

## GENERAL TERMS AND CONDITIONS (EU)

### 1. General

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- 1.1 Together with the Merchant Services Terms, these General Terms constitute the Agreement between Windcave and you and apply to you if you use any Services or Goods. You also agree to be bound by additional terms which are specific to a Service or Goods you use (**Agreement**). By using our Services or Goods you agree to be bound by this Agreement from the Commencement Date.
- 1.2 This Agreement governs your relationship with us relating to the Services and Goods and will apply to the exclusion of any inconsistent terms issued by you.
- 1.3 This Agreement continues for the Term and will automatically renew for successive periods of the Term, unless either party gives the other at least 1 month's written notice to the other party to terminate.
- 1.4 Windcave is licensed by the MFSA for the provision of payment services in terms of the Financial Institutions Act (Chapter 376 of the laws of Malta) and is authorised to provide such payment services across the European Union and the European Economic Area. In providing the Gateway and Merchant Services under this Agreement, we will comply with our relevant obligations under the Financial Institutions Act (Chapter 376 of the laws of Malta), the regulations and MFSA Rules issued thereunder, other laws and regulations transposing the PSD2 Directive, as this may be amended, replaced or supplemented from time to time, relevant directives, guidelines, instructions or other relevant requirements emanating from or issued by the MFSA and/or the Central Bank of Malta and other Regulatory Requirements.
- 1.5 If you are a Microenterprise, you agree that Paragraphs 38(1), 40(3), 48, 50, 52, 53, 56, 64 and 65 of the Central Bank of Malta Directive No. 1 on 'The Provision and Use of Payment Services' shall not apply in whole to this Agreement and your relationship with us.
- 1.6 Prior to the Merchant being onboarded, Windcave will carry out certain checks including in relation to Anti-Money Laundering and Know Your Customer checks, all in accordance with Windcave policies and Applicable Laws. Your acceptance as a Merchant is subject to the satisfactory outcome of these checks.
- 1.7 The parties acknowledge that they have required this Agreement and all related documentation to be drafted in English and agree that all further communication shall be made in the English language.

### 2. Fees/Payment

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- 2.1 You must pay for the Goods or Services we provide to you, and you agree to pay us the Fees without any set-off, deduction or withholding of any kind on the due date, save as may be required by law. All Fees, costs and charges payable pursuant to this Agreement will be charged plus taxes (if applicable). You are also liable to pay for the Fees in respect of Services you have actually used even if the Agreement has expired or if we have provided Services to you beyond your requested date of termination. In the event that you fail to pay the Fees to us on or before the due date then Default Interest will be payable by you on such overdue amounts for the Services or Goods, calculation of which will start from the date which is five days after the relevant due date.
- 2.2 Unless we agree separately in writing with you that you may pay your Fees by credit card or direct credit, you will provide to Windcave a direct debit authority in a form required by Windcave for the payment of all Fees and to debit, credit and settle amounts from your Nominated Bank Account. This direct debit authority may only be terminated or revoked if this Agreement is terminated in accordance with its terms and all amounts actually or contingently owing to Windcave by you have been satisfied. You authorise us to debit and credit (as applicable) your credit

card or Nominated Bank Account for the purposes of the Agreement.

- 2.3 You must maintain a Nominated Bank Account for the term of the Agreement. This account must be a valid European Union based, € (euro) transactional bank account. If at any time you change your Nominated Bank Account, you must immediately provide us with all necessary details of that account and a new direct debit authority.
- 2.4 Windcave may adjust the Fees during the Term by providing you with at least 30 days' written notice
- 2.5 You are responsible for determining, collecting, withholding, reporting and/or remitting any and all Taxes, and VAT (other than Windcave's income tax) arising out of or in connection with the Services and Goods.
- 2.6 In addition to the Fees, you are responsible for, and indemnify Windcave in relation to, any penalties or fines levied by any Card Issuer, Payment Scheme, payment network, financial institution, regulator or other financial intermediary arising from your use of the Services and all costs and expenses (including collection costs and legal costs on a solicitor-client basis) that Windcave incurs in attempting to recover or recovering any overdue or unpaid amounts you owe to Windcave.
- 2.7 If you do not pay the Fees in accordance with this Agreement, Windcave may suspend the Services and/or terminate this Agreement in line with clause 11. In such event, you agree that Windcave will have no liability for any consequences of such suspension or termination.

### 3. Merchant General Responsibilities

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- 3.1 You confirm that you have read and understood this Agreement and have had the opportunity to seek legal advice in relation to this Agreement.
- 3.2 You confirm that all information provided by you to Windcave is accurate and complete and does not infringe any third party intellectual property rights. You will promptly notify us in writing if such information changes or is no longer accurate including if you have had a change in directors, trustees, authorised signatories, financial condition, business activities, ownership, control or anything else which is relevant. You must inform Windcave immediately if your business is experiencing difficulties paying any of its debts when they are due or honouring goods or services commitments to your customers.
- 3.3 On request by Windcave, you will provide us with sufficient information and documents in English to enable us to comply with our obligations under this Agreement, Applicable Laws, including ongoing AML/CFT monitoring obligations, and assess risk associated with your business. Your failure to provide this information may result in the suspension or termination of the Services to you.
- 3.4 You will obtain and maintain all licences, permissions and consents which may be required for the Services before the date on which the Services are due to start, including in respect of (1) any software owned by, or licensed to, you and which Windcave needs to access or use in performing the Services; and (2) any personal information which is provided by you to us, and which relates to you, your personnel or customers, so that this personal information can be used by Windcave in accordance with our Privacy Policy.
- 3.5 You will comply, and procure that your Authorised Users comply, with this Agreement, the Documentation, our restrictions and instructions, all Applicable Laws, Security Standards and Payment Scheme Regulations in your use of the Services and Goods. You will promptly notify Windcave if you become aware of any event or circumstance that has caused your Authorised Users to fail to comply with any of these requirements.
- 3.6 You will co-operate with Windcave in all matters relating to the Services and Goods within the timeframe specified by Windcave.

- 3.7 You will ensure that all Authorised Users comply with all relevant provisions of this Agreement and be responsible for the acts and omissions of any Authorised User, as if they were the acts and omissions of the Merchant.
- 3.8 You are solely responsible for any and all activity undertaken by you and your Authorised Users on the Windcave Gateway / Payline Portal and shall ensure the security of any login credentials. Windcave is not responsible for any loss or damage caused by your failure to maintain the security of the Windcave Gateway / Payline Portal.
- 3.9 The Services and Goods may only be used by you in accordance with this Agreement and may not be used by, or on behalf of, any third party (including any affiliates or related entity of yours), without our prior written consent. If Windcave grants such consent, the Merchant must ensure that the relevant third party complies with the Agreement (so far as those provisions relate to the Merchant) as if the relevant third party were a party to this Agreement. The Merchant will be liable to Windcave for all acts or omissions of any relevant third party.
- 3.10 You will keep all Windcave materials, including any Goods we provide to you, in safe custody at the Merchant's own risk and not use them other than in accordance with this Agreement, including the obligations set out in clause 15.
- 3.11 You are responsible for all equipment, charges and costs associated with connecting to the Windcave Host to operate the Windcave Gateway. Windcave will provide the Merchant with reasonable technical information and Software necessary to enable Merchant to connect to the Windcave Host.
- 3.12 You will, except to the extent caused by an act or omission of Windcave, be responsible for managing the use of all login details made available to you and your Authorised Users and be responsible for the use of the Windcave Gateway via any logins issued to you or your Authorised Users.
- 3.13 Each day you must review your: (a) Payline Portal to ensure no Transaction errors have occurred and (b) Nominated Bank Account to ensure deposits and settlements have occurred without error. If you are not a Microenterprise and an error is discovered by you, you must notify Windcave in writing within 3 Business Days of the date such error occurs and provide Windcave with all relevant details of the error. If you are a Microenterprise, you must notify Windcave of any error discovered by you in respect of the execution of a Transaction as soon as possible upon become aware that such error occurs and no later than 1 month after the debit date, providing Windcave with all relevant details of the error.
- 3.14 If you cease to use Goods (for example where Goods are obsolete or no longer operate or are replaced under warranty) or if this Agreement is terminated, you must return these Goods to Windcave at your cost within 30 calendar days.
- 3.15 You ensure that no act or omission by you and/or the persons related to you and/or your Authorised Users nor use (directly or indirectly) of any Goods and (or) Services under this Agreement is in a manner that is in breach of Sanctions. We may refuse to provide Goods and (or) Services or impose service limitations (including the execution of Transactions and freeze of funds) and we will not be liable for the related losses incurred by you if: (a) you are subject to Sanctions, (b) you are related to a subject to Sanctions, (c) your Transactions are related with a subject to Sanctions, or (d) we are executing any requirements or restrictions established by our banks or competent authorities or bodies related to the implementation of Sanctions.

#### 4. **Terms of Use**

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- 4.1 You acknowledge that you have not relied on and will have no remedies in respect of any statements or representations on the part of Windcave as to performance or functionality, of the Service or Goods, the Windcave Host, Windcave Gateway, Software or the Payline Portal whether in writing, verbal or otherwise, except as expressly recorded in this Agreement.
- 4.2 If you use a capture method for Card processing using a system which is not hosted by Windcave, you agree to display the Windcave Logo in a readily visible position on the user interface of the Merchant's system where the Cardholder data is captured. The Merchant will not alter, obscure, or use the Windcave Logo

for any other purpose without the prior written consent of Windcave.

- 4.3 If you do not comply with any of the Security Standards, you must not capture or store any Card Number or the Card's expiry date locally on your or a third party's system.
- 4.4 You must not, and must not permit any other person to, reverse assemble or decompile, copy, reproduce, translate, adapt, vary, repair or modify all or any part of the Windcave Gateway, the Goods, the Software or the Documentation by any means or in any form without Windcave's prior written consent.
- 4.5 You may not use the Windcave Gateway, the Goods, the Software or the Documentation for any purpose other than the Permitted Use or use the Software independently of the other components of the Windcave Gateway unless Windcave has given prior written consent to do so.
- 4.6 You will be responsible for, and bear all costs associated with, the installation, operation, maintenance and support of the Goods.

#### 5. **Windcave's General Responsibilities**

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- 5.1 Windcave will comply with all relevant Applicable Laws (including, but not limited to, the Financial Institutions Act (Chapter 376 of the laws of Malta), the regulations and MFSA Rules issued thereunder, other laws and regulations transposing the PSD2 Directive, as this may be amended, replaced or supplemented from time to time, relevant directives, guidelines, instructions or other relevant requirements emanating from or issued by the MFSA and/or the Central Bank of Malta), other Regulatory Requirements, Security Standards, and the Privacy Policy. Windcave will co-operate with the Merchant (and the Merchant's service providers) in connection with providing the Windcave Gateway.
- 5.2 Windcave will not decrypt and transmit Tokenized Data to the Merchant or any third party.

#### 6. **Windcave Warranties**

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- 6.1 Nothing in this Agreement is intended to have the effect of restricting or modifying your rights or our obligations that cannot be restricted or modified by law.
- 6.2 Subject to clause 6.6, Windcave warrants that the Goods to be delivered under this Agreement will be free from defects in workmanship (labour and parts included, but transport excluded) during a twelve calendar month warranty period commencing on the delivery date (**Original Warranty Period**). The warranty period on exchanged or repaired Goods shall expire at the conclusion of the Original Warranty Period.
- 6.3 Defective Goods, under warranty, shall be replaced or repaired, free of charge, at Windcave's sole discretion, at Windcave or a subcontractor's premises. The Merchant must pay the costs of transport of the Goods (including insurance) to Windcave.
- 6.4 Windcave may repair the Goods with spare parts or new parts. The new, defective and/or repaired parts, will remain the property of Windcave if the Goods are rented.
- 6.5 Where Goods are replaced pursuant to the warranty in clause 6.2, the Merchant must return the original Goods to be replaced to Windcave within 30 calendar days of replacement Goods being shipped to the Merchant. The Merchant shall pay the shipping fees to return the original Goods to Windcave.
- 6.6 Windcave will have no liability under the warranty in clause 6.2 in respect of:
- defects, breakdowns, or malfunctions due to failure to properly follow the Documentation including in relation to the installation process, instructions for use and maintenance; or
  - external causes (including, but not limited to, shock, lightning fire, vandalism, malicious action, contacts with various liquids or vermin or water damage of any nature, and inappropriate electric voltage); or

- (c) modifications to the Goods made without the written approval of Windcave; or
- (d) maintenance of the Goods by persons who are not Authorised Persons; or
- (e) damage due to insufficient or bad packaging of the Goods when returned to Windcave; or
- (f) wear and tear from normal use of the Goods and accessories; or
- (g) communication problems related to an unsuitable environment, including problems accessing the Internet, transmission faults, local network faults, and modification of the parameters of the relevant cellular network after sale of the Goods; or
- (h) goods returned to Windcave without Windcave's prior consent or that Windcave has not had an opportunity to inspect, investigate or electronically troubleshoot; or
- (i) defects, breakdowns, or malfunctions due to obstructing material being placed on or into the Goods such as paper, plastic, and metal objects or the use of non-compatible products or accessories.

**6.7** Windcave warrants that Windcave has the right and authority to grant to the Merchant the licence set out at clause 14.1, in accordance with the terms of this Agreement.

**6.8** To the fullest extent permitted by Law, except as expressly provided at clause 6.2 and 6.6, Windcave excludes all warranties, conditions, terms, representations or undertakings, which may be sought to be implied. Windcave does not warrant that:

- (a) the Services and the Goods will meet the Merchant's requirements; or
- (b) the Services and the Goods will be uninterrupted or error free.

## **7. Intellectual Property**

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- 7.1** Windcave (or its licensors or suppliers) exclusively own all Intellectual Property rights in the Windcave Gateway, the Services, the Goods, the Software, the Documentation, any Developed Works and the Windcave Logo (collectively the **Windcave IP**).
- 7.2** You acknowledge and warrant that you will not assert any ownership rights or claim any interest in any of the Windcave IP and you will immediately notify Windcave if you become aware of any third party infringing any rights in the Windcave IP.
- 7.3** You must display the advertising and/or promotional materials which Windcave directs you to display, and you must do so in accordance with the written directions of Windcave.
- 7.4** If you wish to use promotional materials and/or advertisements which show, use or include a Mark, for any purpose not specifically authorised by this Agreement, you must first obtain Windcave's written approval to use that advertising and/or material.
- 7.5** Windcave will be free to use any know-how utilised or acquired by it in accordance with the performance of its obligations under the Agreement for its own benefit or the benefit of third parties provided that such know-how does not compromise the Merchant's intellectual property rights or make use of the Merchant's Confidential Information.

## **8. Indemnity**

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- 8.1** You indemnify Windcave against all losses, costs (including legal costs calculated on a full indemnity basis and all other reasonable professional costs and expenses), damages, expenses, penalties or liabilities suffered or incurred by Windcave as a result of:
- (a) breach by you of this Agreement;

- (b) any incorrect or misleading information supplied to Windcave by you, or any relevant information withheld from Windcave by you;
- (c) any other act of, or omission by, you or any of your Authorised Persons, employees, officers or Agents whatsoever (including, the use of a Terminal and/or the use of any Goods and/or Windcave Logo or Mark);
- (d) in the context of the Gateway Services, you have not notified us of an unauthorised or incorrectly executed Transaction within 1 month after the debit date;
- (e) in the context of the Gateway Services:
  - (i) where Transactions are correctly executed; and
  - (ii) if you are a Microenterprise and in the case of unauthorised Transactions, for up to a maximum of EUR 50 resulting from the use of a lost or stolen Device or from the misappropriation of a Device, unless you have acted fraudulently or failed to use a Device in accordance with this Agreement and any applicable Documentation and failed to take all reasonable steps to keep your personalised security credentials safe, in which case the maximum of EUR 50 shall not apply;
- (f) any action taken by Windcave or, a Payment Scheme because of any act of, or omission by, you or any of your employees, officers or Agents; or
- (g) any dispute between any or all of the Cardholders, Windcave and you.

## **9. Liability**

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- 9.1** Subject to clauses 9.2 to 9.5, the Merchant's remedy for any breach by Windcave of Windcave's obligations under the Agreement is (at Windcave's option) either:
- (a) the supply or re-supply of the Services or Goods; or
  - (b) the refund or waiver of Fees for the relevant part of the Services or the Goods which is related to the breach.
- 9.2** Subject to clause 9.3, to the maximum extent permitted by law, Windcave's total liability to the Merchant or any other party in connection with the Agreement or any other services provided by Windcave (whether in contract, tort, including negligence, or otherwise) for any event or series of connected events will not exceed, in the aggregate, an amount equal to the lesser of:
- (a) the fees paid by you to Windcave during the last three (3) months, exclusive of fees and variable costs incurred by Windcave from a third party (for example, in relation to the Merchant Services this will include interchange costs and assessments); or
  - (b) forty thousand euros (EUR40,000).
- 9.3** For the avoidance of doubt, nothing in this clause 9 shall exclude or limit liability of either party in respect of death or personal injury resulting from its negligence, or in respect of fraud or wilful default or any matter in respect of which it would be unlawful to exclude or restrict liability.
- 9.4** Except where Windcave is held by a court or tribunal which has proper jurisdiction to make such a determination, Windcave will not be liable to the Merchant whether in contract, tort (including negligence) or otherwise in respect of any:
- (a) loss of data, lost profits, loss of revenue, loss of goodwill, loss of business, loss of opportunity, loss of reputation, loss of expected savings or for any indirect, consequential or special loss, damage, cost or expense suffered or incurred by the Merchant arising out of, or in connection with, this Agreement whether or not that loss was, or ought to have been, contemplated;

- (b) loss, damage, cost or expense suffered or incurred by the Merchant, to the extent this results from any act or omission by the Merchant; or
- (c) Force Majeure Event.

**9.5** In addition to any other limitation of liability in this Agreement, and to the maximum extent permitted by law, Windcave has no liability to you for any loss, cost, damage, expense or liability suffered or incurred by you, whether directly or indirectly because of any failure by Windcave to perform any of its obligations under this Agreement where, in the reasonable opinion of Windcave, that failure is wholly or partly a result of:

- (a) a failure of or a mistake, error or omission made by the Payment System;
- (b) any act or omission of you, a Cardholder, our processing bank, your Acquirer, Your Bank, or Payment Scheme; or
- (c) any other event or circumstance outside Windcave's direct control.

## **10. Data protection**

### **Processing of Personal Data**

**10.1 Personal Data:** The Merchant acknowledges and agrees that any Merchant Personal Data which is provided to Windcave by or on behalf of the Merchant may be:

- (a) used by Windcave for the purpose of providing the Services to the Merchant;
- (b) disclosed by Windcave to comply with Applicable Law or Payment Scheme Regulations;
- (c) disclosed by Windcave to third party service providers in accordance with this section 10; and
- (d) disclosed by Windcave to its related companies to enable Windcave to provide the Services to the Merchant. The Merchant acknowledges that Windcave's related companies may be located outside the EEA and United Kingdom and that such jurisdictions may not have data protection laws as stringent as those in place within the EEA. The Merchant warrants that it has informed the relevant data subjects (and, as necessary, obtained their consent) in accordance with Data Protection Law for Windcave to Process their personal data for the purposes and in the manner described in this Agreement.

**10.2** The Merchant warrants and represents that:

- (a) The Merchant will comply at all times with the Data Protection Law and will not do or cause anything to be done or omit to do anything that would, or is likely to, place Windcave in breach of the Data Protection Law; and
- (b) in respect of the Merchant Personal Data, the Merchant has, or (as applicable) the Controller of the Merchant Personal Data has, obtained all necessary consents or properly assessed and determined that there is another lawful basis, in accordance with Data Protection Laws, to process the Merchant Personal Data, including by Windcave, as and for the purposes envisaged under this Agreement and provided all information necessary to the Data Subjects of the Merchant Personal Data for the purpose described under this Agreement, including sharing such data with the Merchant and Windcave.

**10.3** The parties acknowledge that:

- (a) Windcave is a Processor acting on the Merchant's behalf in respect of the Merchant Personal Data;
- (b) Windcave and the Merchant are each independent Controllers in respect of Personal Data of the other party's officers, representatives, employees, agents, contractors and other personnel that Windcave and/or the Merchant come into contact with during the term of this Agreement (**Non-Merchant Personal Data**); and

- (c) where Windcave processes Personal Data for its own regulatory compliance purposes, including disclosing Personal Data to comply with Applicable Law (including Payment Scheme Regulations), Windcave does so as an independent Controller.

### **Windcave acting as a Processor**

**10.4** Annex A, Part 1 sets out the data Processing particulars in respect of the Merchant Personal Data and applies where Windcave is a Processor acting on the Merchant's behalf. Annex A, Part 1 contains the instructions from the Merchant to Windcave with respect to its processing of Merchant Personal Data in terms of this section.

**10.5** Taking into account the state of technical development and the nature of Processing, Windcave shall implement appropriate technical and organisational measures to protect the Merchant Personal Data against accidental or unlawful destruction, loss, alteration and unauthorised disclosure or access. Windcave shall ensure that these measures meet the standard required by Article 32 of the GDPR.

**10.6** As at the date of this Agreement, the Merchant gives a general written authorisation to Windcave to engage any agent, sub-contractor or other third party (**Sub-processor**) to process the Merchant Personal Data, subject to: (i) Windcave informing the Merchant of any intended changes concerning the addition or replacement of any Sub-processors and allowing the Merchant to object to such changes, and (ii) Windcave putting in place a written agreement with such Sub-processor containing clauses required by the Data Protection Laws and Windcave remaining responsible for the acts or omissions of its Sub-processors. If the Merchant objects to any Sub-processor, then Windcave will not use that Sub-processor. The Sub-processors listed in Annex A shall be deemed to be authorised Sub-processors as at the date of this Agreement.

**10.7** As at the date of this Agreement, the Merchant gives a general written authorisation to Windcave to transfer Personal Data to Safe Countries.

**10.8** The Merchant hereby provides Windcave with its general authorisation to transfer Personal Data to a third party located outside of the Safe Countries (a **Restricted Transfer**), subject to Windcave:

- (a) informing the Merchant of any Restricted Transfer and allowing the Merchant to object to the Restricted Transfer; and
- (b) taking steps to ensure that the Restricted Transfer at all times complies with the Data Protection Law.

**10.9** If the Merchant objects to any Restricted Transfer, then Windcave will have the right to terminate this Agreement on written notice to the Merchant.

**10.10** The Restricted Transfers listed in Annex A shall be deemed authorised Restricted Transfers as at the date of this Agreement.

**10.11** As a Processor of the Merchant Personal Data, Windcave shall:

- (a) only process the Merchant Personal Data in accordance with: (i) its obligations under this Agreement; and (ii) on the Merchant's documented instructions as set out in Annex A, Part 1, unless required to do so by an EU or Member State law to which Windcave is subject (and in such case, Windcave shall inform the Merchant of that legal requirement before Processing unless that law prohibits such information on important grounds of public interest);

- (b) ensure that access to the Merchant Personal Data is limited to Windcave's personnel and authorised Sub-Processors who need access to it to satisfy its obligations under this Agreement and who are subject to an enforceable obligation of confidence with regards to the Merchant Personal Data;

- (c) taking into account the nature of the Processing, assist the Merchant (by appropriate technical and organisational measures), insofar as this is possible, in relation to responding to, and complying with, any request from any Data Subject of the Merchant Personal Data to exercise their rights under the Data Protection Laws, including providing to the Merchant, at the Merchant's cost, such assistance as is contemplated by Article 28(3)(e) of the GDPR;
- (d) notify the Merchant in writing without undue delay if any of the Merchant Personal Data has been subject to any (i) accidental or unlawful destruction; (ii) accidental loss, damage, alteration, unauthorised disclosure or access; and/or (iii) any other unlawful Processing (**Data Security Breach**), and such notices shall include full and complete details relating to such breach (insofar as they are known to Windcave);
- (e) provide such assistance (at the Merchant's cost) as the Merchant may reasonably require in relation to the Merchant's obligations pursuant to Articles 32 to 36 (inclusive) of the GDPR;
- (f) on termination of this Agreement or otherwise at the end of the services, at the Merchant's cost and option, either return all of the Merchant Personal Data (and copies of it) or securely dispose of the Merchant Personal Data except to the extent that any Applicable Law or regulation requires Windcave to store the Merchant Personal Data in which case Windcave will notify the Merchant of this requirement and be entitled to retain that data for as long as needed); and
- (g) to the extent that it believes that any instruction received by it from the Merchant is likely to infringe the Data Protection Laws, promptly inform the Merchant and Windcave shall be entitled to withhold provision of the Services until the Merchant amends its instruction so as not to be infringing.

**10.12** At the Merchant's cost, Windcave shall allow for a reasonable audit (no more than once per annum) by the Merchant and any auditors appointed by it in order for Windcave to verify its compliance with clauses 10.4 – 10.11, subject to Windcave's reasonable security and confidentiality requirements. Windcave shall cooperate and assist the Merchant (and any auditors appointed) with each such audit.

**10.13** The Merchant acknowledges and agrees that, when Windcave acts as a 'Processor', it is reliant on the Merchant for direction as to the extent to which Windcave is entitled to use and process the Merchant Personal Data. Consequently, Windcave shall not be liable for any loss or damage or for any claim (including but not limited to claims or complaints brought by a data subject or a regulator) arising from any action or omission by Windcave, to the extent that such action or omission resulted from the Merchant's instructions or it is based on inaccurate, incorrect or incomplete data, or information provided by the Merchant.

#### Each party acting as an independent Controller

**10.14** Annex A, Part 2 sets out the data Processing particulars in respect of (1) the Non-Merchant Personal Data; and (2) the Personal Data that the parties process for their own regulatory compliance purposes as set out in paragraph 1.3(c) above, together defined as the "Shared Personal Data".

**10.15** Each party shall:

- (a) remain responsible for their respective compliance obligations under Data Protection Law in relation to the Shared Personal Data;
- (b) implement and maintain adequate and appropriate technical and organisational measures as required by Article 32 of the GDPR including to prevent and where necessary mitigate the occurrence and management of a Data Security Breach affecting the Shared Personal Data;
- (c) be responsible for complying with requirements as regards the privacy notices to Data Subjects pertaining

to the Shared Personal Data as provided in articles 13 and 14 of the GDPR;

- (d) be responsible for dealing with and responding to any request it receives, and addressed to it, from any Data Subject to exercise their rights under the Data Protection Laws in relation to the Shared Personal Data, unless otherwise agreed between the parties; and
- (e) be responsible for dealing with competent personal data protection authorities in relation to investigations or other procedures pertaining to its processing of Shared Personal Data.

**10.16** Each party (the "Disclosing Party") agrees that if it provides Shared Personal Data to the other party (the "Receiving Party"), it shall ensure that:

- (a) the Shared Personal Data is accurate and up to date at the time of transfer to the Receiving Party; and
- (b) the transfer of the Shared Personal Data is carried out in a secure manner having regard to the requirements of Article 32 of the GDPR; and
- (c) where applicable, as agreed in advance with the Receiving Party.

## 11. Termination and suspension

**11.1** Either party may terminate this Agreement in whole or terminate the provision of Merchant Services (if applicable) at any time on not less than 1 month's prior written notice to the other. In any case, where the Merchant terminates, unless clause 11.4 applies, the Merchant will be liable for the Fees for the remainder of the Term (as the case may be) which shall be payable immediately on termination.

**11.2** If Windcave determines, in its sole discretion, that: (a) you are ineligible for the Services because of significant fraud or credit risk or any Insolvency Event by you or persons who control the Merchant; or (b) you use the Services in a prohibited manner or otherwise do not comply with any of the provisions of this Agreement or Windcave's AML/CFT policies and procedures or applicable Sanctions; or (c) you are non-compliant with the Security Standards; or (d) you do not comply with any Applicable Law, Payment Scheme or (e) a Card Issuer, Payment Scheme or applicable regulator requires us to do so; or (f) there is a change in your ownership or control or the nature/type of your business or (g) you commit a material breach of any of the terms of this Agreement which, in the reasonable opinion of Windcave, cannot be remedied, or has not been remedied after a reasonable opportunity to remedy has been given to you, Windcave may: (i) suspend the provision of Services, and if we are providing Merchant Services to you we may hold your funds to cover outstanding costs, Chargebacks and any other risks determined by Windcave (acting reasonably); and/or (ii) terminate this Agreement in whole or in part with immediate effect by written notice to you;

**11.3** If this Agreement is terminated by Windcave pursuant to clause 11.2 prior to the expiry of the Term, the Merchant must pay the unpaid balance of the Fees due under this Agreement and the cost of Windcave's reasonable expenses in terminating this Agreement.

**11.4** The Merchant may terminate following adjustment of the Fees pursuant to clause [2.4](#) or where Windcave has amended the Agreement pursuant to clause [21.2](#) and such amendment has a material adverse effect on your use of our Services, by you giving 30 days' written notice to Windcave. If the Merchant is a Microenterprise, however, such Merchant may terminate following any adjustment of the Fees pursuant to clause 2.4 or where Windcave has amended the Agreement in any way pursuant to clause 21.2 at any time until the date when the adjustment of the Fees or the amendment of the Agreement would have applied. In these circumstances, the Merchant is only liable for the Fees up to the date of termination and will not be liable for the Fees payable to the end of the Term or any damages under clause 39.1.

**11.5** Termination of this Agreement will not affect the rights or obligations of the parties which have accrued prior to or accrue on termination or which by their nature are intended to survive termination (including clauses [2](#), [7.2](#), [7](#), [8](#), [9](#), this 11.5, [12](#), [21](#), [22](#)

and 25, together with those clauses which are incidental to, and required in order to give effect to, those clauses). Merchant Services obligations under clauses 31, 32, 37, 39 and Windcave's rights under clause 35 survive the termination of this Agreement.

- 11.6 Termination of the Gateway Services will also terminate the Merchant Services (which may incur a termination fee pursuant to clause 39 of the Merchant Terms).
- 11.7 On the termination of this Agreement, you must immediately: (a) return all Goods to Windcave; (b) stop displaying any Windcave IP; (c) immediately pay Windcave any outstanding fees, charges, costs, liabilities or other amounts payable by you under this Agreement including the MSF; and (d) comply with any other reasonable directions from Windcave.
- 11.8 Notwithstanding clause 11.1, Windcave may terminate the provision of PAN Entry transactions and mail or telephone order transactions (MOTO) with immediate effect upon notice and without explanation.
- 11.9 The ending of this Agreement will not affect any of the rights, remedies, obligations or liabilities of the parties that have accrued up to the date on which it ends, including the right to claim damages for any breach of the Agreement that existed at or before the date on which it ends.
- 11.10 Any provision of the Agreement that expressly or by implication is intended to come into force or continue in force on or after the end of the Agreement will remain in full force and effect.

## 12. Confidentiality

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- 12.1 Each party must keep confidential any Confidential Information of the other party except as, and then only to the extent:
- required by Applicable Law, Payment Scheme Regulations or Regulatory Requirements;
  - that the information is already or becomes public knowledge, other than because of a breach of this Agreement;
  - that the information is received from a third party who is not under an obligation of confidentiality in relation to the information;
  - that the information is developed independently without access to, or use or knowledge of the Confidential Information;
  - authorised in writing by the other party; or
  - reasonably required by this Agreement.
- 12.2 Without limiting clause 12.1, the Merchant will treat information about Windcave IP as the Confidential Information of Windcave.
- 12.3 Each party acknowledges and agrees that damages alone would not be an adequate remedy for any breach of this clause. Each party will therefore be entitled to the remedies of injunctions, specific performance or other equitable relief for any threatened or actual breach of this clause.
- 12.4 The obligations in this clause survive termination of this Agreement.

## 13. Force Majeure

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- 13.1 The Merchant acknowledges that Windcave relies on third-party providers in the delivery of the Services. The Merchant agrees that Windcave shall not be liable for, and will hold Windcave harmless for any losses, damages, or business interruptions sustained because of interruptions caused by its wireless data network providers or any other third-party provider.
- 13.2 Neither party will be liable for any delays in processing or other non-performance caused by a Force Majeure Event.

## 14. Licence

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- 14.1 Windcave grants to the Merchant a non-exclusive, non-transferable licence to use the Windcave Gateway, the Goods, the Software and the Documentation for the term of this Agreement solely for the Permitted Use. Except to the extent you are specifically authorised under this Agreement, the Merchant must not sub-license, transfer, assign, lease, licence or sell any of the Windcave Gateway, the Goods, the Software or the Documentation or the right to use the Windcave Gateway, the Goods, the Software or the Documentation.
- 14.2 Any unauthorised use or dealings with the Windcave Gateway, the Goods, the Software or the Documentation without the prior written consent of Windcave will be a material breach of this Agreement.

## 15. Rental/Loan of Goods

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- 15.1 Where the Merchant rents or is loaned Goods from Windcave, the rented or loaned Goods are at the Merchant's risk and the following applies:
- legal and beneficial ownership of, and title to, the Goods remains at all times with Windcave;
  - the Merchant will bear the risk of, and be responsible for, all loss (including theft) of or damage to, the Goods from delivery until they are returned to Windcave;
  - the Merchant must take reasonable steps to avoid exposure of the Goods to excessive heat, dust and moisture, liquids and electrical and physical shock;
  - the Merchant must comply with all manufacturer's terms applicable to the Goods (as supplied with the Goods or otherwise notified by Windcave to the Merchant from time to time);
  - if the Goods are stolen, seized, lost, damaged or require repairs, the Merchant must immediately advise Windcave of the theft, seizure, loss, damage or repairs required. The Merchant must pay all costs and comply with Windcave's directions in writing in connection with recovering the Goods, repairing any damage or the replacing of any parts (fair wear and tear excepted). Except where Windcave is unable to repair or replace the damaged Goods in a reasonable period of time, the Merchant must continue to pay the Fees while the Goods are being repaired or, in the event of theft, seizure or loss, while the Goods are missing. Windcave will not be liable for any loss or damage in relation to the unavailability of the Goods;
  - the Merchant must not sell, lend, lease, transfer, modify or otherwise deal with the Goods without first obtaining Windcave's written consent. The Merchant must not create, or allow to be created, a security interest over the Goods;
  - the Merchant must allow Windcave reasonable access to inspect the Goods at any time during normal business hours, provided that Windcave first gives the Merchant not less than 2 Business Days' notice; and
  - Windcave may at any time require rental/loan Goods be replaced with alternative Goods as a result of changes in regulations, expiration of certifications, and updates being made to certain model numbers.

## 16. Purchase of Goods

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- 16.1 Where the Merchant purchases Goods from Windcave, the following applies:
- title in any of the Goods (excluding any Software and firmware forming part of, or supplied with, the Goods) will pass to the Merchant upon the Merchant making payment in full for those Goods. Risk in any of the Goods will pass to the Merchant upon delivery of those Goods to the Merchant;

- (b) the Merchant must not sell, lend, lease, transfer, modify or otherwise deal with the Goods without first obtaining Windcave's written consent;
- (c) Where it is unable to pass to the Merchant any manufacturer's warranties in respect of any of the Goods supplied to the Merchant under this Agreement, Windcave will hold any such warranties for the benefit of the Merchant; and
- (d) if the Merchant has not paid Windcave in full for any Goods which have been delivered, the Merchant will provide all reasonable authority and assistance to enable recovery of those Goods by Windcave. The Merchant will be liable to Windcave for all costs (including legal costs on a solicitor-client basis) incurred by Windcave in recovering the Goods.

## 17. Windcave Support Services

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17.1 Windcave will provide the Support Services to the Merchant as detailed on Windcave's website [www.windcave.com](http://www.windcave.com).

## 18. Entire Agreement

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18.1 This Agreement (comprising these General Terms and Merchant Services Terms) records the entire agreement between you and Windcave for provision and use of the Goods and Services and extinguishes all prior negotiations, representations and agreements between you and Windcave (including, but not limited to, any prior versions of the Agreement). Except where expressly agreed otherwise between you and Windcave, this Agreement will prevail over any conflicting policy or agreement for the provision or use of the Goods and Services.

## 19. Waiver, Severance and Set-off

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19.1 No waiver of any breach, or failure to enforce any provision, of this Agreement at any time by either party shall in any way limit or waive the right of such party to subsequently enforce and compel strict compliance with the provisions of this Agreement.

19.2 Any provision in this Agreement, which is or becomes unenforceable, illegal or invalid for any reason shall be severed and shall not affect the enforceability, legality, validity or application of any other provision which shall remain in full force and effect. Nothing in this Agreement is intended to have the effect of contracting out of any Applicable Law, except to the extent permitted by such Law.

19.3 Windcave may at any time set off any amount that Windcave owes to you against any amount you owe to Windcave in relation to this Agreement. Any exercise by Windcave of its right under this clause shall not prejudice any other right or remedy available to Windcave, whether under this Agreement or otherwise.

## 20. Assignment and Subcontractors

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20.1 Windcave may upon written notice to you, assign all or any of its rights and obligations under this Agreement to any person without requiring your consent. You may not transfer or assign any of your liabilities or rights under this Agreement to any other person without Windcave's prior written consent (such consent not to be unreasonably withheld, provided Windcave in its sole discretion, is satisfied as to the suitability of the assignee.)

20.2 Windcave may appoint subcontractors to perform any of its obligations under this Agreement.

## 21. Amendment

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21.1 Windcave may change or add to these General Terms and/or Merchant Services Terms of this Agreement at any time and to change, delete, discontinue or impose conditions on the use of Services or Goods without notice to you and the need for any acknowledgement, acceptance or any other action from you. Please check our website ([www.windcave.com/terms-and-conditions](http://www.windcave.com/terms-and-conditions)) or contact us for the latest version of our General Terms. If you do not accept the changes, you may terminate this Agreement pursuant to clause 11.4. Continued use of the Services or Goods after the expiry of the 2 month notice period and upon the change taking effect constitutes your acceptance

of the changes if you have not exercised your right to termination in clause 11.4.

## 22. Governing Law and Complaints

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22.1 The parties irrevocably agree that this Agreement 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 laws of Malta and the parties submit to the exclusive jurisdiction of the courts of Malta in respect of all matters relating to this Agreement.

22.2 Any complaint in respect of this Agreement or of the provision of the Services should, in the first instance, be referred by you to Windcave in writing by post, via the Windcave Host or via e-mail to [Acquiring@windcave.com](mailto:Acquiring@windcave.com). Windcave will make every possible effort to reply to your complaint within an adequate timeframe and at the latest within 15 business days of receipt of the complaint. In exceptional situations, where Windcave cannot provide a reply within 15 business days for reasons beyond its control, we will send a holding reply indicating the reasons for the delay in answering to your complaint and providing you with the deadline for receiving the final reply, which shall not exceed 35 business days. Further details on our complaints handling procedures and on how to submit a complaint are set out in our Complaints page on our website.

22.3 If you are an eligible customer in terms of the Arbitrator for Financial Services Act (Chapter 555 of the laws of Malta), you may ultimately refer your complaint to the Office of the Arbitrator for Financial Services in Malta established under such Act, or the Central Bank of Malta in respect of services regulated under the Central Bank of Malta Directive 1.

## 23. Counterparts

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23.1 Reserved.

## 24. Notices

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24.1 Any notice or other communication to be given under this Agreement must be in writing and must be served by one of the following means and in respect of each is deemed to have been served as described:

- (a) By personal delivery – when received by the party.
- (b) By post by registered or ordinary mail – on the second Business Day following the date of posting to the addressee's registered office.
- (c) By email – at the time the email leaves the communications system of the sender, provided that the sender does not receive an error message relating to the sending of the email at the time of sending.

The address for Windcave is set out on our website ([www.windcave.com/contact-us](http://www.windcave.com/contact-us)).

## 25. Windcave's Discretion and Powers

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25.1 Unless this Agreement states otherwise, any power, authority, decision, determination and/or discretion which Windcave has by Law and/or under this Agreement can be exercised, or not exercised, by Windcave in its absolute discretion. The rights, powers and remedies provided to Windcave under this Agreement are in addition to, and not exclusive of, any rights, powers or remedies provided by Law.

25.2 Time shall be of the essence in respect of the performance by you of your obligations under this Agreement. However, if Windcave fails to exercise, or delays in exercising, any right, power or remedy under this Agreement, it will not have, and will not be deemed to have, waived that power, right or remedy. Further, any single or partial exercise of a right, power or remedy by Windcave shall not preclude any other, or further, exercise of that power, right or remedy, or any other power, right or remedy.

25.3 You agree that we may, in our sole and absolute discretion refund and/or decline to authorise any Transaction that you submit to us if we believe the Transaction is in violation of any

Applicable Laws and (or) Windcave's AML/CFT policies and procedures or applicable Sanctions. You agree to be liable for all costs related to illegal transactions including any investigations required.

## 26. Interpretation

**26.1 Interpretation:** In this Agreement, unless the context indicates otherwise:

- (a) the meanings of capitalised terms are set out in definition section;
- (b) the singular includes the plural and vice versa;
- (c) clause and other headings are for reference only and will not affect this Agreement's interpretation;
- (d) the term **includes** or **including** (or any similar expression) is deemed to be followed by the words without limitation;
- (e) references to a **person** include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;
- (f) references to any statutory provision are to statutory provisions in force in Malta and include any statutory provision which amends or replaces it, and any bylaw, regulation, order, statutory instrument, determination or subordinate legislation made under it;
- (g) any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;
- (h) all monetary amounts are stated exclusive of VAT and in EURO;
- (i) in the event of any inconsistency between the terms of any of the following, they will have precedence in the descending order of priority set out below:
  - (i) General Terms (including the definition section);
  - (ii) Merchant Services Terms;
  - (iii) the terms of any specific services provided by Windcave to the Merchant as set out in development work agreements or similar;
  - (iv) the Merchant Operating Guide;
  - (v) the Documentations; and
  - (vi) the Merchant's purchase orders.

### Definitions:

In this Agreement, unless the context indicates otherwise:

**Acquirer** means a bank or any financial institution or a card issuer of financial or non-financial transactions which receives and transmits Transactions via the Windcave Gateway.

**Acquiring Charge** means the amount charged by Windcave for Transactions in addition to the Interchange Fee.

**Agent** means any third party engaged by you to assist you in performing your business activities. Such Agent may store, process, transmit or have access to Card or Transaction information and includes but is not restricted to gateway provider/data processors or data storage entities.

**AMSF** means the average of the 6 most recent MSF payments per Merchant facility (excluding any month where Minimum Monthly MSF payments are made) which were (or are) payable by you (to

be determined by Windcave), or if fewer than 6 MSF payments have been (or are then) payable by you, the average of all MSF payments per Merchant facility (excluding any month where Minimum Monthly MSF payments are made) which were (or are) payable by you (to be determined by Windcave).

**Appendices** means the further terms and conditions attached to this Agreement (if applicable) and applying to the Merchant Services and **Appendix** shall be construed accordingly.

**Applicable Law** means all relevant Law, including all statutory and Regulatory Requirements.

**Authorisation** means confirmation that the Cardholder has sufficient funds available, and the Card has not been reported as lost or stolen.

**Authorised User** means any individual who is duly authorised by Merchant to use the Services on behalf of the Merchant.

**Blended MSF** means a single blended MSF for processing all Transactions.

**Business Day** means any day of the week except Saturday, Sunday or a statutory holiday in Malta.

**Card** means each of the Payment Schemes, Debit Cards or any other card or payment instrument as approved by us for the purposes of this Agreement.

**Cardholder** is a person who has been issued a Card.

**Card Issuer** means a bank or other institution that has a licence agreement with a Payment Scheme to issue one or more Cards.

**Card Number** means the primary Cardholder account number that is assigned to a Card.

**Central Bank of Malta** means the Central Bank of Malta established in terms of the Central Bank of Malta Act (Chapter 204 of the laws of Malta).

**CNP** means a Transaction where the Card is not present.

**Commencement Date** means the date you use our Services and/or Goods.

**Cardholder Data** means either of any information, document or an account number relating to a Cardholder, a Cardholder's nominated Card Number or a Transaction.

**Cardholder Information** means Cardholder Data or Transaction information obtained by your business through the processing of Transactions.

**Central Bank of Malta Directive 1** means Directive No 1 issued by the Central Bank of Malta on 'The Provision and Use of Payment Services'.

**Chargeback** means an obligation to return to a Cardholder an amount relating to a previously completed Transaction in accordance with the relevant Payment Scheme Regulations.

**Confidential Information** means, in relation to either party, any information: (a) relating to the terms of this Agreement; (b) relating directly or indirectly to research or development by, accounting for, or the marketing of, the business of that party or its suppliers or Merchants; (c) disclosed by that party to the other party on the express basis that such information is confidential; or (d) which might reasonably be expected by the other party to be confidential in nature.

**Controller** shall have the meaning given to it in the Data Protection Law.

**Data Breach** means any event whereby your business, or any Agent facilitating the transmission, storage or acceptance of Card payments, suspects or has knowledge of unauthorised access to confidential Card payment details, or otherwise as defined by Data Protection Law.



**Data Protection Law** means any applicable laws and regulations in any relevant jurisdiction relating to the use or processing of Personal Data including: (i) EU Regulation 2016/679 ("GDPR"); (ii) any laws or regulations ratifying, implementing, adopting, supplementing or replacing the GDPR); (iii) any laws and regulations implementing or made pursuant to EU Directive 2002/58/EC (as amended by 2009/136/EC) (including the Privacy and Electronic Communications (EC Directive) Regulations 2003); and (iv) any guidance or codes of practice issued by a governmental or regulatory body or authority in relation to compliance with the foregoing; in each case, as updated, amended, re-enacted or replaced from time to time.

**Data Subject** shall have the meaning given to it in the Data Protection Law.

**Debit Card** means any card issued by a financial institution used by a Cardholder to access a cheque, current or savings account and includes Visa and MasterCard debit and pre-paid products where the transaction is treated as a domestic Transaction.

**Debit Transaction** means a Transaction where payment is made by debiting funds in a cheque, current or savings account which is authorised for access by the Cardholder's account.

**Default Interest** means interest at the rate of 5% above the base lending rate charged by Windcave's bankers to Windcave from time to time. This is calculated daily from the due date until the actual date of payment.

**Delivery** takes place when the Merchant receives the Goods from Windcave, or, in the case of returns, when the Goods arrive at Windcave's premises.

**Developed Works** means any work or thing developed or created by or on behalf of Windcave under or in connection with this Agreement.

**Disclosing Party** shall have the meaning specified in clause 10.15.

**Documentation** means any handbook, user, training or system manuals for the Windcave Gateway or Goods (whether in printed or electronic form) which describes and provides guidance on the use of the Windcave Gateway or Goods.

**Electronic Off-Line Payment Limit** means the maximum amount set by us that you are allowed to process a Transaction for and/or the maximum number of Transactions you can process using a Terminal with Electronic Off-Line Transaction functionality.

**Electronic Off-Line Transaction** means a Transaction made using the automated procedures within the Terminal to capture and store the Transaction for subsequent dispatch to us and authorised manually at your discretion, subject to the terms and conditions of the Agreement.

**EMV** means Europay, MasterCard, Visa Chip Card global processing standards for chip card transactions, as detailed in the Merchant Operating Guide.

**Fees** means the fees payable by you to Windcave for the Services or Goods (as may be amended in accordance with this Agreement).

**Establishment Fee** is the fee incurred upon activating the Services.

**Force Majeure Event** means: (a) fire, flood, epidemic or pandemic, elements of nature or other acts of God; (b) any outbreak or escalation of hostilities, war, riots or civil disorders in any country; (c) any act or omission of the other party or any government authority; (d) any labour disputes (whether or not employees' demands are reasonable or within the party's power to satisfy); or (e) the non-performance by a third party for any similar cause beyond the reasonable control of such party, including failures or fluctuations in telecommunications or other equipment such as described in clause 13.1 of the General Terms; (f) any machine, data processing system or transmission link failing to work, beyond the reasonable control of the party.

**Forensic Review** means a review by Windcave or an authorised representative of Windcave after a suspected or known Data

Breach has occurred. This review may require physical site access and access to all storage and transmission systems.

**General Terms** means these terms and conditions.

**Gateway Services** means the Windcave Gateway services.

**Goods** means any Device, Terminal, product or equipment supplied to you by Windcave, and includes any advertising or promotional material and Documentation.

**Improperly Deposited Funds** means funds that do not rightfully belong to Merchant.

**Incident Response Plan** means a pre-defined set of procedures and actions to be initiated following a Data Breach, or suspected Data Breach.

**Insolvency Event** means, in respect of any person, that person: (a) being placed into bankruptcy, insolvency, preventive restructuring, liquidation, administration, receivership or statutory management or having an official assignee, liquidator, receiver, trustee, manager, administrator, statutory manager or similar appointed in respect of it or all or any of its business or property; (b) being unable, or considered to be unable, to pay its debts; (c) entering into an assignment for the benefit of or entering into or making any compromise or arrangement with any of its creditors; (d) being subject to a resolution or any proceeding for the winding up or liquidation of that person (whether on a voluntary or involuntary basis) other than for a bona fide solvent reconstruction on terms previously approved in writing by Windcave and other than where such resolution or proceeding is formally discharged or dismissed in full within 10 Business Days of the initiation thereof; or (e) being subject to any event which is analogous to any of the events listed in paragraphs (a) to (d).

**Interchange Fee** means the fee that Windcave pays to the issuers of Payment Scheme Cards for Transactions accepted at the Merchant facility when a Card is used. This is a variable fee depending on the: (a) nature of the transaction; (b) card type, and (c) processing environment of the transaction.

**Law** means the laws of Malta or foreign laws and regulations, including those issued, adopted or enforced by an institution of the European Union, which are relevant or applicable to the Agreement and/or any duties, rights, undertakings and obligations of Windcave and/or the Merchant which relate to the provision of the Windcave Goods and Services).

**Intellectual Property** means registered and unregistered trademarks (including logos and trade files), domain names, copyright, patents, petty patents, utility models, registered and unregistered designs, circuit layouts, rights in computer software, databases and lists, Confidential Information, software (whether in object code or source code), and all other rights anywhere in the world resulting from intellectual activity.

**Mail or Telephone Order Transaction (MOTO)** is a CNP transaction where a Cardholder orders goods or services from you by telephone, mail, or other means of telecommunication (excluding Electronic Commerce or E-Commerce) and neither the Card nor the Cardholder is physically present.

**MFSA** means the Malta Financial Services Authority, established in terms of the Malta Financial Services Authority Act (Chapter 330 of the laws of Malta).

**Manual Transaction** means a Transaction which is processed through a Terminal (hand keyed) or a virtual terminal which is CNP, PAN or MOTO.

**Mark** means, in respect of any Payment Scheme any trademark, logotype, symbol, hologram, design or other similar distinguishing emblem used by the Payment Scheme.

**MasterCard** means MasterCard International Inc., any of its successors or assigns, and any of its related companies or related bodies corporate.

**Merchant** means the entity or person named as the other party to this Agreement to whom Windcave will provide the Services and "Customer", "you" and "your" have corresponding meanings. Merchant includes the natural person using Windcave Goods and (or) Services for business purposes, the entity or person's

Authorised Users, employees, contractors, agents and nominated subsidiaries (where applicable).

**Merchant Account** is a type of financial account that allows a Merchant to accept and process electronic payment transactions using the Merchant Services.

**Merchant Operating Guide** means the Windcave "Merchant Operating Guide" found at <https://www.windcave.com/document/Windcave-Merchant-Operating-Guide.pdf> and includes any subsequent amendments, or variations.

**Merchant Personal Data** means all Personal Data subsisting in the data provided by the Merchant, the Authorised Users or other users of the Windcave Gateway, the Merchant Services, the Documentation, the Goods, or the Software, or input by Windcave on the Merchant's behalf and which comes into the possession of Windcave as a result of or in connection with the supply of the Windcave Gateway, Merchant Services, the Documentation, the Goods, or the Software;

**Merchant Services** means the merchant services provided by Windcave

**Merchant Terms** means those merchant services terms and conditions in this Agreement and includes the Appendices.

**MSF** means the sum of the Interchange Fee and Acquiring Charges payable by you to Windcave monthly pursuant to clause 37.2, as calculated under clause 37.3 of the Merchant Terms.

**Microenterprise** means an enterprise, which at the time of conclusion of this Agreement, is an enterprise as defined in Article 3 of the Business Promotion Regulations (Subsidiary Legislation 325.06 of the laws of Malta), as may be amended from time to time. Under the currently applicable definition in terms of the Business Promotion Regulations (Subsidiary Legislation 325.06 of the laws of Malta), a microenterprise is an enterprise which:

- a. has fewer than ten employees; and
- b. has either an annual turnover not exceeding two million euro or a balance sheet total not exceeding two million euro.

**Minimum Monthly MSF** means the Minimum Monthly MSF for a transaction type that Windcave advises you will be the minimum fee payable under this Agreement. Initially, the Minimum Monthly MSF for a transaction type is the amount advised by Windcave.

**Nominated Bank Account** means the bank account(s) you ask us to debit, credit and settle amounts to in accordance with, this Agreement noting that it is possible to have different accounts for debiting of fees and crediting of settlements.

**PAN Entry** is a CNP Transaction where the Card details are manually entered into the Terminal or another electronic means which Windcave has approved.

**Payment Scheme** means Visa, or MasterCard, AMEX, DINERS or any other scheme established to manage and establish standards and procedures for the issuance and acceptance of Cards and the settlement of Transactions, as provided by Windcave.

**Payment Scheme Regulations** means any standards, procedures, rules, regulations, programmes or requirements of, or issued by, Payment Schemes.

**Payment System** means any Payment Scheme or bank which Windcave uses, engages, relies on, or requires, to fully or partly comply with all or any of its obligations under this Agreement.

**Payline/Payline Portal** means Windcave's web-based payment management client set up that permits Merchant to process Transactions manually, process refunds, set up recurring payments, generate reports, and review for Transaction errors.

**Permitted Use** means the transmission to, and receipt from, an Acquirer of data relating to the Windcave Gateway and expressly excludes use for the processing of Transactions of, or for the benefit of, any person other than the Merchant.

**Permitted Purpose** shall have the meaning set out in Annex A, Part 2.

**Personal Data** shall have the meaning given to it in the Data Protection Law.

**PCI DSS** means the Payment Card Industry Data Security Standards global standards. [www.pcisecuritystandards.org](http://www.pcisecuritystandards.org).

**PCI SSC** means Payment Card Industry Security Standards Council.

**PCI Standards** means any standards issued or administered by PCI SSC.

**PIN** means the Personal Identification Number selected by a Cardholder, which when used in conjunction with a Card, enables the Cardholder to make electronic Transactions.

**Preferential Rate** means any discounted preferential rate determined by Windcave in its discretion.

**Prepayment** means a payment that is made for future delivery of goods or services by the Merchant.

**Prepayment Transactions** means a Prepayment and includes any Transaction where goods or services are not supplied at the time payment is taken or any other Transaction which has a deferred service delivery model and for which payment is taken in advance.

**Privacy Policy** means Windcave's privacy policy at <http://www.windcave.com/privacy-policy> as updated from time to time.

**Processing** shall have the meaning given to it in the Data Protection Law and **Process** and **Processed** shall be construed accordingly.

**Processor** shall have the meaning given to it in the Data Protection Law.

**Rate** means the Rate that Windcave advises you will be used to calculate the MSF and, where applicable, references to the Rate will be deemed to include references to the Preferential Rate.

**Refund** means, in respect of a Transaction, the reversal in accordance with the Merchant Operating Guide of that transaction by generating a voucher as a refund for goods and/or services purchased from you by a Cardholder and paid for via a Transaction.

**Regulatory Requirements** means all applicable statutes, regulations and rules in force from time to time including and any other mandatory rules, codes of conduct and codes of practice stipulated by any regulatory, legislative or governmental authority (whether established pursuant to statute or otherwise) to which any party is subject from time to time.

**Receiving Party** shall have the meaning specified in clause 10.15.

**Restricted transfer** shall have the meaning specified in clause 10.8.

**Safe Country** means (i) a member state of the European Union; or (ii) a contract state to the Agreement on the European Economic Area; or (iii) where the GDPR applies, a country or territory that has received an adequacy decision issued by the European Union.

**Sales Amount** means the total value of all Transactions for the particular transaction type which were completed by you during the previous calendar month.

**Sanctions** mean a set of measures imposed by the competent Sanctions Authorities against states, natural and legal persons as well as other subjects. Windcave, as a financial institution, adheres to Sanctions restrictions set by the Sanctions Authorities which would include asset freezes, refusing to conduct Transactions, refraining from contracts with sanctioned entities/individuals.

**Sanctions Authorities** means the Sanctions Monitoring Board, the United Nations, the European Union, the United States of America, the countries where Windcave is operating in as well as other countries and/or international organizations determined by Windcave.

**Security Standards** means PCI Standards including PCI DSS and any data protection or data security standards issued by an Acquirer which receives and accepts Transactions using the Windcave Gateway from the Merchant.

**Services** means the services provided by Windcave to you and includes the Gateway Services and Merchant Services.

**Shared Personal Data** shall have the meaning specified in clause 10.13.

**Software** means the software and other related Goods which:

- (a) form part of the Windcave Gateway; and
- (b) is owned or licensed by or developed by, or on behalf of, Windcave and supplied to the Merchant, including all upgrades, updates, alterations and modifications and other changes to such software by or on behalf of Windcave from time to time, but excluding any third-party software and firmware forming part of, or supplied with, the Windcave Gateway.

**Support Services** means and includes online help, and telephone support that Windcave provides to the Merchant.

**Surcharge Fee** means a fee that you apply to a Transaction, for acceptance of a Card for payment, which fee is not applied when payment is made via other payment mechanisms.

**T** means the number of days remaining per Merchant facility before the end of Term.

**Tax** means all forms of tax, levy, impost, duty, charge, fee, deduction or withholding of any nature and whatever called wherever imposed, levied, collected or withheld or assessed by any government agency in Malta or other country where the Merchant is a tax payer.

**Term** means one (1) month.

**Terminal** or **Device** means any electronic device or terminal (including where applicable a portable electronic device or equipment (such as cables and peripherals) which:

- a) facilitates the payment of goods and/or services by the electronic transfer of funds between the bank accounts of the buyer and seller at the time at which the goods and/or services are sold or processes Transactions using Cards and for initiating the credit or debit of funds to facilitate the settlement of those Transactions; and
- b) is approved by Windcave as a "Terminal" for the purposes of this Agreement.

**Tokenized Data** means data for which Windcave has substituted a sensitive data element with a non-sensitive equivalent that has no extrinsic or exploitable meaning or value.

**Transaction** in the context of the Gateway Services means a request from the Merchant (or Merchant's customer) to initiate a transaction through the Windcave Gateway. A Transaction includes disputed and declined transactions and transactions which could not be completed for any reason. **Transaction** in the context of the Merchant Services includes a sales transaction (being the supply of goods or services or both), refund transaction or cash transaction in which a Card or Card Number of a Card is used and which is processed by you manually or electronically.

**Transaction Receipt** means an electronic or paper record of a Transaction (or a copy) generated at the point of sale and is also known as a Transaction Record.

**Transaction Record** means the record of a Card transaction, a copy of which is kept by you and a copy to be provided to the Cardholder, recording the details of the transaction and includes a Sales Voucher.

**Unbundled MSF** means the MSF is unbundled, so you are charged the Interchange Fee applicable for each Transaction, plus an Acquiring Charge. The actual MSF you end up paying depends on the mix of transactions accepted through your Merchant facility.

**Valid** means a Transaction which has been completed in accordance with and does not breach any provision of this Agreement and "**Valid Transaction**" and "**Invalid**" has a corresponding meaning.

**Visa** means Visa International Inc., any of its successors or assigns, and any of its related companies or related bodies corporate.

**Windcave, we, our or us** means Windcave Limited, a company incorporated in Malta (C 106255).

**Windcave Gateway** means the gateway provided by Windcave for the transmission of data relating to Transactions between a Merchant and an Acquirer, incorporating the Software and including access (via the internet) to the Windcave Host and the Support Services.

**Windcave Host** means the Windcave host server to which Merchant may be connected using the Software and which is in turn linked to an Acquirer to enable Transactions to be processed in real time through the Windcave Gateway.

**Windcave Logo** means the Windcave logo supplied by Windcave to the Merchant (as may be updated from time to time by Windcave).

**Your Bank** means the registered bank with which you will maintain an account to which amounts can, from time to time, be debited and credited pursuant to, and in accordance with, this Agreement.

## MERCHANT SERVICES TERMS

These Merchant Services Terms govern the supply of any Merchant Services by Windcave to you. You also agree to be bound by and comply with the Merchant Operating Guide.

### 27. Services and Term

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27.1 If you wish to process other types of Merchant Services transactions not currently approved by us, you may make a request to process those transactions to Windcave. If Windcave accepts your request any relevant additional terms, Appendices and corresponding variation in pricing will apply from the earlier of: (a) the date Windcave advised you in writing of its acceptance; or (b) the date you commence processing such transactions.

### 28. Windcave's obligations

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28.1 Subject to this Agreement, we will provide you with the Merchant Services.

28.2 We will:

- (a) pay all such moneys, and do all such acts, which we believe are reasonably necessary to ensure that an amount which is equal to the total euro amount of a Valid Transaction (as entered in the Terminal through which the Transaction was facilitated) as contemplated by this Agreement is credited to your Nominated Bank Account; and
- (b) give you access to the Payline Portal.

28.3 Where settlement occurs on a day other than a Business Day, we will use reasonable endeavours to ensure that you receive settlement on the next Business Day.

28.4 Provided that, if a Payment Scheme fails or neglects to pay to us an amount which relates to a Valid Transaction, or there is a delay in the Payment Scheme paying an amount to us which relates to a Valid Transaction, then you acknowledge and agree that Windcave will also be unable to make the payment which relates to that Valid Transaction to you until we have received the relevant amount from the Payment Scheme.

28.5 Where we believe that it is reasonably justified, we may, in our sole discretion, immediately re-route Transactions to a suspense account. In such cases we will make the proceeds in the suspense account available to you when we are satisfied that we are able to do so. You have no ownership of any funds transferred to a suspense account until those funds are transferred to your Nominated Bank Account, and no interest is payable on the funds while they are held by us.

28.6 We are under no obligation to make a payment to any person, or to do any other act, in respect of a Transaction which is not Valid. Without limitation, a Transaction is invalid if it is illegal, unauthorised, fraudulent, in breach of Payment Scheme Regulations, in breach of the Agreement, in foreign currency (unless we have previously agreed to process this for you) or where the Cardholder has not received the goods or services purchased.

### 29. Debit Transactions:

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29.1 You must only use Terminals to process Transactions and you must comply with the Debit Transactions requirements in Appendix 2.

29.2 We may freeze and/or terminate processing of Transactions for you, in accordance with this Agreement, while maintaining processing for other Card Transactions.

### 30. Your Obligations

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30.1 You must:

- (a) provide accurate and complete information (including personal information) to enable us to provide you with Services;
- (b) keep the information that we hold about you (the directors, the authorised signatories, and beneficial owners) and your business current and must promptly inform us of any changes (and failure to inform us may result in Transactions being rerouted to a suspense account in accordance with clause [28.5](#));
- (c) ensure you maintain best practice risk management functions including at least risk management procedures such as fraud control measures, policies and procedures for sensitive data storage that complies with the Security Standards and understand fraud and chargeback risks and liabilities and have procedures for tracking and monitoring fraud allegations and losses.

30.2 If Windcave deposits Improperly Deposited Funds in your bank account or Nominated Bank Account, you must return them in full within 5 Business Days of a written request to do so by Windcave. If you fail to comply, Windcave may immediately suspend services to you until you return the Improperly Deposited Funds. You will be liable to Windcave for the Improperly Deposited Funds, and all costs (including legal costs on a solicitor-client basis) incurred by Windcave in recovering the Improperly Deposited Funds from the date on which you receive a written request from Windcave to return the Improperly Deposited Funds.

30.3 In relation to the Merchant Services, we may, acting reasonably, require you to maintain a minimum credit balance in any Nominated Bank Account during the term of the Agreement. Any such required minimum credit balance will be notified by us to you from time to time.

### 31. Your Obligations to Cardholders

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31.1 You have a number of obligations to Cardholders, including the types of Card you must accept and the information that must be made available to a Cardholder – see Appendix 3.

### 32. Data Handling

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32.1 You must ensure that your business fully complies with the Security Standards. You must maintain an Incident Response Plan for immediate reporting and handling of any exposure of Cardholder Data at your business.

32.2 If you know of or suspect a Data Breach at your company or that of any Agent, you must:

- (a) report the Data Breach immediately to Windcave;
- (b) take appropriate action, including withdrawal of internet shopping facilities if appropriate, to minimise the ongoing risk to Cardholder Information, until such time as investigation and rectification of the Data Breach is completed;
- (c) implement and follow the Incident Response Plan;
- (d) maintain a rigorous audit trail of all actions taken to isolate and rectify the event;
- (e) assist Windcave to the best of your abilities including providing detailed statements and schedules of Card accounts exposed by the Data Breach;
- (f) allow Windcave employees, contractors, or those of any Payment Scheme, acting reasonably, full access to your systems and databases for the purpose of Forensic Review, to ascertain the cause and impact of the exposure;
- (g) undergo a full PCI DSS accreditation to be allowed to continue processing Transactions.

**32.3** You are liable for all costs, charges and/or fines imposed by the Payment Schemes, Applicable Law or regulators, due to any Data Breach, including but not restricted to:

- (a) any fines for Data Breach including for a failure to report the Data Breach in a timely fashion;
- (b) any costs levied by the Payment Schemes for monitoring and/or reissue of credit cards compromised by the Data Breach;
- (c) all costs for Forensic Review including following termination of this Agreement; and
- (d) costs for corrective action to address the cause of the Data Breach and for re-certification with PCI DSS.

**32.4** You must not sell, purchase, provide or exchange any information or document relating to a Cardholder, a Cardholder's account number or a Transaction to any person other than us, the Card Issuer or as required by law.

**32.5** You must ensure that any full card-read data in respect of Cards accessed by you in connection with a Transaction (or otherwise in connection with the Agreement) is stored only on an electronic file in a secure environment with restricted access in compliance with the Security Standards and Windcave's compliance requirements, for the sole purpose of providing documentation for exception processing. You must not record, store, replicate or otherwise use full card-read data for any other purpose.

### **33. Chargebacks, Disputes and Invalid transactions**

**33.1** You will always be liable, as detailed in the Merchant Operating Guide and this Agreement, for the full amount of any Chargebacks validly claimed by a Cardholder. Windcave may, at its discretion, charge you a EUR25.00 fee for each individual Chargeback you incur.

**33.2** If you process an Invalid Transaction, you acknowledge that the Card Issuer and, in the case of a Refund, Your Bank, may dishonour the Transaction and you will be liable for the full amount of the Invalid Transaction.

**33.3** Where the amount of an Electronic Off-Line Transaction exceeds the Electronic Off-Line Payment Limit and/or the Cardholder's account has insufficient funds, the Card Issuer may dishonour the whole amount of the Electronic Off-Line Transaction and you will be liable for the full amount of the Electronic Off-Line Transaction.

**33.4** Authorisation of a Transaction is not a representation or warranty by us to you that a Transaction is not an Invalid Transaction. You are liable for and, without limiting that liability, you irrevocably and unconditionally authorise, Your Bank to debit your Nominated Bank Account with the following amounts at any time:

- (a) the total euro amount of any Refund you have generated;
- (b) any amount that was credited to your Nominated Bank Account in error, or because of any error, mistake or omission;
- (c) any amount was credited to your Nominated Bank Account in respect of a Transaction;
- (d) which is not Valid;
- (e) in respect of which the Cardholder or Windcave disputes liability for any reason;
- (f) any amount in respect of which the Cardholder asserts a claim for set-off, or a counterclaim, against Windcave for any reason;
- (g) any fee, cost, charge, liability, or expense or other amount becomes payable by you to Windcave (including MSFs, penalty fees, Chargebacks, fines imposed by Payment Schemes and amounts payable under clause 33);

(h) any stamp duty (if applicable), postage cost, commission, charge, fee, liability, expense or other amount being incurred by Windcave in connection with the Agreement; or

(i) if any other amount that is owing to Windcave by you, that amount.

**33.5** You must not make any warranty or representation on our behalf without each time obtaining our prior written consent.

### **34. Returns and Refunds**

**34.1** You must establish a policy for the exchange or return of goods for sales Transactions and ensure customers are aware of that policy prior to the Transaction. This policy must be consistent with the Merchant Operating Guide.

**34.2** For any Refund you must always comply with the Merchant Operating Guide, and:

- (a) you may only give a Cardholder a Refund if you have seen a valid proof of purchase;
- (b) Refunds may only be done by exchanging goods and/or services or by completing a Refund;
- (c) you may only give a Refund by means of a Transaction processed to the same Card on which the original Transaction was made, a credit note issued by you or an exchange of the goods, and not in cash or by cheque;
- (d) your Refund policy must detail a separate method for obtaining a Refund for online Transactions, and a separate method for obtaining a Refund for Terminal Transactions.

### **35. Records and use of Information**

**35.1** You must allow Windcave to inspect and examine your books of account and records (including, any records in respect of Transactions and Refunds) upon 3 Business Days' notice and you must provide Windcave with any other information which Windcave may reasonably request, including (but not restricted to) your audited financial statements and customer due diligence information. If you are unable to supply the requested Transaction information the transaction may be charged back to you by Windcave.

**35.2** You authorise Windcave to create and maintain records in respect of you and your business and to collect information about you from any person or entity who Windcave deems appropriate.

**35.3** You authorise Windcave to disclose and use any relevant information about you held by Windcave in accordance with the Privacy Policy. Notwithstanding clause 21.2, Windcave may amend the Privacy Policy at any time by notice by posting a new version on Windcave's website [www.windcave.com/privacy-policy](http://www.windcave.com/privacy-policy). Such new version will become effective 5 Business Days after such notice without the need for any acknowledgement, acceptance or any other action from you.

**35.4** You agree to comply with all record retention provisions under Applicable Law, and subject to the Security Standards, you will retain a copy of all Transactions for a minimum of 24 months from the date of each Transaction. You agree when discarding or destroying any Transaction Records after the time for retaining them has passed, you must do so in a secure manner in accordance Applicable Laws and Security Standards.

**35.5** You agree to lodge Transactions with us for settlement in accordance with the Merchant Operating Guide and, in the case of a Transaction processed through a Terminal, immediately by entering the Transaction.

### **36. Prepayment Credit Card Sales**

**36.1** If you process Prepayment Transactions, you may be required to provide Windcave with regular financial data information to keep us informed of your financial viability. This information may include the following:

- (a) cash flow statements clearly segmenting Prepayment Transactions. Statements will identify an appropriate running account balance of Prepayment Transactions, including actual results for the quarter just ended and projections on a 12-month rolling basis;
- (b) financial reports as and when issued (e.g. annual, half yearly, quarterly) including independent audit certification (where they are obtained) confirming the accuracy of Prepayment Transactions cash flow statements you have provided periodically;
- (c) immediate notice to Windcave of any significant increase or decrease in the level of Prepayment Transactions;
- (d) liquidity and net worth reporting;
- (e) estimate or actual transaction totals booked on prepaid basis;
- (f) changes to your point-of-sale procedures for Authorisation, Refund policy and transaction flow.

**36.2** You may be required to provide a financial reserve as security for the Prepayment risk that exists for your business. If security is required, you will be required to sign additional documentation for that security.

**36.3** If you process Prepayment Transactions, Windcave may, at its discretion from time to time, specify a limit allowed for Prepayment Transactions.

### **37. Merchant Services Fees Payable**

**37.1** Windcave will advise you of the Rate which will be used to calculate the MSF and may change the Rate at any time by giving you 30 days' written notice. The Rate will be calculated on the basis of a Blended MSF or Unbundled MSF option as advised by Windcave. Windcave reserves the right to require you to set up a separate merchant facility for your Card Not Present transactions.

**37.2** You must pay Windcave the MSF each month as calculated in clause 37.3. The MSF is payable as specified on the invoice. Windcave will automatically direct debit the MSF from your Nominated Bank Account pursuant to clause 2.2.

**37.3** Subject to clause 37.4, the MSF is calculated as follows:

- (a) the MSF for each transaction type payable for each month is equal to the Rate for that transaction type multiplied by the Sales Amount for that transaction type, minus the aggregate of:
  - (i) the total value of all Refunds for the particular transaction type delivered to Windcave by, or in respect of, you during the previous calendar month; and
  - (ii) any amount debited to your Nominated Bank Account in respect of the particular transaction type during the previous calendar month pursuant to clause 2.2 if the amount was previously used to determine an MSF which was paid by you;
- (b) the total MSF payable for each month is equal to the sum of each MSF for each transaction type calculated in clause 37.3.

**37.4** If any individual MSF calculated under clause 37.3 is less than the Minimum Monthly MSF applicable to the relevant transaction type, the amount for the purposes of clause 37.3 will be deemed to be the applicable Minimum Monthly MSF.

### **38. Suspension and Termination**

**38.1** Windcave, in its sole and absolute discretion, may suspend or freeze all or part of the Merchant Services or hold the funds for settlement if it believes on reasonable grounds that you have or may breach this Agreement. When exercising this right, we are not required to notify you in advance. When we suspend the Merchant Services you will not be able to process any

Transactions and we are not required to accept any Transactions processed by you. We may during the period of suspension or freezing of the Merchant Services terminate the Merchant Services under clause 11.2.

**38.2** We may also suspend the availability of various types of Cards for such period or periods as we may consider appropriate if we reasonably consider it is prudent to do so or a financial institution has suspended the use of those types of Cards. We will use reasonable endeavours to give you notice of suspension of Card types, or settlements but are not required to notify you of the suspension of settlements or transactions based on the risk assessed by Windcave.

**38.3** We may also terminate the Merchant Services at any time in accordance with clauses 11.1 and or 11.2.

**38.4** You may, with or without cause, terminate either:

- (a) the whole Agreement; or
- (b) any of the Merchant Services if you no longer wish to process the particular types of transactions;

by giving Windcave no less than 1 month's prior written notice provided that if you terminate the Agreement or any of the Merchant Services within the Term, you will be required to pay the termination fee set out in clause 39.

**38.5** You will be deemed, at Windcave's discretion, to have terminated the Merchant Services if you commence processing any Transaction with another supplier and cease processing with Windcave.

**38.6** If Windcave increases the Rate in accordance with clause 37.1 and you object to that increase in writing to Windcave and:

- (a) such increase is not due to you failing to achieve the agreed average transaction size; or
- (b) if you are using a Terminal processing method and such increase is not due to you increasing your percentage number of Manual Transactions so that the number of Manual Transactions exceed 5% of the total number of Terminal transactions you process in any three-month period;

you may terminate the Merchant Services by giving Windcave one month's prior written notice and no termination fee will apply. If you terminate under this clause 38.6, then you will not be required to pay any damages under clause 39.1.

**38.7** The termination of this Agreement shall not affect any right held, or obligation incurred, by either Windcave or you prior to the date of termination including your continued liability for Chargebacks.

### **39. Termination Fee**

**39.1** Subject to clauses 11.4 and 38.6:

- (a) if you are not a Microenterprise, and you terminate, or are deemed to have terminated, the Merchant Services before the expiry of the Term; or
- (b) if you are a Microenterprise and you terminate the Merchant Services before the date you start using our Merchant Services,

other than as a direct result of Windcave breaching this Agreement, you will immediately pay to Windcave (in addition to any other amounts which are payable by you under this Agreement) by way of liquidated damages (which you agree is a fair and reasonable estimate of Windcave's loss) an amount per Merchant facility which is equal to the greater of: (a)  $(.25 \times \text{AMSF}) \times T$ ; or (b) EUR400.

### **40. Acknowledgement**

**40.1** You acknowledge that Windcave does not give any warranty, representation or assurance, whether express or implied, as to the creditworthiness of a Cardholder or the accuracy or reliability of the Payment System.

## APPENDIX 1

### CARD NOT PRESENT TRANSACTIONS

#### A. Application

- (a) This Appendix forms part of and is subject to the general terms and conditions set out in the Merchant Services Terms and applies to all CNP and/ or E-Commerce Transactions (as applicable).
- (b) CNP include the following types of transactions:
  - (i) Mail or telephone order transactions (MOTO);
  - (ii) E-Commerce Transactions;
  - (iii) Recurring Transactions;
  - (iv) Instalment Transactions;
  - (v) PAN Entry Transactions.
- (c) At any time Windcave may disable your ability to process any one or more of the transaction types in (b) above with immediate effect and without explanation in the event that Windcave knows or suspects that you are in breach of Applicable Law.

#### B. Acceptance of Risk

- (a) **You accept risk:** By processing CNP you accept the increased risk of fraud or errors arising from where Card details are entered manually and/or the Card is not physically present, and the Cardholders identity or authority may be later called into question. You acknowledge and agree that:
  - (i) there is a much greater risk that a Card is being used fraudulently, or is in some other way invalid and you must maintain best practice risk management functions;
  - (ii) you accept all risks associated with processing a CNP including, but not limited to, all costs, fines or penalties imposed, loss, or liability incurred by you or any other person in relation to the processing of that transaction;
  - (iii) as with any other Card Sales Transaction, an authorisation approval and code provided by Windcave of a CNP does not in any way guarantee payment by Windcave for that transaction. Windcave will in no way be liable for any Chargeback, cost, fine or penalty imposed, loss or liability incurred by you or any person in processing that transaction;
  - (iv) where a CNP has not been validly authorised by the Cardholder, or is in some other way invalid, the value of that transaction will be charged back to you in accordance with the Agreement.

#### C. E-Commerce Transactions

- (a) **Website Information:** Before accepting any E-Commerce Transaction you must ensure your website displays all the following information:
  - (i) consumer data privacy policy;
  - (ii) security capabilities and policy for transmission of Card details;
  - (iii) complete description of the goods or services offered;
  - (iv) Cancellation and Refund/return policy;
  - (v) customer service contact, including email address, or telephone number;

- (vi) transaction currency (e.g. euros);
- (vii) export restrictions (if known);
- (viii) delivery policy;
- (ix) country of merchant's residence;
- (x) Merchant responsibilities in handling disputes;
- (xi) Payment Scheme brand marks for Cards accepted by you wherever payment options are presented; and
- (xii) 3DS brand marks on payment pages if participating in these authentication programs.

#### (b) Your Obligations: To process E-Commerce Transaction you must:

- (i) ensure you have an internet connection and website;
- (ii) ensure that your business name corresponds with the name of your website and the name that will appear on cardholder statements and as advised on the payment record;
- (iii) comply with the Security Standards and any requirements notified to you by us and the Payment Scheme Regulations regarding the presentation and security of your website. You must provide us with reasonable access to view, monitor and audit the pages of your website;
- (iv) ensure all E-Commerce Transactions are captured and transmitted only using the Windcave Gateway and no Card payment details may be accepted or transmitted via email;
- (v) ensure you do not violate Applicable Laws governing the sale of prescription medicines, including controlled substances or other regulated products; and
- (vi) advise us in writing at least 10 Business Days prior to changing your: internet address; email address; telephone number; website name or nature of business.

#### D. Definitions

**Definitions:** In this Appendix, unless the context otherwise requires:

**"E-Commerce Transaction"** or **"Electronic Commerce"** is a transaction initiated by a Cardholder that has interacted with a Merchant via an open network such as the Internet. This includes online processing and encrypted order forms.

**"Instalment Transaction"** is a transaction in which the Cardholder is billed in monthly instalments until the total amount of the transaction has been repaid. Instalment Transactions allow the Merchant to offer the Cardholder a payment plan which has the option of spreading payments over an agreed upon time frame in agreed amounts.

**"Recurring Transaction"** is a transaction for which a Cardholder grants written permission to you to periodically charge their Card for recurring goods or services provided.

**"3DS"** (3D Secure) is an authentication method that provides an additional layer of authentication for credit card transactions, protecting against fraudulent actors. 3DS asks Cardholders to verify their identity with the Issuer during payment.

## APPENDIX 2

### DEBIT TRANSACTION REQUIREMENTS

You must:

- (a) use reasonable care in processing a Transaction to detect forged or unauthorised signatures or the unauthorised use or forgery of a Card;
- (b) comply with specific requirements set out in the Merchant Operating Guide or otherwise notified by us in writing to you;
- (c) immediately give the Cardholder a copy of the Transaction Receipt if requested. The Transaction Receipt must include the following:
  - (i) type of account;
  - (ii) type and amount of the Transaction;
  - (iii) date of the Transaction;
  - (iv) time of the Transaction;
  - (v) Transaction record number; and
  - (vi) confirmation that the Transaction has been accepted or approved;
- (d) prominently and clearly inform the Cardholder of your identity so that the Cardholder can readily distinguish you from any supplier of goods or services to you;
- (e) comply with all Applicable Laws, any obligations in the Agreement, Payment Scheme Regulations and any direction from us in carrying out your obligations in processing Transactions under the Agreement;
- (f) ensure that each Transaction is recorded in Euros; and
- (g) process all Debit Transactions and Card Transactions (including transactions using debit and pre-paid products where the transaction is treated as a credit card transaction) through us, except where we have agreed otherwise.

You must not process a Transaction unless the Cardholder's identity is verified using the correct PIN or Cardholder signature other than a contactless transaction where permitted. You must notify the Cardholder that you are responsible for:

- (a) the sales Transaction including any goods or services that are the subject of the sales Transaction;
- (b) all customer service relating to the sales Transaction;
- (c) dispute resolution in connection with the sales Transaction; and
- (d) performance of the terms and conditions of the sales Transaction.

If electronic processing is not available for any reason, you must process Transactions in accordance with the Merchant Operating Guide and the Merchant Terms.

When completing an Electronic Off-Line Transaction, you must:

- (a) ensure that if the Transaction is stored within a point-of-sale device attached to the Terminal, such point-of-sale device is secure against unauthorised access;
- (b) not process any Transactions that exceed the Electronic Off-Line Payment Limit;
- (c) not use two or more Electronic Off-Line Transactions to effect one Transaction if the amount of the Transaction exceeds the Electronic Off-Line Payment Limited; and
- (d) retain a signed copy of the Transaction Receipt for at least 24 months.

In all circumstances when an Electronic Off-Line Transaction is conducted, it must not be used to:

- (a) provide a Cardholder with cash;
- (b) process a Transaction where the card's magnetic stripe or chip is unable to be read by the Terminal;
- (c) process a Transaction which has been previously declined or which could not be completed as a result of Cardholder PIN errors; or
- (d) process a Transaction away from your normal site of business.

## APPENDIX 3

### YOUR OBLIGATIONS TO CARDHOLDERS

You must:

- (a) accept any Card as approved by Windcave without discrimination unless you are aware of any valid reason not to do so;
- (b) not surcharge the Cardholder if surcharging is prohibited by Applicable laws and Regulatory Requirements;
- (c) if you add a Surcharge Fee (to the extent that such surcharge fee is permitted by Applicable Laws and Regulatory Requirements) to your advertised charges when a Cardholder chooses to pay with a Card:

- (d) clearly display notices, signs or decals at your premises as well as a notice next to your point of sale in a minimum of Arial 10-point font (or other size required by Applicable Law) disclosing that you will apply a Surcharge Fee when payment is made by Card and if you do not have a physical point of sale, you must prominently communicate in an E-Commerce transaction or telephone order that a Surcharge Fee will apply when payment is made by Card;
- (e) clearly display, to the Cardholder, as part of the Transaction environment or process, that if they choose to pay with a Card and there is a Surcharge Fee on the Transaction, the Cardholder has an opportunity to cancel the Transaction;



- (f) ensure the Surcharge Fee which you charge bears a reasonable relationship to your cost of accepting the Card, and is applied on a flat basis;
- (g) include the Surcharge Fee as part of a total single Card Transaction, and not collect it separately;
- (h) not describe the Surcharge Fee as, or inform the Cardholder that the Surcharge Fee is, imposed by the Payment Scheme or by Windcave;
- (i) comply with all Applicable Law, regulation and applicable Payment Scheme requirements regarding the Surcharge Fee, and indemnify Windcave for your failure to do so;
- (j) not accept a Transaction for giving a Cardholder cash except where the Card is being used is a Debit Card and it is a Debit Transaction conducted through a Terminal unless we have advised you that a particular Card or Payment Scheme cannot be used to give cash;
- (k) perform all obligations to the Cardholder in connection with a sale before notifying Windcave of the Card Sales Transaction;

(l) not use Cardholder names, account numbers or other transaction information embossed, encoded or appearing in any other manner on the Card for any purpose other than for the sole purpose of completing the Transaction, or as specifically required by Applicable Law;

(m) maintain systems, records and media containing Cardholder Data or Transaction information in accordance with the Security Standards. and any information accessible from the internet is protected by a firewall and any electronic data is held in encrypted form.

**You must not:**

- (a) make any representation in relation to the goods and/or services provided by you that would bind Windcave or any of the Payment Schemes; or
- (b) indicate or imply that Windcave or any of the Payment Schemes endorses or sponsors any of your goods and/or services; or
- (c) refer to Windcave, or any of the Payment Schemes stating eligibility to purchase the goods and/or services provided by you.

**DATA PROCESSING PARTICULARS**
**Part 1 – WINDCAVE ACTING AS A PROCESSOR**

<b>Categories of Data Subjects of the Personal Data Processed under this Agreement</b>	<p><i>The Personal Data transferred concern the following categories of Data Subjects (please specify):</i></p> <ul style="list-style-type: none"> <li>• Cardholders</li> </ul>
<b>Type of Personal Data Processed under this Agreement</b>	<p><i>The Personal Data transferred concern the following categories of data (please specify):</i></p> <ul style="list-style-type: none"> <li>• Cardholders' contact information, including: name, address, ZIP code, email address and telephone number.</li> <li>• Online identifiers such as cookie, IDs and IP address.</li> <li>• Details related to the Card used – Card Number, expiry date, the name on the Card and the address associated with the Card, issuing country of the Card, the Merchant reference data (proprietary data to the Merchant requirements that the Merchant requests that Windcave asks from Cardholder, which can include personal data such as drivers' licence and passport details).</li> <li>• 3DS v2 information.</li> </ul>
<b>Special categories of Personal Data (if applicable)</b>	<p><i>The Personal Data transferred concern the following special categories of data (please specify):</i></p> <p><input type="checkbox"/> Racial or ethnic origin</p> <p><input type="checkbox"/> Political opinions</p> <p><input type="checkbox"/> Religious beliefs or other beliefs of a similar nature</p> <p><input type="checkbox"/> Trade union membership</p> <p><input type="checkbox"/> Physical or mental health or condition</p> <p><input type="checkbox"/> Sex life and sexual orientation</p> <p><input type="checkbox"/> Genetic data and biometric data</p> <p><input checked="" type="checkbox"/> None</p>
<b>Subject matter, nature and purpose of the Processing of Personal Data under this Agreement</b>	<p><i>Subject matter and purpose</i></p> <p>Windcave Processes the Personal Data for the provision of the Services, including the Gateway Services and the Merchant Services, to the Merchant.</p> <p><i>Nature</i></p> <p>Processing activities, such as:</p> <ul style="list-style-type: none"> <li>• Segregated storage &amp; encryption</li> <li>• Securely sending data to third parties that are also involved in the payment chain</li> <li>• Referencing data to diagnose and correct problems in payment chain</li> </ul>
<b>Authorised Sub-processors and Restricted Transfers</b>	<p>Windcave Limited (United Kingdom) Windcave Limited (New Zealand); Windcave New Zealand Limited (New Zealand); Windcave International Limited (New Zealand); Windcave Pty. Limited (Australia); Windcave Inc. (United States of America); Windcave Canada Limited (Canada) Windcave Private Limited (Singapore), Windcave Limited (Malta) and Windcave Payments New Zealand Limited (New Zealand).</p> <p>Processing operations:</p> <ul style="list-style-type: none"> <li>• Segregated storage &amp; encryption</li> <li>• Internal Windcave &amp; Merchant reference for payment transactions</li> </ul>
<b>Description of Windcave's security measures</b>	<p>Windcave has taken measures including, but not limited to, the following: 1) encrypting sensitive data; 2) using 3DS where appropriate; 3) establishing data protection and information security policies and procedures; 4) setting up passwords, which change, to protect access; 5) establishing secure disposal of data; 6) establishing a business continuity plan; 7) Network security controls; 8) end point security; 9) device encryption; 10) certifications; 11) vulnerability management; 12) InfoSec training/awareness, and 13) incident response team.</p>
<b>Duration of the Processing of Personal Data under this Agreement</b>	<p>Until termination of the Agreement.</p>
<b>Competent Supervisory Authority</b>	<p>The Information and Data Protection Commissioner.</p>

**Part 2 – WINDCAVE AND THE MERCHANT EACH ACTING AS INDEPENDENT CONTROLLERS**

<b>Categories of Data Subjects of the Shared Personal Data Processed under this Agreement</b>	<p><i>The Personal Data transferred concern the following categories of Data Subjects (please specify):</i></p> <ul style="list-style-type: none"> <li>• Cardholders</li> <li>• Windcave and the Merchant's employees, authorised signatories, beneficial owners, agents, contractors or other personnel that the parties come into contact with during the term of this Agreement.</li> </ul>
<b>Type of Shared Personal Data Processed under this Agreement</b>	<p><i>The Personal Data transferred concern the following categories of data (please specify):</i></p> <ul style="list-style-type: none"> <li>• Cardholders: <ul style="list-style-type: none"> <li>○ Details related to the Card used – Card number, expiry date, the name on the Card, address and ZIP code associated with Card or Cardholder, Cardholder IP address, issuing country of the Card, the Merchant reference data (proprietary data to the Merchant requirements that the Merchant requests we ask from Cardholder, which can include personal data such as drivers' licence and passport details).</li> <li>○ 3DS v2 information.</li> </ul> </li> <li>• Employees, authorised signatories, beneficial owners, agents, contractors or other personnel: <ul style="list-style-type: none"> <li>○ Contact details, including full name, email address, job role and phone number</li> <li>○ Any additional information voluntarily shared / sent, for example, details regarding the volume and type of Processing the Merchant completes</li> </ul> </li> </ul>
<b>Special categories of Shared Personal Data (if applicable)</b>	<p><i>The Personal Data transferred concern the following special categories of data (please specify):</i></p> <p> <input type="checkbox"/> Racial or ethnic origin  <input type="checkbox"/> Political opinions  <input type="checkbox"/> Religious beliefs or other beliefs of a similar nature  <input type="checkbox"/> Trade union membership  <input type="checkbox"/> Physical or mental health or condition  <input type="checkbox"/> Sex life and sexual orientation  <input checked="" type="checkbox"/> Genetic data and biometric data*  <input type="checkbox"/> None </p> <p>*Windcave may Process biometric data of the Merchant's employees, agents, contractors or other personnel with the consent of the individual for the purposes of its own ID verification purposes to comply with Windcave's regulatory obligations.</p>
<b>Permitted purpose for Processing the Shared Personal Data</b>	<ul style="list-style-type: none"> <li>• Administration and management of the Agreement by Windcave and the Merchant</li> <li>• Regulatory and legal compliance purposes</li> <li>• Transaction processing</li> </ul>
<b>Duration of the Processing of the Shared Personal Data under this Agreement</b>	<p>Until termination of the Agreement or, where applicable, until the end of the relevant party's applicable retention period in respect of the Shared Personal Data.</p>
<b>Competent Supervisory Authority</b>	<p>The Information and Data Protection Commissioner.</p>