



Data Centre Services Terms of Business

These **Data Centre Services Terms of Business** are between Chi-X Europe Limited, whose registered office is located at 26th Floor, 25 Canada Square, Canary Wharf, London, E14 5LB (“**Chi-X**”) and the **Recipient** (as defined below) (each a “**Party**” and together the “**Parties**”).

Chi-X is authorised by the Financial Services Authority to operate a multilateral trading facility known as the Chi-X system. Chi-X desires to provide Recipient and Recipient desires to receive certain services at the Facility (as defined below) as indicated on the Order Form to access the Chi-X system.

1. Definitions and Interpretation

1.1 In these Terms of Business and in the Order Form, unless the context otherwise requires, the following words shall have the following meanings:

“**Additional Fees**” means additional third party costs incurred by Chi-X and Chi-X standard rate charges as set out on the Price List (a minimum charge of 1 hour will be applied to the calculation of the Additional Fee);

“**Affiliates**” means, in relation to either Party, any entity which directly or indirectly owns or controls or is directly or indirectly owned or Controlled by or in common ownership of Control with that Party;

“**Agreement**” means the terms and conditions of the Terms of Business and the Order Form;

“**Business Day**” means any day which is not a Saturday or a Sunday or a public holiday in England;

“**Change of Control**” means the occurrence of a change in the person or entity who: (a) directly or indirectly owns or Controls; or (b) is directly or indirectly owned or Controlled by; or (c) is in common ownership of Control, with the Recipient;

“**Chi-X Related Party**” means Chi-X’s directors, partners, officers, employees, agents and/or its Affiliates and/or its Affiliates’ directors, partners, officers, employees and agents;

“**Commencement Date**” means the date set out on the Order Form;

“**Confidential Information**” means the terms, conditions and subject matter of the Agreement and all information disclosed by one Party to the other or otherwise received by the other in the negotiation, entering into and performance of the Agreement, which relates directly or indirectly to that Party or any third party with which it has or proposes to have business dealings and its or their officers, employees, agents, suppliers or customers and any information which the receiving Party has been informed is confidential or which it might reasonably expect the other Party would regard as confidential but excluding information: (i) already in the public domain; (ii) that subsequently becomes part of the public domain other than as a result of an unauthorised disclosure; or (iii) that is or becomes available to the receiving Party from a third party who is legally entitled to possess and provide the information to the receiving Party;

“**Control**” means holding more than 50% of the shares, or stock having the power to vote at a general meeting or equivalent, or by having the power to control the composition of the board of directors or, the possession, direct or indirect, of the power to direct or cause the direction of the management, policies or activities of a person, whether through the ownership of stock, by contract or agency or otherwise and “**Controls**” and “**Controlled**” shall be interpreted accordingly;

“**Facility**” means the data centre(s) indicated on the Order Form;

“**Fees**” means those fees applicable to the Recipient as set out in the Order Form and/or Price List;

“**Insolvency Event**” means: (i) the Recipient ceases to pay its debts or suspends payments generally, or becomes unable or admits its inability to pay its debts as they fall due, or the value of its assets is or becomes less than its liabilities (taking into account contingent and prospective liabilities), or it becomes otherwise insolvent; (ii) a moratorium or suspension of payments is declared or instituted or ordered, or a resolution is passed in respect of any indebtedness of the Recipient, or the Recipient is otherwise afforded protection from its creditors generally; (iii) the Recipient passes a resolution for voluntary winding up or a court of competent jurisdiction makes an



Data Centre Services Terms of Business

order that the Party be wound up (except for the purposes of bona fide reconstruction while solvent); (iv) save in respect of a solvent reorganisation, a liquidator, receiver, administrative receiver, administrator, examiner, trustee, supervisor, compulsory or interim manager is appointed over the Recipient or any of its assets; or (v) any similar or analogous event in any jurisdiction;

“**Intellectual Property**” means any and all rights whether registered or unregistered and whether in existence now or in the future including without limitation copyright, trademarks, design rights, patents, utility models, database rights, rights in semiconductor or circuit layouts and the right to have confidential information kept confidential and any other similar or analogous rights and any application or right to apply for registration or renewal of any such rights;

“**Maintenance Handling Rate**” means the rate that it is charged by the Facility provider plus 10%;

“**Order Form**” means the order form agreed in writing between the Parties in accordance with Clause 2.2;

“**Price List**” means the list of Fees set on the Order Form and/or published by Chi-X on the Website or provided by Chi-X to the Recipient from time to time;

“**Recipient**” means the Party set out on an Order Form;

“**Services**” means the services requested by the Recipient as set out in an Order Form;

“**Terms of Business**” means Clauses **Error! Reference source not found.** - 9 below; and

“**Website**” means Chi-X’s website at www.chi-x.com as amended or replaced from time to time.

1.2 In the Agreement a reference to:

any reference to a “person” includes any individual, company, corporation, firm partnership, joint venture, association, organisation or trust (in each case, whether or not having separate legal personality) and references to any of the same shall include a reference to the others;

1.2.1 references to any Party include its successors (whether by operation of applicable law, regulation or otherwise) and permitted assigns;

1.2.2 any phrase introduced by the words “including”, “include”, “in particular”, “for example” or any similar expression shall be construed as illustrative only and shall not be construed as limiting the generality of any preceding words;

1.2.3 a word importing one gender shall (where appropriate) include any other gender and a word importing the singular shall (where appropriate) include the plural and vice versa;

1.2.4 any statute or statutory provision includes, except where otherwise stated, the statute or statutory provision as amended, consolidated or re-enacted from time to time, and includes any subordinate legislation made under the statute or statutory provision (as so amended, consolidated or re-enacted); and

1.2.5 the Financial Services Authority shall include any organization which takes on the regulatory functions of the Financial Services Authority.

1.3 The headings in the Agreement are for convenience only and shall not affect its interpretation.

2. **Services; Ordering Services**

2.1 The Recipient shall complete a draft order form indicating which Services it requires from Chi-X and provide the same to Chi-X.

2.2 If and when approved by Chi-X and agreed between the Parties, an Order Form shall form a part of this Agreement and be binding upon the Parties.



Data Centre Services Terms of Business

- 2.3 Chi-X will supply the Services set out in an Order Form to the Recipient.
- 2.4 The Recipient shall ensure that it:
- 2.4.1 provides Chi-X with all reasonable assistance in performing the Services;
 - 2.4.2 provides access to any equipment or location it uses in conjunction with the Services at all times; and
 - 2.4.3 has sufficient disaster recovery procedures in order to ensure the continuity of the Services.
- 2.5 The Agreement is a services agreement and is not intended to be and is not any form of lease, easement, tenancy, ownership or any other interest in the Facility or other Chi-X premises, Chi-X equipment or any other real or personal property.
- 3 **Payment; Taxes; Set Off**
- 3.1 Recipient agrees to make timely payment of the Fees within 30 days of receipt of Chi-X's invoice and time of payment shall be of the essence.
- 3.2 Fees are payable monthly in arrears, from and including the month in which Chi-X has completed its work and the Service is ready for use, even if the Recipient is not ready to begin using the Service. If the date on which the Service is ready for use by the Recipient falls on a date which is not the first of the month, the first payment of monthly Fees shall be pro-rated to take account of the number of actual days in that month for which the Service was ready to use and invoiced to the Recipient.
- 3.3 If Fees are not paid in full in accordance with Clause 3.1, without prejudice to any other rights and remedies available to Chi-X, Chi-X may:
- 3.3.1 charge interest on all outstanding amounts at the annual prevailing base lending rate of Chi-X's principal bankers from time to time plus three (3) per cent, calculated pro rata on a daily basis from the due date to the date of payment;
 - 3.3.2 suspend the provision of Services under this Agreement until the date of payment in full; and/or
 - 3.3.3 terminate this Agreement by the provision of written notice to that effect.
- 3.4 Chi-X reserves the right to charge Recipient at the Maintenance Handling Rate where additional maintenance and support services are required as a result of:
- 3.4.1 an installation of equipment by the Recipient, its employees or its contractor which is not in accordance with the applicable service guide; and
 - 3.4.2 a change and/or additional work originating from a request by the Recipient (or its agents and contractors) which occurs once the Service goes live and which causes Additional Fees to be charged by Chi-X.
- 3.5 All sums payable under this Agreement by the Recipient are payable in full without deduction, withholding, set-off or counterclaim for any reason whatsoever, whether arising in contract, tort (including negligence), breach of statutory duty or otherwise, save as may be required by law. All amounts payable by the Recipient to Chi-X under the Agreement shall be exclusive of value added tax ("VAT") (if any). VAT shall be charged in addition to such amounts. Recipient shall assume full and complete responsibility for the payment of any taxes, charges or assessments imposed on Recipient by any foreign or domestic national, state, provincial or local government bodies, or subdivisions thereof, and any penalties or interest, (other than income taxes imposed on Chi-X) relating to the provision of Services to Recipient. In addition, if Recipient is required under applicable law to deduct or withhold any such tax, charge or assessment from the amounts due to Chi-X under the Agreement, then such amount shall be increased so that the net amount actually received by Chi-X after the deduction or withholding of such tax, charge or assessment, will equal one hundred per cent (100%) of the Fees.
- 3.6 Chi-X reserves the right to change the Fees by not less than thirty (30) days notice given to the Recipient by means of both a notice posted on Chi-X's web site, and by email. If a change in Fees is more than the Retail Price Index (calculated from the year preceding



Data Centre Services Terms of Business

the date of the Fee change notice) plus 10%, then the Recipient may terminate this Agreement upon providing thirty (30) days written notice to Chi-X, otherwise the Recipient shall have no termination rights in relation to changes in the Fees. Chi-X shall have the right to set off any sums due from Recipient to Chi-X against any sums due from Chi-X to Recipient. There is no right to reimbursement of Fees or Additional Fees in the event of suspension or termination of Services.

4. Limitation of Liability

4.1 Neither Party excludes or in any way limits their liability for:

4.1.1 fraud;

4.1.2 death, or personal injury caused by a Party's negligence;

4.1.3 the indemnity in Clause 6; and/or

4.1.4 any liability to the extent the same may not be excluded or limited as a matter of law.

4.2 Subject to Clause 4.1, Chi-X shall not be liable to the Recipient under or in connection with the terms of the Agreement, the Services and/or the Chi-X system for any and all of the following, howsoever arising, whether such loss or damage was foreseeable or in the contemplation of the parties to the Agreement and whether arising out of breach of contract, tort (including negligence), breach of statutory duty, indemnity or otherwise:

4.2.1 loss of opportunities;

4.2.2 loss of income;

4.2.3 loss of revenues;

4.2.4 loss of actual or anticipated profits;

4.2.5 loss of business;

4.2.6 loss of contracts;

4.2.7 loss of goodwill or reputation;

4.2.8 loss of actual or anticipated savings;

4.2.9 loss of, damage to or corruption of data; or

4.2.10 special, indirect or consequential loss or damage of any kind.

4.3 Subject to Clauses 4.1 and 4.2, Chi-X's entire liability howsoever arising and whether arising out of breach of contract, tort (including negligence), breach of statutory duty, indemnity or otherwise to the Recipient and/or any other person in respect of any claims or losses of any nature, arising directly or indirectly, from the Agreement, Chi-X system and/or the Services shall be limited in respect of all incidents or series of incidents occurring in any one calendar year, to the Fees (including 10% of all Maintenance Handling Rate fees) paid under the Agreement in the calendar year when the date on which the first claim arose.

4.4 Subject to Clause 4.1.4 this Agreement sets forth the full extent of the Parties obligations and liabilities arising out of or in connection with this Agreement or any collateral contract, and there are no conditions, warranties, representations or terms, express or implied, that are binding on the Parties except as specifically stated or contemplated in this Agreement. Subject to Clause 4.1.4, any condition, warranty, representation or term which might otherwise be implied into or incorporated in this Agreement or any collateral contract, whether by statute, common law or otherwise, is expressly excluded.



Data Centre Services Terms of Business

4.5 The Recipient hereby acknowledges and agrees that it shall bring any claim arising under or relating to the Agreement within twelve months from the date of the claim arising, or, if later, within twelve months from the date the Recipient first became aware of the matters leading to the claim, and failure to do so shall result in any such claim automatically and irrevocably expiring.

5 Warranties

5.1 Chi-X represents and warrants that it has all rights, authority and licenses to provide the Services to Recipient and that any Services will be performed with reasonable care and skill and in compliance with any applicable laws and regulation.

5.2 Subject to Clause 5.1 the Services are provided "as is," without any other warranty including, but not limited to, any implied warranties of merchantability, fitness for a particular purpose, trade usage, course of dealing, and course of performance. The entire risk as to the quality and performance of the Services is with the Recipient and there is no guarantee that the Services will meet the Recipient's requirements, be error free, or operate without interruption.

5.3 Recipient represents and warrants that it has all rights, authority and licenses to enter into the Agreement and will throughout the term of the Agreement act in compliance with any applicable laws and regulation.

6. Indemnity

6.1 Recipient agrees to indemnify and hold harmless Chi-X and Chi-X Related Parties and their successors and assigns ("**Indemnified Parties**") from and against any cost, expense, liability, claim, loss or damage, direct, consequential and/or incidental in nature (including reasonable legal fees) based on any claim, demand, proceeding, suit and/or action by the Facility provider to which any Indemnified Party may become subject which arises out of any act or omission of the Recipient or its employees, agents or contractors, other than use by the Recipient of the Services in accordance with the terms and conditions of the Agreement.

7. Term and Termination or Suspension of Agreement

7.1 The Agreement is for the term of one year from the date on which the Order Form is executed by the parties and is automatically renewed on an annual basis unless terminated by either Party pursuant to the terms of the Agreement. Chi-X may immediately suspend the Services or terminate the Agreement, or any portion thereof, if it determines that:

7.1.1 Chi-X can no longer generally provide the Services (including, where an act or omission of, or issue affecting, the provider of the Facility causes Chi-X to no longer be able to provide the Services), in which event Chi-X will use reasonable endeavours to provide written notice to the Recipient as soon as practicable;

7.1.2 Recipient has breached any material term of the Agreement and Recipient fails to cure such breach within twenty (20) Business Days after written notice thereof from Chi-X;

7.1.3 Recipient is engaged in activities that Chi-X reasonably determines to be detrimental to the business of Chi-X;

7.1.4 Recipient, in Chi-X's sole discretion, poses a credit risk to Chi-X;

7.1.5 Recipient has or is likely to be subject to an Insolvency Event; or

7.1.6 Recipient undergoes a Change of Control.

7.2 Either Party may terminate the Agreement or any part of the Services for convenience upon not less than ninety (90) days prior written notice to the other Party such notice to take effect only on an anniversary of the Agreement.

8. Confidentiality

8.1 Each Party will treat as confidential all Confidential Information obtained from the other under The Agreement. They will not, except as expressly provided in the Agreement, without the prior written consent of the other, disclose Confidential Information to any person or use the same except for the purposes of the Agreement.



Data Centre Services Terms of Business

- 8.2 Clause 8.1 does not prohibit disclosure of Confidential Information to:
- 8.2.1 the receiving Party's own employees (including agents and permitted sub-contractors) who need to know it provided that these employees are first made aware of the confidential nature of the Confidential Information and the receiving Party's obligations in relation to it and themselves agreed to treat the Confidential Information confidentially;
 - 8.2.2 the receiving Party's auditors, professional advisors, HM Inspector of Taxes, HM Customs & Excise and any other person having a statutory or regulatory right to request and receive that information (including any regulator of competent jurisdiction); or
 - 8.2.3 any person by pursuant to an order or subpoena of a court or request by a regulatory body having appropriate authority provided that the disclosing Party has first been given a reasonable opportunity to oppose such disclosure.
- 8.3 Each Party agrees to keep secure the other Party's Confidential Information using at least the same security measures and the same level of care as it employs in the protection of its own Confidential Information. Upon termination of the Agreement for any reason whatsoever, all notes, letters, documents, computer disks, records and any other written, printed, recorded or other tangible materials which are in the possession or control of a Party to the extent they contain the other Party's Confidential Information shall upon the other Party's request be delivered to such party or destroyed and that no copies or summaries thereof shall be retained, however, each Party may retain copies of the other Party's Confidential Information to the extent necessary to comply with applicable legal and/or regulatory requirements.
- 9. General**
- 9.1 During the term of the Agreement, Recipient agrees that it will maintain sufficient all risks insurance at levels no less than those required by applicable law.
- 9.2 If any term of this Agreement is found to be illegal, invalid, or unenforceable under any applicable law, such term shall, insofar as it is severable from the remaining terms be deemed omitted from this Agreement and shall in no way affect the legality, validity or enforceability of the remaining terms.
- 9.3 Neither Party may transfer or assign the Agreement to any third party without the prior written approval of the other Party, however, Chi-X may transfer or assign the Agreement to an Affiliate and will provide the Recipient with written notice of any such assignment.
- 9.4 A Party claiming that a dispute has arisen under or in connection with the Agreement shall notify the other Party in writing giving details of the dispute. During the ten (10) day period after a notice is given (or any longer period agreed in writing between the Parties) (the "**Initial Dispute Resolution Period**") the parties' management teams shall work in good faith to resolve the dispute. While the procedure set forth in this Clause 9.4 is being followed, both parties shall continue to fulfil their obligations under the Agreement. The procedure set out in this Clause 9.4 is not intended to limit or exclude a Party's rights under the Agreement or at common law or equity (including the right to make applications for interim relief, including injunctions).
- 9.5 Recipient shall provide Chi-X with oral and written notice of any: (i) name change, or (ii) Change of Control within fifteen (15) days of the occurrence of any such event. Recipient shall provide immediate written notice to Chi-X in the event of any voluntary or involuntary filing by or against Recipient under any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, whether now or hereafter in effect.
- 9.6 Neither Party shall be liable for any delay or failure to perform its obligations hereunder so long as that delay or failure is the result of an event beyond its reasonable control, and provided that such Party uses commercially reasonable efforts to fulfill its obligations under the Agreement. For the avoidance of doubt, the actions or omissions of the provider of the Facility shall be outside either Party's reasonable control.
- 9.7 Any notice which either Party is required or authorised by the Agreement to give or make to the other shall be given in writing by email (to be provided by the Recipient in the completed Data Order Form), post or hand delivery addressed to the other Party at their last known business address. In addition, any notice which Chi-X is required or authorised by The Agreement to give or make to the Recipient may be given by trading notice published by Chi-X on the Website. Notices given by hand delivery shall be deemed to have been given on the date and at the time of delivery. Notices sent by post shall be sent by first class post and shall be deemed received on the second Business Day after posting. Notices sent by email on a Business Day before 4.30p.m, shall be deemed received on that day. In any other case, they shall be deemed received on the next Business Day after the day on which it was sent. In the case of Chi-X such



Data Centre Services Terms of Business

notice must be specifically addressed to the Head of Legal and if given by email, sent to legal@chi-x.com or such other email address as Chi-X may request from time to time. It is the Recipient's responsibility to inform Chi-X promptly of any change to contact details provided to Chi-X.

- 9.8 The Agreement contains all the terms agreed between the parties regarding its subject matter and supersedes any prior agreement, understanding or arrangement between the parties, whether oral or in writing. No representation, undertaking or promise shall be taken to have been given or be implied from anything said or written in negotiations between the parties prior to the Agreement except as expressly stated in the Agreement. Neither Party shall have any remedy in respect of any untrue statement made by the other upon which that Party relied in entering into the Agreement (unless such untrue statement was made fraudulently or was as to a fundamental matter including as to a matter fundamental to the other Party's ability to perform its obligations under the Agreement) and that Party's only remedies shall be for breach of contract as provided in the Agreement.
- 9.9 In the event of any conflict or inconsistency between the terms of these Terms of Business and the Order Form, then the terms and conditions of these Terms of Business shall prevail over the Order Form to the extent of the conflict or inconsistency.
- 9.10 The Order Form may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.
- 9.11 Subject to Clause 3.4, Chi-X reserves the right, at its discretion, to make changes to the Agreement. CXE will give the Recipient five (5) Business Days' prior notice before such changes are effective. If Chi-X makes a material amendment to the terms of the Agreement, Chi-X shall provide at least twenty (20) Business Days' written notice of the same and if the amendment is to the Recipient's material detriment, the Recipient shall be entitled to terminate the Agreement effective from the date on which the amendment is to be implemented, by the provision of at least ten (10) Business Days' written notice (or as much notice as reasonably possible in the circumstances if provided with less than ten (10) Business Days' notice by Chi-X) provided that it has first given Chi-X a reasonable opportunity to revert to the previous Chi-X terms and/or amend the terms to the Recipient's satisfaction. The Agreement may be amended only in writing by authorised representatives of both parties.
- 9.12 The terms and conditions of Clauses 1, 2.4, 3, 4, 6, 8 and 9 shall survive any termination, cancellation or expiration of the Agreement.
- 9.13 Any waiver by the other Party in writing of any of the other Party's obligation hereunder, or any failure to insist upon strict compliance with any obligation shall not operate as a waiver of, or estoppel with respect to any subsequent or other failure.
- 9.14 Save in respect of the rights of the Indemnified Parties to enforce any of the provisions of the Agreement expressly or impliedly for their benefit, nothing in the Agreement is intended for the benefit of any third party, and the parties do not intend that any term of the Agreement should be enforceable by a third party either under the Contracts (Rights of Third Parties) Act 1999 or otherwise.
- 9.15 The Agreement (and any non-contractual obligations arising out of or in connection with the Agreement) shall be governed by the laws of England and Wales. The parties consent to the exclusive jurisdiction of the English Courts in relation to any legal action or proceedings arising out of or in connection with the Agreement.