

## Terms and Conditions of Use – Cochlear Link

### WELCOME!

Welcome to Cochlear Link, a service that enables the remote storage and sharing of Cochlear implant recipient data within and between authorised persons for treatment purposes. The term Cochlear Link includes the Software (as defined in clause 15.7) ("**Cochlear Link**"). This service is owned and operated by Cochlear Limited and its affiliates listed in clause 13 ("**us**", "**we**", or "**our**").

Below we set out the terms and conditions of your use of and access to Cochlear Link, including the Software. Please read these terms and conditions carefully before using or otherwise accessing Cochlear Link or installing or using the Software. If you or the entity you represent ("you", "your" or "Customer") do not agree to these terms and conditions do not install the Software or use or access Cochlear Link.

### ACKNOWLEDGEMENTS

By installing, using or otherwise accessing ("**Using**", "**Use**" or "**Uses**") Cochlear Link, you agree to be bound by these terms and conditions ("**Terms**"). If you are Using Cochlear Link on behalf of an entity, you warrant that you are properly authorised to bind that entity to the Terms and you agree to be bound by these Terms on behalf of yourself and on behalf of the entity. If you or an entity you represent does not wish to be bound by the Terms neither you nor the entity you represent may Use Cochlear Link. You agree to ensure that any person who Uses Cochlear Link at your direction or on your behalf complies with the Terms.

You agree that we provide Use of Cochlear Link to you subject to the Terms. We reserve the right to change any of the Terms at any time by notifying you of the changes, or by presenting the updated Terms to you on installation of any updates to the Software ("**Modifications**"). Your Use of Cochlear Link after we make any Modifications available in this manner constitutes your acceptance of those Modifications. Once a Modification is accepted in this manner, that Modification will form part of the Terms. You acknowledge and agree that the Software automatically communicates with Cochlear servers to check for and receive updates to the Software in accordance with clause 5.1 below.

#### 1. GRANT OF LICENCE TO THE SOFTWARE

Subject at all times to your compliance with the Terms, we grant to you until expiry or termination of the Terms for any reason a royalty-free, non-exclusive, non-transferable, non-assignable, non-sublicensable personal license to use the Software solely for the purpose of Using Cochlear Link in accordance with the Terms.

#### 2. DISCLAIMER & COCHLEAR'S RESPONSIBILITIES

2.1 If you reside in Australia, the European Economic Area, United Kingdom, Switzerland, New Zealand or any other applicable jurisdictions with mandatory guarantees or legal requirements, we acknowledge that there are certain guarantees, warranties, terms and conditions (including in respect of refunds and returns) imposed by the law relating to the supply of goods and services which the law expressly provides may not be excluded, restricted or modified or may only be limited to a certain extent ("**Statutory Obligations**"). Nothing in the Terms excludes, restricts or modifies the Statutory Obligations, otherwise than as permitted by law.

2.2 Subject to the Statutory Obligations and other applicable law:

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- 2.2.1 except as otherwise provided herein, Cochlear Link is provided 'as is' and without any guarantee, warranty or condition, either express or implied, including without limitation, warranties of merchantability, title, non-infringement, fitness for a particular purpose or that Cochlear Link will be secure, uninterrupted or error free. Except as otherwise provided herein, you expressly agree that your Use of, or ability to Use Cochlear Link is at your own risk;
  - 2.2.2 Cochlear Link is provided without any obligation to provide support, upgrades, maintenance, bug patches or fixes ("**Support Services**"). If we elect to provide Support Services to you, such Support Services will be provided 'as is' and without any guarantee, warranty or condition, either express or implied;
  - 2.2.3 we do not guarantee, represent or warrant that the information, or any advice, opinion, statement or representation contained in or accessible through Cochlear Link is accurate, suitable for your purposes or without errors or omissions;
  - 2.2.4 although all reasonable care has been taken in the development of Cochlear Link to guard against defects or vulnerabilities, we cannot guarantee, represent or warrant that Cochlear Link is virus, worm, defect or Trojan horse free, and therefore it is your responsibility to secure your own systems and your access to Cochlear Link.
- 2.3 Cochlear represents and warrants that:
- 2.3.1 it owns or licenses all Intellectual Property Rights in Cochlear Link and has the authority to grant the rights subject to the Terms; and
  - 2.3.2 Cochlear Link does not and will not infringe the Intellectual Property Rights of any third parties.
- 2.4 You acknowledge that your Use of Cochlear Link may be interfered with by numerous factors outside of our control.
- 2.5 Unless expressly provided by us, should you rely on any materials, data or other information provided or otherwise made available in or through Cochlear Link for any reason you do so at your own risk.
- 2.6 Subject to the Statutory Obligations and other applicable law, we make no guarantees, representations or warranties on behalf of, and accept no responsibility for services made available in or through Cochlear Link by people other than us.

**3. RULES FOR USING COCHLEAR LINK**

- 3.1 You agree that each time you Use Cochlear Link you will not:
- 3.1.1 act in violation of the Terms or any applicable laws;
  - 3.1.2 violate the rights of any person (including us), including trade secrets, privacy rights, confidentiality rights, Intellectual Property Rights (as defined in clause 15.7) and other rights;
  - 3.1.3 use Cochlear Link in any manner which is not reasonable and/or not in accordance with the purposes for which it is made available to you, such as off-label use, or to build a similar or competitive product;

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- 3.1.4 use Cochlear Link (directly or indirectly) for any activity which is obscene, indecent or offensive and/or which defames, abuses, harasses, stalks, threatens, menaces or offends any person;
  - 3.1.5 use any device, software, process or means to access, retrieve, scrape or index any content on or from Cochlear Link and/or to interfere, or attempt to interfere, with the proper working of Cochlear Link;
  - 3.1.6 provide false identity information to gain access to or use Cochlear Link, pose as any person or attempt to solicit money, passwords or Personal Information (as defined in clause 15.7) from any person and/or gain access, or attempt to gain access, to any secured portion of Cochlear Link to which you do not possess express access rights;
  - 3.1.7 reproduce, republish, retransmit, modify, adapt, distribute or redistribute, translate, create derivative works or adaptations of, publicly display, sell, trade, or in any way exploit Cochlear Link or any content on Cochlear Link, except as expressly authorised by us;
  - 3.1.8 remove, alter, cover or obfuscate any copyright, trade mark or other propriety rights notices on or embedded in the Software, including on or in any machine readable or printed portion of the Software displays, packaging and labelling;
  - 3.1.9 reverse engineer, decompile, disassemble all or any portion of the Software or otherwise attempt to gain access to the human-readable computer programming language (ie source code) version of the Software; and/or
  - 3.1.10 intentionally transmit, or attempt to transmit, any computer viruses, worms, defects, Trojan horses or other items of a destructive nature that do, or are designed to, interrupt, destroy, change or limit the functionality of Cochlear Link or any other computer software, hardware or other electronic equipment or information which in any way impinges on another user's use or enjoyment of Cochlear Link, or otherwise breaches, or encourages other users to breach, the Terms.
- 3.2 In Using Cochlear Link, you acknowledge that certain minimum system requirements apply. Such minimum system requirements may change over time and will be supplied to you upon request. You are responsible for the proper configuration, maintenance, backup and security of any computing and/or networking equipment to enable your connection to and Use of Cochlear Link.
- 3.3 You must notify us immediately (and in any event, within 24 hours) of any unauthorised use of any username or password or any other known or suspected breach of security, and use reasonable efforts to stop any unauthorised use of Cochlear Link that is known or suspected by you. We may exercise whatever means we deem necessary to prevent unauthorised Use of Cochlear Link, including instituting technological barriers or reporting the conduct to any person or governmental agency.

**4. INTELLECTUAL PROPERTY**

- 4.1 All Intellectual Property Rights in Cochlear Link are owned by or licensed to us, unless otherwise expressly notified by us.
- 4.2 You represent and warrant that you do now, or will prior to your Use of Cochlear Link, own or have a licence to all Intellectual Property Rights in all data provided by you to Cochlear through your Use of Cochlear Link ("**Data**").

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4.3 You grant to us a limited license to use and disclose the Data (i) to the extent necessary to provide the Cochlear Link service in compliance with the Terms and applicable law and (ii) as otherwise set out in these Terms.

**5. AUTOMATIC SOFTWARE UPDATES**

5.1 The Software, once installed, regularly communicates with our servers to determine whether there are any patches, bug fixes, updates, upgrades or other modifications to improve the Software. You agree that the Software may automatically install any such improvements to the Software without providing any further notice. This feature may not be disabled. If you do not want to receive automatic updates, you must uninstall the Software.

**6. DATA AND DATA PROTECTION**

6.1 If you provide Data or other information to us or into Cochlear Link which contains Personal Information then, without limiting any of your obligations to us, you warrant that:

6.1.1 the Personal Information has been obtained in accordance with Privacy Law (as defined in clause 15.7); and

6.1.2 we are authorised (either by consent of the individual or otherwise by Privacy Law) to receive the Personal Information from you, use, share and otherwise process the Personal Information in accordance with the Terms.

6.2 Responsibilities under European Data Protection Law: Subject to clause 6.3, where European Data Protection Law applies to the processing of Personal Information, you and we will each act as independent data controllers and you and we are each responsible for our own compliance with European Data Protection Law and do not rely on the other party for this purpose. You and we both acknowledge that there may be circumstances in which you and we act as joint controllers (e.g., when data is synchronised via Cochlear Link), as you and we may jointly determine the purposes and means of processing of certain Data. Each of us shall comply with all the obligations applicable to us under European Data Protection Law and to the extent that you and we act as joint controllers:

6.2.1 any party that receives a data subject request which relates to Data processed jointly by the parties shall contact the other party should assistance be required with responding to that data subject request; and

6.2.2 you and we agree to provide reasonable assistance as is necessary to each other to enable the other party to comply with data subject requests and to respond to any other queries or complaints from data subjects.

6.3 Where European Data Protection Law applies and you act as our service provider, clause 6.2 does not apply and the terms set out in your agreement with Cochlear (for example, a service agreement) will apply to your and our handling of Personal Information.

6.4 Responsibilities under Non-European Data Protection Law: If Non-European Data Protection Law applies, each party will comply with any obligations applicable to it under that law with respect to the processing of Personal Information and, in particular, will:

6.4.1 keep Personal Information confidential (and ensure its employees and contractors comply with their confidentiality requirements) and that Personal information is disclosed only on a need-to-know basis in accordance with the Terms;

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- 6.4.2 adequately protect against unauthorised or unlawful access to or processing of Personal Information and against accidental loss or destruction or disclosure of, or damage to, Personal Information; and
- 6.4.3 ensure it has an appropriate data breach response plan in place to handle any actual or suspected data breaches affecting Personal Information.
- 6.5 If you access Cochlear Link from the United States, you acknowledge that a Business Associate Agreement is not required under HIPAA, as further described by the U.S. Department of Health and Human Services,<sup>1</sup> and any sharing of Personal Information, including Protected Health Information, shall fit within HIPAA's treatment exception.
- 6.6 We do not guarantee any back-up or other storage of any Data and we are not required to make any Data available to you, other than as required by Privacy Law.
- 6.7 We may use or otherwise process De-identified Data processed in connection with Cochlear Link for (i) evaluating, improving and/or developing our products and services; (ii) developing new products and services; and (iii) analytics and scientific research.
- 6.8 Any disputes or claims (including non-contractual disputes or claims) arising out of or in connection with this clause 6 shall be governed by and construed in accordance with the laws of the country where you are located.

**7. SECURITY OF COCHLEAR LINK**

- 7.1 Use of Cochlear Link is password protected. You must memorise your password and store your password in a safe and secure place. You agree that you will not disclose your password or allow your password to be used by any person who is not authorised pursuant to the Terms to access or use your password and you are responsible and liable to us for any Use of Cochlear Link by anyone using your password. Subject to the Statutory Obligations and other applicable law, we accept no responsibility for breaches of security or unauthorised access to Cochlear Link.
- 7.2 Cochlear will implement and maintain appropriate administrative, organizational (physical) and technical safeguards to help protect the Data against unauthorised access, destruction, modification and disclosure.

**8. LIMITATION OF LIABILITY & INDEMNITY**

- 8.1 To the maximum extent permitted by law but subject to the Statutory Obligations and excluding any indemnification obligations, neither party nor any of its directors, officers, employees, principals or contractors shall have any liability to the other party in contract, tort, statute or in any other way (whether arising from negligence or otherwise) for any indirect, special, incidental, or consequential damage or loss of any kind, including loss of profits, loss of revenue or business opportunities, business interruption, costs, charges or expenses, or for any damage for personal injury or loss of Data, even if the other party has been advised of the possibility of such damages.

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<sup>1</sup> <https://www.hhs.gov/hipaa/for-professionals/faq/490/when-may-a-covered-health-care-provider-disclose-protected-health-information-without-authorization/index.html>.

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- 8.2 To the maximum extent permitted by law and subject to the Statutory Obligations, in no event shall our total liability to you for all direct damages (other than as may be required by applicable law) exceed the amount of two hundred and fifty dollars (US\$250.00).
- 8.3 You will at all times indemnify and will continue to indemnify, hold harmless and defend us and our directors, officers, employees, principals and contractors (our Indemnified) against all losses, whether direct or indirect, including all liabilities, damages, costs and expenses (including all legal costs determined on a full indemnity basis), suffered or incurred by any of our Indemnified arising out of or in connection with any claims brought by third parties arising from your negligence, wilful misconduct, and/or breach of clause 3 or any express warranty set out in the Terms. To the extent that the indemnity in this clause refers to persons other than us, we hold this indemnity on trust for those other persons.
- 8.4 Cochlear will at all times indemnify and will continue to indemnify, hold harmless and defend you and your officers, employees, principals and contractors (your indemnified) against all losses, whether direct or indirect, including all liabilities, damages, costs and expenses (including all legal costs determined on a full indemnity basis), suffered or incurred by any of your indemnified arising out of or in connection with any claims brought by third parties arising from our breach of any express warranty set out in the Terms.
- 8.5 In defence or settlement of a claim relating to any actual or alleged infringement or violation of Intellectual Property Rights by Cochlear, we may, at our election, obtain for you the right to continue using Cochlear Link, replace or modify Cochlear Link to ensure its non-infringement, or terminate the Terms upon written notice to you. Further, no indemnity obligations shall arise for such claims where they arise as a result of: (i) your use of the Cochlear Link in violation of the Terms; and/or (ii) your failure to use updated or modified Software provided by Cochlear to avoid an infringement claim or failure to install upgrades in a timely manner.
- 8.6 If any third party makes a claim, or notifies an intention to make a claim, relevant to clauses 8.3 or 8.4 of the Terms, the party against which the claim is made (the “**Indemnified Party**”) shall:
- 8.6.1 as soon as reasonably practicable, give written notice of the claim to the other party (the Indemnifying Party), specifying the nature of the claim in reasonable detail;
- 8.6.2 not make any admission of liability, agreement or compromise in relation to the claim without the prior written consent of the Indemnifying Party (such consent not to be unreasonably conditioned, withheld or delayed);
- 8.6.3 give the Indemnifying Party and its professional advisers access at reasonable times (on reasonable prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Indemnified Party, so as to enable the Indemnifying Party and its professional advisers to examine them and to make copies (at the Indemnifying Party’s expense) for the purpose of assessing the claim; and
- 8.6.4 subject to the Indemnifying Party providing security to the Indemnified Party’s reasonable satisfaction against any claim, liability, costs, expenses, damages or losses which may be incurred, take such action as the Indemnifying Party may reasonably request to avoid, dispute, compromise or defend the claim.

**9. RESTRICTION ON DISTRIBUTION**

The Software may be subject to export laws and regulations. We do not authorise you to ship or export the Software or any portion thereof to any country or jurisdiction other than the country or jurisdiction in which you acquired it. Without limiting the foregoing, you agree that you will comply with all such export laws and regulations and will not ship or export the Software or any portion thereof to any country or jurisdiction to which such shipment or export would be prohibited under any laws.

**10. STOPPING YOUR USE OF COCHLEAR LINK**

10.1 You may terminate your Use of Cochlear Link at any time by uninstalling the Software and by contacting our Customer Service team<sup>2</sup> for your country or region. We reserve the right to terminate, temporarily block, suspend or otherwise deny your Use of Cochlear Link at any time and for any reason and, subject to the Statutory Obligations and other applicable law, at no cost or liability to you. We will notify you prior to, or as soon as reasonably practicable after, any suspension, termination or other blockage of your Use of Cochlear Link.

10.2 We may change, remove or discontinue Cochlear Link or any features or functionality of Cochlear Link from time to time. We will notify you in advance of any material change to or discontinuation of Cochlear Link.

**11. EFFECT OF TERMINATION**

11.1 Upon termination of the Terms;

11.1.1 all your rights under the Terms immediately terminate;

11.1.2 you will immediately return or, if instructed by us, destroy all Software in your possession; and

11.1.3 any post-termination assistance from us is subject to mutual agreement.

**12. NOTICES**

Any notices or communications to Cochlear under or relating to these Terms must be provided in writing and shall be addressed to: Cochlear Ltd, 1 University Avenue, Macquarie University, NSW 2109 Australia, ATTN: Group General Counsel.

**13. GOVERNING LAW AND CONTRACTING ENTITY**

13.1 Without prejudice to clause 6.8, if you access Cochlear Link from:

13.1.1 North America, the Terms are governed by the laws of the State of Colorado, USA, and Cochlear Link is provided by Cochlear Americas;

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<sup>2</sup> <https://www.cochlear.com/customer-service>.

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- 13.1.2 Latin America, the Terms are governed and interpreted under the laws of the Republic of Panama and Cochlear Link is provided by Cochlear Latinoamérica S.A.;
- 13.1.3 Europe, the Middle East or Africa, the Terms are governed by the laws of England and Cochlear Link is provided by Cochlear Europe Limited; or
- 13.1.4 Asia, Australia or elsewhere in the South Pacific, the Terms are governed by the laws of the State of New South Wales, Australia, and Cochlear Link is provided by Cochlear Limited,

except where you are required by applicable law or regulation to enter into contracts governed by the laws of a specific country, in which case these Terms are governed by the laws of that specific country.

- 13.2 You agree to submit to the non-exclusive jurisdiction of the courts and courts of appeal from them in the jurisdiction of the governing law applicable to you in accordance with clause 13.1 and you agree that you will not object to the exercise of such jurisdiction by those courts on any basis.

#### 14. SURVIVAL

Clauses 2.1-2.2, 2.4-2.6, 6.7, 6.8, 8, and 11-15 of the Terms survive the termination (for any reason) or expiry of the Terms.

#### 15. MISCELLANEOUS PROVISIONS & TERMINOLOGY

- 15.1 These Terms which, for the avoidance of doubt, include Modifications accepted pursuant to the Terms contain everything that we and you have agreed in relation to the subject matter dealt with by the Terms. You cannot rely on an earlier written document or anything said or done by or on behalf of us that are not contained in the Terms. We will not be bound by any term, condition or other provision which is different from or in addition to the provisions contained in the Terms (whether or not it would materially alter the Terms) and which is submitted by you in any confirmation, correspondence or any other document. If we provide a translation of the English language version of the Terms, the English language version of the Terms will prevail to the extent of any conflict or inconsistency.
- 15.2 Any of our software (other than the Software) to be acquired by/licensed to you ("**Additional Software**") will be done so on separate stand-alone terms and conditions ("**Additional Software Terms**"). In the event and to the extent of an inconsistency between the Terms and any Additional Software Terms the Terms will prevail in respect of Cochlear Link or any part of it and the Additional Software Terms will prevail in respect of the Additional Software or any part of it.
- 15.3 In the interpretation of the Terms, the following applies unless the context otherwise requires:
  - 15.3.1 headings are inserted for convenience only and do not affect the interpretation of the Terms;
  - 15.3.2 a reference in the Terms to any law, legislation, legislative provision, statute, regulation or code includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision, and any re-statement of a code;
  - 15.3.3 an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency; and



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- 15.3.4 a reference to the word "include" or "including" is to be interpreted without limitation.
- 15.4 Subject to the Statutory Obligations and other applicable law, we are not liable to you for any delay in performing, or failure to perform, any of our obligations if such delay or failure is due to a Force Majeure Event (as defined in clause 15.7).
- 15.5 Each provision of the Terms is individually severable. If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction it is to be treated as being severed from the Terms in the relevant jurisdiction, but the rest of the Terms will not be affected. The legality, validity and enforceability of the provision in any other jurisdiction will not be affected.
- 15.6 A waiver of any right, power or remedy under the Terms by either party must be in writing signed by both parties. A waiver by either party only affects the particular obligation or breach for which it is given, and it is not an implied waiver of any other obligation or breach or an implied waiver of that obligation or breach on any other occasion. The fact that either party fails to do, or delay in doing, something that it is entitled to do under the Terms does not amount to a waiver by the party.
- 15.7 In the Terms, the following definitions apply:
- "Additional Software"** has the meaning given to that term in clause 15.2.
- "Additional Software Terms"** has the meaning given to that term in clause 15.2.
- "Cochlear Link"** has the meaning given to that term in the Welcome section at the beginning of the Terms.
- "Data"** has the meaning given to that term in clause 4.2.
- "De-identified Data"** means Data where all identifying information has been obscured or removed such that it is not reasonably likely that an individual can be identified from such data.
- "EU GDPR"** means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
- "European Data Protection Law"** means as applicable EU GDPR, the Federal Data Protection Act of 19 June 1992 (Switzerland) and the UK GDPR, as amended from time to time.
- "Force Majeure Event"** means any event or other occurrence which is beyond our reasonable control.
- "HIPAA"** means the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, the regulations enacted by the Department of Health and Human Services at 45 CFR Parts 142, 160-164, and requirements of the Health Information Technology for Economic and Clinical Health Act ("HITECH"), as incorporated in the American Recovery and Reinvestment Act of 2009 and any regulations promulgated pursuant thereto, as amended from time to time.
- "Intellectual Property Rights"** means all intellectual property rights at any time recognised by law, including:
- (a) patents, copyright (including future copyright), circuit layout rights, designs, trademarks, business names, whether registered or not, trade secrets, know-how and other intellectual property rights but not including Moral Rights; and

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- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a).

**"Modifications"** has the meaning given to that term in the Acknowledgments section at the beginning of the Terms.

**"Moral Rights"** has the meaning given to that term in the *Copyright Act 1968* (Cth) and includes a right of a similar nature that is conferrable by statute, and that exists or comes to exist anywhere in the world.

**"Non-European Data Protection Law"** means data protection or privacy laws in force outside the European Economic Area, Switzerland and the UK, as amended from time to time.

**"Personal Information"** means any information or an opinion about an identified individual, or an individual who is reasonably identifiable (including information forming part of a database), whether true or not, and whether recorded in material form or not and includes 'sensitive information' (as that term is defined in the Privacy Law).

**"Privacy Law"** means as applicable, EU Data Protection Law and Non-European Data Protection Law.

**"Software"** means the computer program accompanying/to be used with Cochlear Link that is furnished (whether electronically as a download or physically on a disk or other media) to you for use (including all components of the program, such as screen displays, graphics, images, applets, and files), as well as any accompanying manuals or documentation, whether printed or in electronic form, as well as the media containing the program.

**"Statutory Obligations"** has the meaning given to that term in clause 2.1.

**"Support Services"** has the meaning given to that term in clause 2.2.2.

**"Terms"** has the meaning given to that term in the Acknowledgments section at the beginning of the Terms.

**"Use", "Uses" and "Using"** has the meaning given to those terms in the Acknowledgments section at the beginning of the Terms.

**"UK GDPR"** means the EU GDPR as amended and incorporated into UK law under the UK European Union (Withdrawal) Act 2018, if in force.

**Last updated:** 11 June 2021