

## Activ Terms and Conditions

**The Customer's attention is in particular drawn to the provisions of Conditions 5 and 9.**

### 1. INTERPRETATION

1.1 The definitions and rules of interpretation in this condition apply in these terms and conditions (Conditions).

**Confidential Information:** all information, whether technical or commercial, where the information is identified as confidential at the time of disclosure, or ought reasonably to be considered confidential given the nature of the information or the circumstances of disclosure.

**Contract:** the contract between the Supplier and the Customer for the provision of the System incorporating the Order Form and these Conditions.

**Customer:** the person, firm or company who purchases a System from the Supplier.

**Customer's Equipment:** any equipment, systems, cabling or facilities provided by the Customer and used directly or indirectly in the supply of the System and any Support Services.

**EULA:** the end user licence agreement with the Relevant Licensor relating to the System software, a copy of which is contained on the System.

**Intellectual Property Rights:** all intellectual property rights wherever in the world arising, whether registered or unregistered (and including any application), including copyright, know-how, confidential information, trade secrets, business names and domain names, trademarks, service marks, trade names, patents, petty patents, utility models, design rights, semi-conductor topography rights, database rights and all rights in the nature of unfair competition rights or rights to sue for passing off.

**Monthly Cost:** the monthly licence fee referred to in Condition 6.3.

**Order Form:** the document setting out details of the System and payment plan, signed by the Supplier.

**Party:** a party to the Contract.

**Primary User:** the Customer's manager for the System, either stated in the Order Form or appointed in accordance with Condition 5.1.

**Relevant Licensor:** GreyRidge Software Limited, a company incorporated in England under company number 05322105, whose registered office is at Room 04 Ground Floor, Cobalt Business Exchange, Cobalt Park Way, Wallsend, Tyne and Wear, NE28 9NZ.

**Supplier:** MyActiv Limited, a company registered in England under number 05954592, whose registered office is at 30 Tower View, Kings Hill, West Malling, Kent ME19 4UY.

**Support Services:** the services provided by the Supplier under the Contract to assist users of the System.

**System:** the Activ online management system being supplied to the Customer by the Supplier pursuant to the Contract.

**VAT:** value added tax chargeable under English law for the time being and any similar additional tax.

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1.2 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.3 A reference to writing or written includes faxes and e-mail.

1.4 References to Conditions are to the Conditions of the Contract as set out herein.

### **2. APPLICATION OF CONDITIONS**

2.1 These Conditions shall:

(a) apply to the provision of the System and Support Services detailed in the Contract; and

(b) prevail over any inconsistent terms or conditions contained, or referred to, in any purchase order, confirmation of order, acceptance of a quotation, or specification or other document supplied by the Customer, or implied by law, trade custom, practice or course of dealing.

2.2 The Customer is deemed to have accepted these Conditions by accepting the terms contained in the Order Form.

2.3 If the Order Form contains any terms or conditions that are inconsistent with these Conditions then in relation to such terms or conditions the Order Form shall prevail.

### **3. COMMENCEMENT**

The System to be delivered under the Contract shall be provided by the Supplier as soon as is reasonably possible after the date of receipt of the Order Form countersigned by the Customer or as specified in the Order Form.

### **4. SUPPLIER'S OBLIGATIONS**

4.1 The Supplier shall use reasonable endeavours to deliver the System and any Support Services to the Customer in accordance with the Order Form in all material respects.

4.2 The Supplier shall use reasonable endeavours to observe all health and safety rules and regulations, and any other reasonable security requirements that apply at any of the Customer's premises and that have been communicated to it under Condition 5.1(e), provided that it shall not be liable under the Contract if, as a result of such observation, it is in breach of any of its obligations under the Contract.

### **5. CUSTOMER'S OBLIGATIONS – THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CONDITION**

5.1 The Customer shall:

(a) co-operate with the Supplier in all matters relating to the delivery of the System and any Support Services;

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- (b) where the Primary User has not been specified in the Order Form, promptly appoint the Primary User and notify to the Supplier such person's name and contact details;
- (c) promptly notify to the Supplier any change to the identity of the Primary User;
- (d) provide the Supplier, its agents, subcontractors, consultants and employees, in a timely manner and at no charge, with access to the Customer's premises, office accommodation, data and other facilities as reasonably required by the Supplier or any of them;
- (e) inform the Supplier of all health and safety rules and regulations and any other reasonable security requirements that apply at any of the Customer's premises;
- (f) ensure that all the Customer's Equipment is in good working order and suitable for the purposes for which it is used in relation to the System and conforms to all relevant United Kingdom standards or requirements;
- (g) enter into the EULA immediately upon logging in to the System for the first time;
- (h) not use the System for any other user except for the Customer without the Supplier's express written authorisation and to do so would be a material breach of the Contract.

5.2 If the Supplier's performance of its obligations under the Contract is prevented or delayed by any act or omission of the Customer, its agents, subcontractors, consultants or employees, the Supplier shall not be liable for any costs, charges or losses sustained or incurred by the Customer arising directly or indirectly from such prevention or delay.

5.3 The Customer shall be liable to pay to the Supplier, on demand, all reasonable costs, charges or losses sustained or incurred by the Supplier (including, without limitation, any direct, indirect or consequential losses, loss of profit and loss of reputation, loss or damage to property and those arising from injury to or death of any person and loss of opportunity to deploy resources elsewhere) arising directly or indirectly from the Customer's fraud, abuse, misuse and/or modification of the System (including negligent misuse or modification), subject to the Supplier confirming such costs, charges and losses to the Customer in writing. This does not affect the Supplier's rights in respect of any claim for breach of contract or delay in performance by the Customer.

## 6. CHARGES AND PAYMENT

6.1 In consideration of the delivery of the System and any Support Services by the Supplier, the Customer shall pay the charges as set out in the Customer's payment plan in the Order Form without deduction or set-off.

6.2 All prices set out in the Order Form or other contract exclude VAT, which the Supplier shall add to its invoices at the appropriate rate.

6.3 The Customer's payment plan (as referred to in Condition 6.1) for the System shall comprise a Monthly Cost, the amount of which shall be related to a number of variables (including, without limitation, the selected modules and the number of users registered by the Customer on the System).

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6.4 The Monthly Cost may be reviewed and increased by the Supplier with effect on and from 1 January in any calendar year provided that the Supplier has given the Customer at least one month's prior written notice of such proposed increase. Each individual increase applied will be limited to the higher of 5% or UK RPI (as published in the month prior to the notification of the increase).

6.5 Without prejudice to any other right or remedy that it may have, if the Customer fails to pay the Supplier on the due date, the Supplier may:

(a) charge interest on such sum after 30 days from the due date for payment at the annual rate of 5% above the base lending rate from time to time of the Bank of England, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment and the Customer shall pay the interest within 7 days of demand for payment.

(b) suspend the System and all Support Services until payment has been made in full.

6.6 Time for payment is of the essence. For the avoidance of doubt the failure of the Customer to make payment in accordance with these provisions shall be grounds for termination under Condition 11.

6.7 All sums payable to the Supplier under the Contract shall become due immediately on its termination despite any other provision.

6.8 The Supplier may, without prejudice to any other rights it may have, set off any liability of the Customer to the Supplier against any liability of the Supplier to the Customer.

## 7. INTELLECTUAL PROPERTY RIGHTS AND THE SYSTEM SOFTWARE

7.1 The Supplier shall retain the property and copyright in all documents supplied to the Customer in connection with the Contract (including without limitation template forms, process descriptions, procedures, spreadsheets and guidance notes) and it shall be a condition of such supply that the contents of such documents shall not be communicated either directly or indirectly to any other person, firm or company without the prior written consent of the Supplier.

7.2 The System software is the property of the Relevant Licensor and shall be supplied to the Customer by the Relevant Licensor in accordance with the Relevant Licensor's standard terms, as set out in the EULA. The monthly licence fee for such software is included in the charges payable pursuant to Condition 6.

7.3 The Supplier warrants to the Customer that:

(a) it has full and sufficient right, title and authority to grant the access to the System and provide the Support Services under the Contract for the permitted uses expressed in the Contract;

(b) it has all and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this Contract;

(c) the installation of the System and the provision of the Support Services will be performed in accordance with all applicable laws and regulations and with all reasonable care and skill; and

(d) the disclosure and delivery of any information, documents and other materials, and use thereof, as contemplated by the Contract, the use of the System or provision of the Support Services, will not

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knowingly infringe or violate any Intellectual Property Rights or right of confidentiality of any third party.

7.4 The Supplier's obligations under Condition 7 shall not apply to Services modified or used by the Customer otherwise than in accordance with the Contract or the Supplier's instructions. The Customer shall indemnify the Supplier against all losses, damages, liability, costs and expenses (including reasonable legal fees) incurred by the Supplier in connection with any claim arising from such modification or use.

### 8. CONFIDENTIALITY AND THE SUPPLIER'S PROPERTY

8.1 Each Party to the Contract shall protect the Confidential Information of the other Party against unauthorised disclosure by using the same degree of care as it takes to preserve and safeguard its own confidential information of a similar nature, being at least a reasonable degree of care.

8.2 Either Party may disclose Confidential Information:

- (a) to its employees, officers, representatives, advisers, agents or subcontractors who need to know such information for the purposes of carrying out the Party's obligations under the Contract; and
- (b) as may be required by law, court order or any governmental or regulatory authority.

8.3 Each Party shall ensure that its employees, officers, representatives, advisers, agents or subcontractors to whom it discloses such information comply with this condition 8.

8.4 Neither Party shall use Confidential Information for any purpose other than to perform its obligations under the Contract.

### 9. LIMITATION OF LIABILITY – THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CONDITION

9.1 This Condition 9 sets out the extent of the Parties' liability under or in connection with this Agreement (including any liability for the acts or omissions of its employees, agents, consultants and subcontractors) to the Customer in respect of:

- (a) any breach of Contract
- (b) any use made by the Customer of the System and Support Services or any part of this
- (c) any representation, statement or tortious act or omissions (including negligence) arising under or in connection with the Contract

9.2 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

9.3 Nothing in these Conditions limits or excludes the liability of either Party:

- (a) for death or personal injury resulting from negligence; or
- (b) for any damage or liability incurred as a result of fraud or fraudulent misrepresentation; or

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(c) for any liability as a result of any of the conditions as to title or the warranty as to quiet possession implied by section 2 of the Supply of Goods and Services Act 1982.

9.4 Subject to Condition 9.2 and Condition 9.3

(a) Neither party shall be liable for any special, indirect, consequential or pure economic loss, loss of profit, costs, damages, charges or expenses, nor any loss of, theft of, damage to, or corruption of, the Customer's data and/or documents;

(b) The Parties total liability in contract, 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 price paid for the System for 12 months (as set out in the Order Form).

(c) The Supplier is providing the System and Support Services at the Customer's request and the Customer is responsible for verifying that the information it provides to the Supplier is correct. The Supplier will not be liable for any Systems or Support Services which are incorrect as a result of information provided by the Customer.

9.5 The limitations of liability set out in Conditions 9.4 shall not apply in respect of any indemnities given by either party under this Agreement

9.6 The limitation of liability set out in Condition 9.4 shall not apply in respect of Condition 5.2, 5.3 and 7.4 which are expressly excluded from this provision

## 10 DATA PROTECTION

10.1 The Customer acknowledges and agrees that details of the Customer's name, address and payment record may be submitted to a credit reference agency.

10.2 Personal data relating to the Customer's employees, clients and/or suppliers may be processed by the Supplier for the purposes of, and for the duration of, the delivery of the System and Support Services, in which case the Customer shall ensure that the data protection principles specified in the General Data Protection Regulation are complied with.

10.3 The Customer remains legally responsible for the processing of any personal data carried out by the Supplier in relation to the delivery of the System and Support Services, and shall not instruct the Supplier to process personal data where the Customer does not have a secure basis in law to process that data.

10.4 The Supplier shall at all times process personal data in relation to the delivery of the System and Support Services only on documented instructions from the Customer and in accordance with the General Data Protection Regulation, unless required to do so by law.

10.5 The Supplier shall have in place appropriate technical and organisational security measures that protect any personal data it is contracted to process on behalf of the Customer from unauthorised or unlawful processing, accidental loss, destruction or damage.

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10.6 The Supplier shall assist the Customer in ensuring compliance with the obligations in relation to security of personal data, the notification of personal data breaches and data protection impact assessments.

10.7 The Supplier shall have in place appropriate measures, insofar as this is possible, for the fulfilment of the Customer's obligation to respond to requests for exercising the data subject's rights in relation to their personal data.

10.8 The Supplier shall ensure that anybody authorised to process any personal data has committed themselves to maintain its confidentiality.

10.9 Subject to Condition 10.10, the Supplier shall not share any personal data that is processed by the Supplier in relation to the delivery of the System and Support Services with any third party without the prior written permission of the Customer or process personal data on behalf of the Customer in any way or for any purpose that has not been instructed and authorised by the Customer.

10.10 The Supplier sub-contracts the Relevant Licensor to deliver the System. The Customer shall authorise the Relevant Licensor to process personal data on behalf of the Supplier in relation to the delivery of the System. The Supplier shall impose the same data protection obligations contained in this Condition 10 on the Relevant Licensor by way of a binding contract.

10.11 The Supplier shall not transfer personal data processed on behalf of the Customer to any territory outside the United Kingdom.

10.12 The Supplier shall make available to the Customer all information necessary to demonstrate compliance with the obligations laid down in this Condition 10 and allow for and contribute to audits, including inspections, conducted by the Customer (or another auditor mandated by the Customer) at the Customer's expense.

10.13 The Supplier shall, at the choice of the Customer, delete or return any personal data processed on behalf of the Customer to the Customer after the end of the provision of System and Support Services, and delete any existing copies.

10.14 The Supplier shall notify the Customer without undue delay after becoming aware of a security incident relating to any personal data processed on behalf of the Customer.

10.15 The Customer acknowledges and agrees that the Supplier may use the Customer's name and company logo in its marketing materials unless the Supplier is advised to the contrary in writing by the Customer at any time.

10.16 The Supplier shall have access to the Customer's System in order to provide Support Services and may collect and use technical information from the Customer's System for those purposes.

## 11 TERMINATION

11.1 Without prejudice to any other rights or remedies which the parties may have, either Party may terminate the Contract without liability to the other immediately on giving notice to the other if:

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- (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 seven days after being notified in writing to make such payment; or
- (b) the other Party commits a material breach of any of the terms of the Contract and (if such a breach is remediable) fails to remedy that breach within 30 days of that Party being notified in writing of the breach; or
- (c) 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 (being a company) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or (being a natural person) is deemed either unable to pay its debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986 or (being a partnership) has any partner to whom any of the foregoing apply; or
- (d) the other Party takes any action, or any third party takes any action in relation to the other Party, or its assets, which leads the Party seeking to terminate the Contract pursuant to this Condition 11 reasonably to believe that the other Party may be insolvent, may become insolvent, or may be or become the subject of insolvency-related proceedings of any nature whatsoever;
- (e) 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 Condition 11.1(c); or
- (f) the other Party suspends or ceases, or threatens to suspend or cease, to carry on all or a substantial part of its business.

11.2 The parties acknowledge and agree that any breach of Condition 6.1 shall constitute a material breach for the purposes of this Condition 11.

11.3 Either Party may terminate the Contract by giving the other Party at least three months' written notice of such termination following completion of the minimum contract period specified in the Order Form. Prior to the end of the notice period, the Customer shall retrieve all of its data from the System and notify the Supplier in writing when it has done so.

11.4 On termination of the Contract for any reason:

- (a) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Systems and Support Services supplied but for which no invoice has been submitted, the Supplier may submit an invoice, which shall be payable immediately on receipt;
- (b) subject to Condition 11.4(c), the Customer shall be entitled to export all of its records from the System;
- (c) the Supplier shall disable the System and thereafter the Customer shall cease to have access to the System;
- (d) the Supplier will delete the System 12 months after termination or upon written request from the Customer to do so;
- (e) the accrued rights and liabilities of the parties as at termination and the continuation of any provision expressly stated to survive or implicitly surviving termination, shall not be affected.



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11.5 On termination of the Contract (however arising) the following Conditions shall survive and continue in full force and effect:

- (a) Condition 8;
- (b) Condition 9;
- (c) Condition 11; and
- (d) Condition 21;

### 12 FORCE MAJEURE

Neither Party shall be liable to the other 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) strikes, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport 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 subcontractors.

### 13 VARIATION

13.1 The Supplier may, from time to time and without notice, change the System and Support Services in order to comply with any applicable safety and/or statutory requirements, and, subject to giving the Customer notice (which in this instance shall include electronic means including notification posted on the System), make changes which, in the reasonable opinion of the Supplier, enhance the nature and scope of the System and Support Services.

13.2 With the exception of any amendments to these Conditions that are necessary to comply with changes to applicable safety and/or statutory requirements (which, for the avoidance of doubt, can be made by the Supplier at any time and will, subject to the Customer receiving notice of the change, be immediately binding on the Customer) these Conditions and Order Form cannot be varied except in writing signed by a duly authorised representative of both the Parties.

13.3 Subject to Conditions 13.1 and 13.2, no variation of the Order Form shall be valid unless agreed in writing by both of the Parties

### 14 WAIVER

A waiver of any right under the Contract is only effective if it is in writing and it applies only to the circumstances for which it is given. No failure or delay by a Party in exercising any right or remedy under the Contract or by law shall constitute a waiver of that (or any other) right or remedy, nor preclude or restrict its further exercise. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that (or any other) right or remedy.

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### **15 SEVERANCE**

15.1 If any provision of the Contract (or part of any provision) is found by any court or other authority of competent jurisdiction to be invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed not to form part of the Contract, and the validity and enforceability of the other provisions of the Contract shall not be affected.

15.2 If a provision of the Contract (or part of any provision) is found illegal, invalid or unenforceable, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

### **16 ENTIRE AGREEMENT**

16.1 The Contract constitutes the whole agreement between the parties and supersedes all previous agreements between the parties relating to its subject matter.

16.2 Each Party acknowledges that, in entering into the Contract, it has not relied on, and shall have no right or remedy in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than for breach of contract.

### **17 ASSIGNMENT**

17.1 The Customer shall not, without the prior written consent of the Supplier (which shall not be unreasonably withheld), assign, transfer, charge, mortgage, subcontract or deal in any manner with all or any of its rights or obligations under the Contract.

17.2 The Supplier may at any time assign, transfer, charge, mortgage, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party or agent.

17.3 Each Party that has rights under the Contract is acting on its own behalf and not for the benefit of another person.

### **18 NO PARTNERSHIP OR AGENCY**

Nothing in the Contract is intended to, or shall be deemed to, constitute a partnership or joint venture of any kind between the parties, nor constitute either Party the agent of the other Party for any purpose. No Party shall have authority to act as agent for, or to bind, the other Party in any way.

### **19 RIGHTS OF THIRD PARTIES**

A person who is not a Party shall not have any rights under or in connection with it.

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### **20 NOTICES**

20.1 Unless expressly stated otherwise in this Contract, any notice or other communication required to be given under the Contract shall be in writing and shall be delivered personally, or sent by pre-paid first-class post, recorded delivery or by commercial courier, or by e-mail, to the other Party.

20.2 Any notice or other communication required to be given under the Contract shall be deemed to have been duly received if delivered personally, when left at the address specified for that Party in the Order Form or, if sent by pre-paid first-class post or recorded delivery, at 9.00 am on the second Business Day after posting, or, if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed, or, if delivered by e-mail, on the date and time specified on the electronic delivery receipt and/or read receipt received by the sender in respect of such e-mail.

### **21 GOVERNING LAW AND JURISDICTION**

21.1 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.

21.2 The Parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of, or in connection with, the Contract or its subject matter or formation (including non-contractual disputes or claims).