

# Mobile Services

## General terms and conditions of business of

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### 1. Area of application and subject of the contract

1.1 atms provides indirect access to SMS Centres ("SMSC") to service providers (information service providers, communications service providers, communication network operators, operators) for the operation of mobile services and the sending and receiving of SMS/MMS messages (hereafter referred to as "SMS") to customers (end customers, users) and/or the setting up of one or more SMS premium rate/service numbers and/or SMS short dials exclusively on the following terms. The telephone numbers and accesses allocated to the service provider, as well as the services provided by the service provider, are set out in the registration (in particular, the order form), which is an integral part of this contract. atms is only responsible for the due sending and/or receiving of SMS and the associated delivery/acceptance to or from the interface of the mobile operator, but it is not responsible for the actual entry (transmission) to the SMS Centres or their customers. Possible changes, limitations and enhancements of allocated SMS premium rate/service numbers and/or SMS short dials or services will be immediately notified to the service provider by atms.

1.2 atms may use third parties as vicarious agents in fulfilling its service obligations. The contractual obligations of atms are not affected by this. atms is entitled to change the technical platforms and parameters underlying these services or to use alternative vicarious agents, provided that this does not significantly impair the services for the service provider and provided that this does not result in any additional inconvenience beyond what is reasonable.

1.3 The SMS premium rate/service numbers and/or SMS short dials will be provided by atms to the service provider following registration (in particular, the order form). The equipment necessary for this on the part of the service provider lies in its area of application and will be produced and maintained at the cost of the service provider. Set-up and connection charges are to be paid to atms in advance by the service provider. If an SMS premium rate/service number and/or SMS short dial is not set up within the time frame stated above for reasons not attributable to atms, the service provider can terminate the contract for an extraordinary reason. However, atms is not liable to the service provider for any consequential loss (excluding deliberate acts and personal injury – irrespective of the degree of fault).

1.4 atms reserves the right to adopt codes of behaviour (e.g. regulations or recommendations, in particular of regulatory authorities in connection with the provision of services) for all allocated SMS premium rate/service numbers and/or SMS short dials and services offered and, following notification (in writing and effective four weeks after sending), to apply this as part of the respective contract. The notified code is legally binding on the service provider. Furthermore, the provisions of Austrian and European law regarding telecommunications in their respective applicable version (currently, in particular, the Telecommunications Act 2003 [Telekommunikationsgesetz 2003] and the Ordinance on Communications Parameters, Charges and Premium Rate Services [Kommunikationsparameter-, Entgelt- und Mehrwertsteuerordnung]) apply to the contractual relationship.

### 2. Obligations of the service provider

2.1 The service provider must offer the services in a quality which is commensurate with state-of-the-art technology.

2.2 The service provider will immediately notify atms in writing of any change to its address, its company, its place of business, its invoice address, as well as its legal form. If the service provider does not fulfil the aforementioned obligation, atms is entitled to serve legally binding correspondence on the service provider at its last known address or in accordance with the last known company information.

2.3 The service provider may only use SMS premium rate/service numbers and/or SMS short dials for promotional, information and entertainment purposes and/or transferring binary data. Each SMS must be clearly identified by the service provider so that it is clear to the recipient that the service provider is the sender.

2.4 It is noted that the service provider has knowledge of the relevant provisions of the Telecommunications Act 2003 ("TKG"), in particular § 107 TKG in its applicable version. The service provider is obliged (following a request by atms) to immediately provide atms with evidence of the consent of the recipient to receive SMS and/or as to the lawfulness of sending of the same.

2.5 The service provider undertakes to familiarise itself sufficiently with the services offered by it in accordance with statutory provisions, in particular the Ordinance on Communications Parameters, Charges and Premium Rate Services ("KEM-V") in its applicable version, and is liable for

all claims resulting from a breach of the aforementioned statutory provisions. The service provider is liable for all claims arising from failure to duly comply with the obligations incumbent on it. The service provider will, when first requested, hold atms free and harmless from such and all other third-party claims.

2.6 The service provider is solely responsible for the content and legal admissibility of SMS sent and received and/or SMS premium rate/service numbers and/or SMS short dials set up within the framework of this contract. atms is thus not liable for the content of SMS sent or received by the service provider within the framework of this contract. atms is equally not liable for the legal admissibility of SMS sent by the service provider. The service provider shall, when first requested, hold atms free and harmless from all third-party claims resulting from the content and/or sending of SMS and/or SMS premium rate/service numbers and/or SMS short dials – irrespective of the legal basis. The service provider is furthermore obliged, at the request of atms, to notify to atms in writing traffic data (offer and invoice mechanism) of SMS messages sent by the service provider or its customers and/or SMS premium rate/service numbers and/or SMS short dials.

2.7 If the service provider or one of its customers breaches any of the stated provisions, atms is entitled to immediately block the service provider from accessing the SMSC and to refuse to send or receive SMS sent by/to the service provider. This shall not give rise to any claim whatsoever by the service provider against atms and the service provider shall hold atms free and harmless from all third-party claims. This also applies where atms is obliged – on the basis of legislation, an agreement with the mobile phone operators or a direction or recommendation of a court or authority – to block access or refuse to send or receive SMS, or when one or more mobile phone operators cease to provide their services to atms on the basis of a breach of Items 2 et seq. by the service provider or any of its customers.

### 3. Immediate suspension of services

3.1 atms is entitled to wholly or partly cease services without prior due or extraordinary termination of this contract if:

- a) the service provider is in arrears in paying fees following unsuccessful threats to the service provider to suspend or deactivate the services and providing for a two-week grace period;
- b) insolvency proceedings are commenced over the assets of the service provider or insolvency proceedings are dismissed due to their being insufficient assets to cover costs;
- c) atms requests the service provider to immediately remove disruptive factors and the service provider fails to immediately comply with the request, in particular despite impairing the network or one of atms' services, or endangering persons;
- d) the service provider distributes or allows to be distributed content which is illegal or there are grounds to suspect the same. This includes, in particular, content that contravenes the Austrian Criminal Code [Strafgesetzbuch], Pornography Act [Pornographiegesetz], Prohibition Act [Verbotsgesetz], Data Protection Act [Datenschutzgesetz], Telecommunications Act 2003 [TKG] or the Ordinance on Communications Parameters, Charges and Premium Rate Services [KEM-V] (each in its applicable version) and any threat to public order or security, as well as the distribution of content which is capable of endangering the moral or healthy development of young people;
- e) it is feared that SMS or SMS premium rate/service numbers and/or SMS short dials are being used to commit criminal or other unlawful activities or for other disruptive purposes;
- f) it is unreasonable for atms to provide the envisaged services owing to a serious breach of contract by the service provider or due to technical or operational reasons beyond its control;
- g) an administrative authority or the Rundfunk und Telekom Regulierungs-GmbH recommends or orders the cessation of the service;
- h) there are grounds to suspect that the content rendered with the service or which is behind the service is the result of, or in connection with, fraud or behaviour similar to fraud, or is capable of deceiving atms or third parties or impairing their assets;
- i) the requested deposit or advance payment has not been made in accordance with Item 5.9.

### 4. Provision deadlines, scope of service and fault clearance

4.1 A contract, and thus the obligation to provide services, comes about through a written order or registration from

the customer (in particular, the order form) and the subsequent order/registration confirmation by atms or the activation of the service by atms (in accordance with 1.3). The service provider must notify atms of the content, as well as changes to the content, of the services to be offered via the SMS premium rate/service numbers and/or SMS short dials that are the subject of this contract at least two weeks before the activation or amendment of the service. atms may object to the planned activation or amendment of the service no later than one week before the planned activation or amendment of the service.

4.2 The service provider is aware that the services of atms can only be provided in accordance with the provision and availability of communication channels and relay systems by the participant network operator and/or the communication channels and relay systems provided by third parties. As a result of the technical circumstances of other telecommunications networks, communications channels and the availability of performance features may, however, be restricted. To the extent that it is necessary to carry out work required for operations or to avoid network disruption, atms is entitled to partially restrict the service. atms will communicate foreseeable disruptions to the service provider at least six hours before the suspension commences.

4.3 The service provider must immediately notify faults to the responsible fault centre of atms (by phoning +43/810400500). At the request of atms, access to the premises of the service provider in order to rectify the fault is to be facilitated at all times. atms or its vicarious agents will rectify the fault within the framework of their technical and operational resources without culpable delay.

4.4 If atms is requested to remove a fault and the cause of the fault is attributable to the service provider, services performed by atms and costs accrued by atms are to be paid to it by the service provider.

### 5. Charges, payment terms and contractual amendments

5.1 The level of charges is determined by the offer underlying the contract or the pricing plan of atms valid at the time of performing the service. The stated charges are in EUR and, unless otherwise stated, exclusive of sales tax. atms is entitled to amend the charges/contract. atms will inform the service provider of the essential content of the non-solely advantageous amendment at least one month before the change becomes effective. Such notice is to be given in a suitable form (e.g. printed on invoices). At the same time, the service provider's attention will be drawn to the time when the change becomes effective and to the fact that it is entitled to terminate the contract free of charge until this time.

5.2 A distinction is made between fixed charges (monthly costs), SMS-dependent charges and other charges (e.g. costs for setting up telephone number, changing parameters). At the beginning of a calendar month, atms will provide the service provider with an invoice to charge for the fixed charges for the previous month and SMS-dependent charges for the previous month, in each case set out in itemised form. All other charges, in particular set-up costs and connection charges, will be invoiced separately to the service provider by atms following provision of the service. The interval between periodic invoicing shall not exceed three months. If the records of the service provider and atms conflict, the records of atms shall prevail.

5.3 All invoice amounts are due and payable free from deductions and charges within ten days of receipt of the invoice. The time when the account of atms stated in the invoice is credited shall determine whether payment has been made promptly. In the event of late payment, the service provider must pay default interest of 2% for each month commenced when payment is overdue, as well as all costs, expenses and cash outlays incurred by atms to expediently pursue claims. atms expressly reserves the right to bring claims for further loss. atms reserves the right to send invoices to the service provider in electronic form (e-mail) using a digital signature. If atms invokes this right, it will give notice to the service provider sufficiently in advance. As soon as this right to send electronic invoices is invoked by atms, invoices will no longer be sent in the post. At all times, atms is entitled (after providing sufficient advance notice) to revert to sending invoices in the post and to cease sending invoices electronically.

5.4 Objections to invoiced amounts receivable are to be raised by the service provider in writing within one month of the invoice date, otherwise the amount receivable will be deemed to be accepted. If, following verification by atms, the objections of the service provider prove to be unjustified in the opinion of atms, the service provider can initiate a dispute resolution process with Rundfunk und Telekom Regulierungs-GmbH in accordance with § 122 and § 71 Section 2 TKG (in the applicable version) within

one month of receipt of atms' response. If Rundfunk und Telekom Regulierungs-GmbH is invoked, from the time when it is invoked until resolution of the dispute only the due date of the disputed charges in connection with the invoiced telecommunications services will be deferred. Irrespective of this, however, an amount corresponding to the average of the previous three invoice amounts for the provision of telecommunications services can be made immediately due and payable; excess amounts levied will be reimbursed together with statutory interest from the day on which the money is collected.

5.5 If an error is discovered in an invoice that could have had a detrimental effect on the service provider and the correct charge for the telecommunications services provided cannot be determined, the service provider must levy a charge for this that corresponds to the average of the invoice amounts for telecommunications services provided over the previous three months or, if the contractual relationship has not existed for three months, an amount that corresponds to the last invoice amount.

5.6 The service provider will assist atms in every event of discrepancies, conflicts and such like in connection with invoicing and it undertakes to keep all records necessary for verification and processing and to provide these to atms without delay upon request.

5.7 Payments to the service provider are made on the 15th day of the month following the month in which payment is received by atms. The parties agree that atms is not obliged to make a payment to the service provider to the extent that the payment to be made by atms is not covered by its receipt of the corresponding charge from the respective mobile network operator.

5.8 If atms provides equipment to the service provider, this remains the property of atms until payment of the purchase price is made in full.

5.9 atms can, in its sole discretion, request payment of an appropriate advance payment or deposit. If this is not made by the service provider, atms is permitted to restrict or suspend services (Item 3).

5.10 It is noted that the sending of SMS to foreign networks and third-party networks is governed by agreements between the network operators invoiced, in accordance with which the reciprocal delivery of SMS between network operators is currently free of charge. A "third-party" network means any network to or from which an SMS is to be sent via traffic routing over the network of another mobile phone operator. If the mentioned agreements are terminated and the network operators levy fees for reciprocal traffic routing of SMS, the service provider is obliged to compensate atms for the additional charges resulting from the traffic routing of SMS to or via such networks. The service provider shall hold atms free and harmless from all third-party claims for the payment of such additional fees. atms makes no warranty (within the meaning of Item 1.1) and is not liable for the delivery of SMS to a third-party network or foreign network, or from a third-party network or foreign network (excluding deliberate acts and personal injury, irrespective of the degree of blame).

## 6. Term of the contract and termination

6.1 Unless otherwise agreed, the contract is entered into for an indefinite period. It can be terminated by either party by giving three months' written notice (by registered letter) to the quarter end. Porting to a third-party network operator is only permitted when all open outstanding amounts between atms and the service provider have been settled (by the service provider or a third party). For the avoidance of doubt it is noted that the related requirement for the aforementioned porting restriction is late payment by the service provider or misuse of telephone numbers or services and an existing active block after threatening to suspend services in accordance with § 70 TKG 2003. The contract may be extraordinarily terminated with immediate effect if there is a compelling reason for doing so. From atms' perspective, the situations set out in Item 3 in particular constitute a compelling reason. In the event of the justified extraordinary termination of the contract by atms, atms is entitled to physically and/or logically cut off the service provider from the atms network at the cost of the service provider and without providing advance warning. In this situation, the service provider shall have no claims whatsoever and, in particular, no claims for damages. When the contract ends for any reason whatsoever, the service provider must immediately return leased equipment, accessories and other equipment belonging to atms and – where the contract is extraordinarily terminated by atms – put atms in the position it would have been in if the contract had been duly observed or terminated.

In the event that the general economic situation (especially cost prices, IC conditions) changes to the detriment of atms in such a way that it is no longer commercially viable to offer the services at the subject of this contract (in particular, where there is a deterioration of the profit situation of atms vis-à-vis the profit situation at the time of entering into the contract), atms is entitled to terminate the contract with the service provider by giving three weeks' notice.

## 7. Warranty

7.1 The service provider is aware that the services of atms can only be provided in accordance with the provision and availability of mobile phone services and networks by the mobile phone operators and/or communications channels provided by third parties. Consequently, atms only warrants for the provision of its own equipment which is necessary for providing the contractually agreed services. To the extent that equipment is not within the control of atms, atms is only responsible within the framework of its technical and operational resources for the due provision of the contractually agreed services.

7.2 If the service provider asserts any warranty claims against atms, the service provider is limited to the warranty remedies of rectification and supplementing what is missing. All other warranty remedies are excluded.

7.3 In particular, atms makes no warranty that access to the SMSCs of the mobile phone operators is possible without interruption and free of errors at all times or that the transmission and relaying of an SMS will be undertaken within a certain timeframe.

7.4 atms assumes no warranty for sent SMS correctly reaching the recipient to the extent that an error arises when transmitting the message which is outside of the control of atms. Unforeseeable events, such as force majeure, strikes, official measures, transmission outages (for example, the internet) or other disruption that is not attributable to atms, absolve atms from its obligation to provide services and its warranty.

## 8. Liability

8.1 atms is liable for itself and its vicarious agents (excluding telecommunications network operators) only for deliberate acts and gross negligence. Liability for financial loss, loss resulting from business interruption, loss of profit, lost or altered data, indirect loss or consequential loss is excluded. Compensation for each loss-causing event payable to the aggrieved party is limited to EUR 3,500 (and subject to an aggregate maximum amount of EUR 35,000) and becomes time-barred after six months. If the total loss exceeds the upper threshold value, the compensation claims of the aggrieved parties shall be reduced proportionately. However, in no circumstances shall atms be liable for loss or other claims based on Items 3 and 4.2 (except for deliberate acts and personal injury, irrespective of the degree of blame).

8.2 Any liability on the part of atms for the content or lawfulness of forwarding SMS sent from and to the service provider is excluded. The service provider is solely responsible for the content and sending of its information and premium rate services (including advertising of the same) and will hold atms completely free and harmless in the event that atms is the subject of a claim by third parties in connection with the information or premium rate services provided. This also applies in particular to situations in which operations are permanently or temporarily suspended, interrupted or prohibited by atms on the basis of an order by the authorities or courts in connection with information and premium rate services provided by the service provider (including advertising of the same).

8.3 atms does not assume any liability for loss arising from a failure to obtain – where required – an official consent, authorisation or concession or third-party approval.

8.4 In the event of changes, restrictions or enhancements to allocated telephone number groups, SMS and/or SMS premium rate/service numbers and/or SMS short dials, the service provider shall have no claim for compensation (excluding deliberate acts and personal injury, irrespective of the degree of blame).

8.5 The service provider is responsible for payment requests of atms resulting from the usage of information services, premium rate services and services provided by the service provider using SMS and/or SMS premium rate/service numbers and/or SMS short dials by end customers (callers, users) to the extent that these payment requests cannot be recovered from the end customer (caller, user) or are not settled by a third party. The parties (atms and the service provider) thus agree that the collection risk and bad debt risk between the parties is not to be borne by atms. This applies irrespective of whether the non-recoverability of the receivable is based on its invalidity, lack of willingness to pay, inability to pay or other reasons, in particular such as fraudulent activities. Decisions of the regulatory authority, as well as official or court decisions, which release the end customer (caller, user) from an obligation to pay are to be at the service provider's expense.

8.6. atms is not liable for loss (excluding deliberate acts and personal injury, irrespective of the degree of blame) arising from an inadequate provision of services by the mobile phone operators to atms.

## 9. Non-disclosure and data protection

9.1 The parties undertake to keep confidential all of the data and, in particular, commercial terms made available to them within the context of the entry into and performance of this contract, provided that this is compatible with mandatory statutory provisions. The provisions of the TKG and the Data Protection Act 2000 relating to data protection, together with the corresponding ordi-

nances, are to be observed.

9.2 atms will determine the following personal data for charging purposes in accordance with §§ 96, 97 and 99 TKG 2003 (in its applicable version): master data in accordance with § 92 Section 3 Item 3 TKG 2003 (i.e. first name, last name, academic degree, company name, company registration number, address, e-mail address, fax and telephone number, user number, bank details, bank sort code (BLZ), bank account number) as well as traffic data in accordance with § 99 TKG 2003 (i.e. date, time, destination, participant telephone number, minutes, number of calls or SMS, price in EUR, total amounts of the routed connections). Master data will be deleted not later than the termination of the contractual relationship with the service provider, unless this data is still required by atms to settle or collect charges, to process complaints or to fulfil statutory obligations. Traffic data will be deleted at the earliest possible opportunity, but it will be stored until any deadlines have expired before which the invoice can be legally challenged or a claim for payment can be enforced. atms shall take all measures which are technically and commercially reasonable in order to protect data stored by it from unauthorised third-party access. To the extent that atms is obliged by statutory provisions to pass on data, atms will fulfil this statutory obligation. In particular, atms is entitled to disclose to Rundfunk und Telekom Regulierungs-GmbH the identity of the service provider as well as the nature of the services rendered by it. If a breach of the Telecommunications Act or other Austrian or international legal provisions is suspected to have occurred, or if required to do so by contract, atms is authorised to disclose the master data of the service provider – including to third parties.

## 10. General

10.1 The contract is governed by Austrian law. The United Nations Convention on Contracts for the International Sale of Goods is excluded. The responsible court on the 1st municipal district of Vienna has sole responsibility for all disputes arising out of or in connection with the contract, including disputes as to its validity.

10.2 atms is entitled to transfer the contract to a company which is affiliated to it.

10.3 Amendments and supplements to this contract must be made in writing. This includes any amendment or supplement intended to dispense with this requirement for the same to be made in writing. E-mail does not fulfil the requirement for the written form, with the exception of Item 4.1.

10.4 atms is entitled to amend these General Terms and Conditions of Business. The circumstance that a non-solely advantageous amendment will occur shall be notified to the service provider in a suitable manner one month before the change. Non-solely advantageous amendment to the General Terms and Conditions of Business entitle the service provider to terminate the contract free of charge from the time when the non-solely advantageous amendment is notified until the coming into effect of the revised General Terms and Conditions of Business.

10.5 The invalidity, ineffectiveness or unfeasibility of individual provisions in this contract shall not bring about the invalidity or ineffectiveness of the entire contract. In this situation, the parties are obliged to cooperate immediately in order to establish a legally effective provision which corresponds with, or most closely approximates to, the commercial intention of the ineffective provision.

10.6 If the legal situation changes in such a way that compliance with the contract is not possible without breaching applicable law, Item 3 of these General Terms and Conditions of Business shall apply. The same applies to the situation in which the regulatory general conditions change to such an extent that the telephone numbers and the respective pricing plan and the associated services conflict with statutory provisions or the guidelines of Rundfunk und Telekom Regulierungs-GmbH. A common European emergency number (112) exists.

10.7 Upon registration and/or placing of the order (in particular, the order form) by the service provider, these General Terms and Conditions of Business, price plans, service specifications and any codes of behaviour that have been agreed or adopted/notified in accordance with Item 1.4 are deemed to have been accepted. The service provider consents to being included in atms' list of reference customers. Any fees that are required to be paid in connection with this contract shall be paid by the service provider.