement will not breach any applicable laws (including the Data Protection Act 1998).
- 10.2 The Provider warrants that:
- (a) it will act only on instructions from the Customer in relation to the processing of any Personal Data performed by the Provider on behalf of the Customer; and
  - (b) it has in place appropriate security measures (both technical and organisational) against:
    - (i) unlawful or unauthorised processing; and
    - (ii) loss or corruption,of Personal Data processed by the Provider on behalf of the Customer.

## **11. Confidentiality**

- 11.1 The Provider will keep confidential the Confidential Information, and will not disclose that Confidential Information except as expressly permitted by this Clause 11.
- 11.2 The Provider will protect the confidentiality of the Confidential Information using

at least reasonable security measures.

- 11.3 The Confidential Information may be disclosed by the Provider to its officers, employees and professional advisers, provided that each recipient is legally bound to protect the confidentiality of the Confidential Information.
- 11.4 These obligations of confidentiality will not apply to Confidential Information that:
- (a) has been published or is known to the public (other than as a result of a breach of the Agreement);
  - (b) was known to the Provider before disclosure by the Customer; or
  - (c) is required to be disclosed by law, or by an order, binding upon the Provider, of a competent governmental authority, regulatory body or stock exchange.
- 11.5 Nothing in this Clause 11 shall prevent or inhibit the Provider from using the Customer's email marketing database in the course of providing the Services.

## **12. Publicity**

The Customer will not make any public disclosure relating to the Agreement (including press releases, public announcements and marketing materials) without the prior written consent of the Provider, not to be unreasonably withheld or delayed.

## **13. Termination**

Either party may terminate the Agreement immediately at any time by:

- (a) giving notice of termination using the facility on the Platform; or
- (b) giving written notice of termination to the other party.

## **14. Effects of termination**

- 14.1 Upon termination all the provisions of the Agreement will cease to have effect, save that the following provisions of the Agreement will survive and continue to have effect (in accordance with their terms or otherwise indefinitely): Clauses 1, 5.5, 6.3, 9, 14 and 16.3 to 16.11.
- 14.2 Termination of the Agreement will not affect either party's accrued rights (including accrued rights to be paid) as at the date of termination.
- 14.3 Subject to Clause 7.8, the Customer will not:
- (a) be entitled to any refund of Charges on termination; or
  - (b) be released from any subsisting obligation to pay Charges to the Provider (whether or not invoiced).

## **15. Force Majeure Events**

Where a Force Majeure Event gives rise to a failure or delay in either party performing its obligations under the Agreement (other than obligations to make payment), those obligations will be suspended for the duration of the Force

Majeure Event.

## **16. General**

- 16.1 Any notice given under the Agreement must be in writing (whether or not described as "written notice" in the Agreement) and must be delivered personally, sent by recorded signed-for post, or sent by fax or email, for the attention of the relevant person, and to the relevant address, fax number or email address given in the Registration Information (or as notified by one party to the other in accordance with this Clause).
- 16.2 A notice will be deemed to have been received at the relevant time set out below (or where such time is not within Business Hours, when Business Hours next begin after the relevant time set out below):
- (a) where the notice is delivered personally, at the time of delivery;
  - (b) where the notice is sent by recorded signed-for post, 48 hours after posting; and
  - (c) where the notice is sent by fax or email, at the time of the transmission (providing the sending party retains written evidence of the transmission).
- 16.3 No breach of any provision of the Agreement will be waived except with the express written consent of the party not in breach.
- 16.4 If a Clause of the Agreement is determined by any court or other competent authority to be unlawful and/or unenforceable, the other Clauses of the Agreement will continue in effect. If any unlawful and/or unenforceable Clause would be lawful or enforceable if part of it were deleted, that part will be deemed to be deleted, and the rest of the Clause will continue in effect (unless that would contradict the clear intention of the parties, in which case the entirety of the relevant Clause will be deemed to be deleted).
- 16.5 Nothing in the Agreement will constitute a partnership, agency relationship or contract of employment between the parties.
- 16.6 The Agreement may not be varied except by a written document agreed by or on behalf of each of the parties.
- 16.7 Neither party may without the prior written consent of the other party assign, transfer, charge, license or otherwise dispose of or deal in the Agreement or any rights or obligations under the Agreement.
- 16.8 The Provider may subcontract any of its obligations under the Agreement to any third party.
- 16.9 The Agreement is made for the benefit of the parties, and is not intended to benefit any third party or be enforceable by any third party. The rights of the parties to terminate, rescind, or agree any amendment, waiver, variation or settlement under or relating to the Agreement are not subject to the consent of any third party.
- 16.10 Subject to Clause 9.1 the Agreement will constitute the entire agreement between the parties in relation to the subject matter of the Agreement, and supersedes all previous agreements, arrangements and understandings between the parties in respect of that subject matter.

- 16.11 The Agreement will be governed by and construed in accordance with the laws of England and Wales; and the courts of England will have exclusive jurisdiction to adjudicate any dispute arising under or in connection with the Agreement.
- 16.12 The Agreement is subject to a fair usage policy; The Provider will monitor usage of the Platform by the Customer and should the Provider deem usage to be excessive, the Provider has the right to apply restrictions to ensure the stability, performance and availability of the Platform. These restrictions will be reviewed periodically and removed when there are no further occurrences of excessive usage.