

## **General Terms and Conditions for optivo® broadmail**

### **1. Scope**

- (1) The General Terms and Conditions (hereinafter referred to as "GT&C") apply to the optivo® broadmail proposal (hereinafter referred to as "broadmail") from optivo GmbH (hereinafter referred to as "optivo"). They also apply to all future proposals or services in connection with optivo® broadmail to the Customer, even if they are not agreed separately again.
- (2) The subject matter of the Agreement is primarily determined by the order prepared by optivo, and supplemented by these GT&C. Different specifications in orders or other Customer letters shall only become effective if they are expressly confirmed by optivo.
- (3) The Customer's general terms and conditions shall not become an integral part of the contract even if the optivo does not expressly object to them.

### **2. Subject matter and conclusion of the Agreement**

- (1) The subject matter of the Agreement is the provision of the broadmail software as a Software as a Service (SaaS) solution for the contractually agreed period. broadmail enables the Customer to send advertisements, newsletters, or other information in electronic format (such as e-mails or faxes and SMS) and as a print product (letter, postcard) to the Customer's contacts (contractual partner, interested parties etc.) and to evaluate this dispatch using statistics. Details of the service are taken from the service specifications which are available on request.
- (2) In addition to providing broadmail, optivo also offers services that support the Customer when using broadmail. The type and scope of the service and the remuneration are set out in optivo's proposal.
- (3) The Agreement takes effect when the Customer accepts optivo's proposal in writing. This acceptance is usually made when the Customer returns the signed order document by fax.
- (4) In cases of doubt, the power of representation of the acting person has to be proved by the Customer.

### **3. Work services and acceptance**

- (1) optivo is specially commissioned to provide for the Customer work services such as setup, configuration and/or programming services (hereinafter referred to as "project") that are connected to the use of broadmail.
- (2) Partial acceptances within a project
  - a) In each project phase, the submission of certain work results is agreed that have to be accepted by the Customer using the following correction loops.
  - b) Level 1:
    - optivo provides the Customer with a work result (e.g., template designs).
    - Within 10 working days, the Customer issues its approval (acceptance) or notifies optivo of correction specifications. The correction specifications must comprise all points that have to be worked on by optivo.
  - c) Level 2:

- If optivo receives correction specifications, these shall be implemented by optivo and the corrected work result shall be submitted to the Customer.
  - The Customer shall grant optivo its approval within 10 working days, or else issue new correction specifications. It is hereby noted that these correction specifications must refer exclusively to the corrections named and worked on in level 1.
- d) New commissioning
- Change requests that go beyond the change specifications named in level 1 are the subject matter of separate commissioning. The cost that is incurred by this is charged separately.
- (3) Final acceptance of a project
- a) optivo shall notify the customer that it is ready for acceptance. The Customer must declare its acceptance within 10 working days. Otherwise, the services shall be deemed to be accepted after the deadline has expired.
  - b) If the Customer pays the remuneration without reservation after using the service provided, this is equivalent to an acceptance of the services provided by optivo.
- (4) The acceptance cannot be refused because of insignificant defects.

#### **4. Readiness for dispatch**

- (1) If a user account is to be set up, optivo's readiness for dispatch occurs on receipt of the notice indicating the Customer's readiness for acceptance in accordance with section 3(3)a). Readiness for dispatch includes the conclusion that optivo has met all key, contractually agreed services for using broadmail's send function.
- (2) In the event that the Customer does not meet its duties to cooperate in accordance with section 8 in terms of setting up the user account, and because of this, the readiness for dispatch cannot be established as agreed in the Agreement, optivo shall be entitled to set up a user account with a standard setup for the Customer at the end of three months after the Agreement was concluded. When the Customer receives notification that the standard account has been set up, readiness for dispatch shall be deemed to have occurred analogously to paragraph (1).

#### **5. Change request**

- (1) The Customer may request changes and supplements to the contractually agreed scope of project right up to the time when a project is accepted, provided that they are technically feasible and reasonable for optivo. The following procedure is applied here:
  - a) optivo shall check the change requests made in writing and submit the result of the check together with any costs and delays to the service period to the Customer in the form of a binding proposal within 10 working days.
  - b) The Customer shall check the proposal within 10 working days of receipt.
  - c) If the Customer accepts the proposal in text form within the notice period, the changes shall be included as components of the Agreement. If the Customer does not accept the proposal, the Parties shall perform the Agreement within the agreed scope of service.

- (2) During an ongoing change request procedure, optivo shall continue the originally agreed services as planned, unless the Customer notifies optivo that the work should be stopped or restricted until the final decision has been made.

## **6. Technical usage prerequisites, availability**

- (1) The Customer can use broadband over the Internet with a current version of the Mozilla Firefox or Microsoft Internet Explorer browser. optivo provides an interactive user interface for this.
- (2) optivo shall not be responsible for the nature of the software required by the Customer or the telecommunications connection between the Customer and optivo up to the point of transfer.
- (3) For the broadband services for which it is responsible, optivo shall guarantee an availability of 99.8% as a monthly average for the following services:
  - Sending e-mails,
  - Receiving returns,
  - Measuring statistics,
  - Online versions of mailings,
  - Hosting images and files,
  - Log on and log off pages,
  - broadband user interface ([www.broadmail.de](http://www.broadmail.de)),
  - broadband API (SOAP, HTTP, and FTP).
- (4) optivo shall be entitled to perform maintenance work and to stop or restrict the provision of broadband for this reason (scheduled downtime). optivo shall notify the Customer about this. If optivo can predict that the scheduled downtime will exceed one hour, optivo shall notify the Customer about this by e-mail at least one week before the start of the respective work. Maintenance work shall be conducted by optivo during times of low use wherever possible. Scheduled downtimes are not included in the measurement of the availability provided. However, the scheduled downtimes must not exceed the overall duration of 3 hours per month.

## **7. Usage rights for broadband**

- (1) The Customer shall receive simple, non-transferable usage rights that are restricted to the term of this Agreement for the broadband application, as well as the provided work results as part of the provisions of this Agreement. If, during the term of this Agreement, new versions, updates, upgrades, or patches to the application are provided, the usage right also extends to these.
- (2) For all documents, programming, and other services that are created by optivo, for which optivo holds the copyright and other intellectual property rights, the Customer shall receive a simple, non-transferable usage right for the contractual use for the duration of the Agreement.
- (3) If the Customer sells broadband services to its end customers (resellers) in its own name on the basis of contractual agreements with optivo, it is entitled to grant its end customers usage rights in accordance with paragraphs (1) and (2) for use in accordance with contractual conditions.
- (4) Further rights pertaining to the software or the other work results shall not be granted to the Customer.

## **8. General obligations of the Customer**

- (1) The Customer shall promote the execution of the Agreement through active and appropriate cooperative actions. In particular, it shall promptly provide optivo with all information, data, and documentation that is required for the provision of the contractually agreed services.
- (2) If a lack of cooperation from the Customer should mean that certain services cannot be performed within an agreed period, the service period shall be extended accordingly.
- (3) At the Customer's request, optivo shall name a contact person to coordinate the performance of the Agreement. The contact person shall answer the Customer's queries or forward them to the responsible departments in optivo. No rights and obligations exist in accordance with section 8 (4).
- (4) Contacts and performance of the Agreement
  - a) The Customer is obliged to name a technically competent contact person who is responsible for the necessary internal coordination of the project with the Customer and, where necessary, with third-party service providers, and provides optivo with the necessary information and documentation in a usable form.
  - b) The contact person is also authorized to take decisions that are necessary for the smooth implementation and completion of the project (such as changes to the scope of service, acceptances).
  - c) optivo points out that replacing the contact person during an ongoing project, as well as the suspension of projects by the Customer over a period of more than one month, is regularly associated with increased costs for optivo. Nevertheless, if the Customer does replace the contact person, or if there are no cooperative actions by the Customer for more than one month, and if optivo incurs increased expenses as a result of this, the Customer shall bear the additional costs that are incurred.
- (5) The Customer shall take the necessary precautions to prevent the use of broadband by unauthorized persons. This includes in particular the secure use of passwords. The Customer shall be responsible for ensuring that broadband is not used for illegal purposes, insofar as it is responsible for this.
- (6) An unauthorized transfer of rights for the use of the software also exists if the Customer does not use broadband for its own business operations (e.g., newsletter to its own end customers), but uses it fully or partially for a third party. optivo shall be notified about such use beforehand and optivo must issue written consent. The Customer shall ensure and prove that a third party is subject to the same obligations of this Agreement as regards optivo (e.g., general obligations from section 8, guarantees and exemption from liability from section 14, regulations with regard to sending messages from section 9, in particular the submission of consent in text form, rights to restriction and blocking from section 10, restrictions of the fixed term from section 17).
- (7) The Customer shall be responsible for creating regular security copies (back-ups) of its own data.

## **9. Special provisions on sending messages**

- (1) The Customer is obliged to ensure that its use of broadmail does not violate applicable law. Both when collecting, selecting and using recipient addresses and data, and in terms of the contents to be sent (texts, images, etc.) and the hyperlinks that are used, the Customer is obliged to comply in particular with laws relating to national and international data protection, competition, criminal law, copyright, trademark, labeling, patent and name laws, as well as provisions on child protection and other third-party rights.
- (2) Content that is illegal or in violation of accepted moral standards shall neither be saved nor transmitted. A reference to such information is not permitted. Above all, this includes information that incites hatred and violence against segments of the population, induces the commission of criminal offenses or glorifies or trivializes violence, or is sexually offensive or pornographic.
- (3) The Customer shall ensure that for each data record it uses, the Customer shall have explicit permission from the relevant recipient for sending advertisements or commercial communication in the communication channel chosen by the Customer (e.g., e-mail, fax, or SMS).
- (4) The Customer shall undertake to meet the recognized and widely-used codes of conduct and standards for the proper mass sending of advertising messages. In particular, this concerns what are known as white list programs for sending e-mails. The objective of these codes and standards is to send the messages without any faults from a technical and legal point of view.
- (5) On optivo's request, the Customer shall provide optivo with consent in text form immediately, with all of the information it has for the respective data record, provided that this is not expressly and verifiably forbidden for legal reasons. This may affect the following information:
  - Log on information e.g.: Double-opt-in procedure, context of the collection of e-mail addresses, text of the declaration of consent, notes on the cancellation option
  - Date and time of the log on confirmation by the Customer with double-opt-in procedure
  - Copy of the confirmation e-mail with double-opt-in procedure
  - URL of the website with which the log on was performed
  - Time (date, time and IP address) of the log on and log on confirmation (double-opt-in)
  - Basis and content of the customer relationship (e.g., purchased product)

## **10. Restricting and blocking the broadmail services**

- (1) If there are specific indications that the Customer has violated statutory provisions, third-party rights, or contractual obligations, optivo shall be entitled to restrict the Customer's use of broadmail, and to deactivate the e-mail sending function in particular. When selecting the measures, optivo shall consider its own operational requirements and liability risks and the legitimate interests of any claimants and the Customer (e.g., default, severity of the violation of the obligation, risks, user's opinion) appropriately. The Customer can prevent the performance of the measures by submitting appropriate proof, at its own cost, of currently available evidence of a violation.

- (2) If optivo is provided evidence of breaches of duty by the Customer, e.g., following a complaint by a third party, optivo shall notify the Customer of this. optivo can set an appropriate deadline in individual cases for making a comment, which can only last a few hours in particularly urgent cases. The sanctions that optivo can impose on a Customer are:
  - Statement of a Customer warning with the request to refrain from the violation immediately;
  - Restriction of the use of broadband by the Customer;
  - Provisional blocking of the Customer.
- (3) In particular, optivo is authorized to deactivate the sending function immediately,
  - as soon as there is evidence that the promised consents in accordance with section 9(3) are not available
  - if the Customer does not submit the evidence of consent in accordance with section 9(5) immediately on request, or refuses to submit it.
- (4) The right to terminate the Agreement shall remain unaffected.

## **11. Legal consequences of sending messages in breach of the Agreement**

- (1) If the Customer has not obtained legal consent for sending marketing messages, or if the Customer cannot submit this in accordance with section 9(3), and if optivo receives complaints from a party concerned, or a trade association appointed by a party concerned or a competitor due to the unauthorized sending of marketing messages (spam) the Customer is obligated to pay a penalty to the amount of EUR 5,000.
- (2) Trade associations within the meaning of paragraph 1 include institutions which are authorized to issue a class action in accordance with section 8 (3) UWG [Act against Unfair Competition]. This includes institutions in the field of online marketing and Internet business such as white list providers, or the *Wettbewerbszentrale* [center for protection against unfair competition].
- (3) optivo reserves the right to assert any claims for damages; in this case, the contractual penalty shall be offset against any claims for damages.

## **12. Remuneration**

- (1) The charges to be paid by the Customer are based on the proposal sent by optivo.
- (2) The remuneration for contractual services shall be due seven days after invoicing, unless different provisions are agreed.
- (3) The Customer shall be invoiced the fee for using broadband at the end of each month. The billing period is the calendar month. Billing takes place from the first day the broadband services are used by the Customer, but no later than when readiness for dispatch occurs in accordance with section 4. The first billing month shall be invoiced on a pro rata basis.
- (4) Charges are specified as net prices plus the applicable value-added tax.
- (5) Payments are made in EUR.

- (6) It is made clear that the Customer is obligated to reimburse optivo separately for costs that are incurred in connection with the provision of contractual services outside of Berlin (travel and accommodation costs, time). They are not part of the remuneration. The contractually agreed daily and hourly rates shall apply. Train tickets for second class journeys or Economy Class flights, and accommodation costs in 3 to 4 star accommodation, up to a maximum of EUR 150.00 per night, can be reimbursed. Other expenses will not be reimbursed.

### **13. Liability and warranty**

- (1) The following regulations regarding optivo's liability and warranty shall apply to all of the Customer's claims for damages or other claims for compensation occurring at this point that result from or in connection with the performance of this Agreement and cases of liability regardless of their legal basis (e.g., warranty, delay, impossibility of performance, any violation of obligations, the existence of an impediment to performance, tort, etc.) except for claims from the Customer:
  - a) for damage resulting from any injury to life, limb or health,
  - b) for claims resulting from fraudulent concealment of a defect by optivo, or if a characteristic is missing for which optivo has incorporated a guarantee,
  - c) based on intentional or grossly negligent behavior of optivo, its bodies or managing employees and
  - d) in accordance with the Product Liability Act.

However, statutory requirements shall apply to these exceptions.

- (2) optivo and its agents shall be liable for material damage and financial loss caused through negligence only in the event of infringement of an essential obligation, that is, an obligation whose fulfillment enables a proper implementation of the Agreement and on whose compliance the Customer can regularly rely, but limited to typical damage foreseeable at the time when the Agreement was concluded.  
Otherwise, optivo's liability for simple or slight negligence is excluded.
- (3) optivo's strict liability under landlord and tenant law and similar usage relationships for errors that already existed when the agreement was concluded is expressly excluded.
- (4) optivo shall warrant the technical availability of the services in accordance with the regulations in section 6 (3) of these GT&C. optivo shall not assume liability for any incidents within the service network for which optivo is not responsible.
- (5) The Customer has no right of self-execution in accordance with section 637 BGB for contractual services. Warranty rights resulting from the Agreement are restricted to the period of 12 months after acceptance of the work performance. Claims for damages shall remain unaffected.

### **14. Warranty, exclusion of liability**

- (1) The Customer guarantees that all contents transmitted by the Customer to optivo, such as images, texts, photos, and designs, are free from third-party rights and that their contractual use therefore does not infringe third party rights.
- (2) The Customer is obligated to indemnify optivo from all third-party claims and expenses that are based on the culpable violation of third-party rights by the Customer. It is made clear that this also includes violations of rights that are associated with the use of optivo broadband while using the Customer's access data. The claim for indemnification also includes all costs and expenses for legal defense.

- (3) If the Parties find out about possible third-party claims, they shall immediately notify each other. The Customer is obligated to take all appropriate measures to defend optivo against the claims brought and to remedy the alleged infringement.

## **15. Contractual terms, termination of Agreement**

- (1) The Agreement shall enter into force upon receipt of the declaration of acceptance and is concluded for a period of validity up to the expiry of the 12th calendar month from readiness for dispatch in accordance with section 4. The Agreement shall be automatically extended by 12 months unless it is terminated with a notice period of three months before the expiry of the Agreement term.
- (2) This does not affect the rights of either party to terminate the Agreement without notice for good cause. In particular, good cause shall be deemed to exist for optivo if
  - a) the Customer has culpably breached essential obligations from this Agreement;
  - b) the Customer used broadband to distribute illegal information;
  - c) the Customer used broadband to send messages to persons without being authorized to do so;
  - d) the Customer makes broadband available to an unauthorized third party, contrary to section 8 (5) and (6).
- (3) Notices of termination must be made in writing. Sending them by fax constitutes the written form.

## **16. Data processing on behalf of the controller**

- (1) The services agreed in this Agreement shall be provided by optivo as data processing on the Customer's behalf. The Customer is the responsible body in the sense of sections 3 (7), 11 BDSG (*Bundesdatenschutzgesetz* [German Federal Data Protection Act]). optivo is obligated to keep secret personal data that is processed on the Customer's behalf, and to process it only in accordance with the Customer's instructions.
- (2) If the Customer uses broadband to send contents using print product, E-POST Solutions GmbH shall be involved as a subcontractor.
- (3) Employees of optivo, as well as third parties who are deployed within the scope of the order, or who have access to personal data, are to be obliged in writing to adhere to confidentiality and maintaining data secrecy in accordance with section 5 BDSG.
- (4) The Parties shall also regulate the agreement on data processing on behalf of the controller in a controller-processor agreement that shall be concluded separately.

## **17. Disclosure of data upon termination of the Agreement or insolvency**

- (1) optivo is obliged to retain the recipient data that was provided to the Customer, or that was saved on the Customer's behalf, for a period of at least three months after the end of the Agreement. This does not affect the Customer's right to demand the deletion of the data at any time in accordance with section 17 (5).
- (2) optivo shall notify the Customer about the deletion of the data two weeks before the period expires, in writing or by fax in accordance with paragraph (1). At the end of this period, optivo is entitled to delete the Customer's data.

- (3) Until the expiry of the period named in paragraph (1), the Customer shall have the right to access at all times the recipient data saved in its otherwise deactivated user account. This shall enable the Customer to export the recipient data to a standard data format such as .csv and to save it on a data carrier.
- (4) In case insolvency proceedings are requested or initiated regarding optivo's assets, or if the initiation of such proceedings has been rejected due to a lack of assets, the Customer shall be granted unrestricted access right to its data analogously to the provision in paragraph (3).
- (5) If the Customer issues optivo with a binding approval for deletion in written form or by fax, optivo is entitled and obliged to delete the data within two weeks after receipt of the approval declaration, even before the retention period expires in accordance with paragraph (1).
- (6) Only data which optivo is legally obliged to retain is excluded from the deletion of data.

## **18. Confidentiality**

- (1) The Parties agree to handle confidentially the content of the agreements made between them, and all information exchanged between them, as well as any findings that are obtained when performing and processing the Agreement.
- (2) The Parties shall also oblige all contracting parties, subcontractors, or clients who are deployed with this Agreement to maintain secrecy.
- (3) Excluded from the obligation to maintain confidentiality is information that is generally available, or information that was notified to a contractual party by a third party without violating a confidentiality obligation, or whose disclosure the disclosing party is obliged to perform for legal reasons, or due to a judicial or administrative ruling.

## **19. Reference**

- (1) optivo shall be entitled to name the Customer in publications on the Internet and print media.
- (2) The Customer shall name the advertising materials released for this, such as logos, and is obliged to grant all necessary rights. If there are any special provisions for use (such as corporate identity), the Customer shall provide these without being asked.
- (3) A reference shall only be named in an appropriate manner and is precluded if it opposes the legitimate interests of the Customer.
- (4) The Customer has the option of opposing a reference for the future in writing at any time. Print media that have already been created may be used up. The reference can be provided up to three years after the end of the Agreement.

## **20. Final provisions**

- (1) If the Customer is a businessman, or a legal entity or special fund under public law, or if the Customer does not have a general jurisdiction in the Federal Republic of Germany, the exclusive place of jurisdiction shall be optivo's registered office.
- (2) Declarations under these GT&C require written form (such as fax, e-mail) unless agreed otherwise.

- (3) All legal relationships on which these GT&C are based, are subject to the laws of the Federal Republic of Germany without the provisions that result in the applicability of foreign law or the United Nations Convention on Contracts for the International Sale of Goods (CISG).
- (4) If these GT&C (in German) have been translated into a different language and have been made available to the Customer, the German version shall be relevant for the contractual relationship to optivo. This especially applies in the event of inconsistencies or conflicts between the German language version and a translated version.
- (5) Central European Time or Central European Summer Time (CET/CEST) shall apply to all time information, time periods, and notice periods.
- (6) Should one provision of these GT&C be or become wholly or partially invalid, the effectiveness of the remaining provisions shall not be affected.

Last revised: January 2015