

101Smart Ltd

# Smart Messenger Terms and Conditions

101Smart Ltd: May 2018

## Terms and Conditions

This document sets out the terms and conditions (“Terms”) between (1) the Client, whose details are given on the Service Agreement and (2) 101Smart Ltd, via its online Smart Messenger Service which provides tools and resources to create, launch, and manage online email campaigns. These Terms and the associated Data Processing Agreement govern your use of Smart Messenger. By using these products and services, you confirm that you accept these Terms and that you agree to abide and be bound by them. YOU MAY NOT USE THE PRODUCTS AND SERVICES UNLESS YOU AGREE TO BE BOUND BY THESE TERMS AND THE DATA PROCESSING AGREEMENT.

These Smart Messenger Conditions (together with any agreed Supplier Conditions) shall apply to any Service Agreement between 101 and the Client for the provision of Email Marketing Products and Services and shall prevail over any inconsistent terms or conditions submitted by the Client or implied by trade custom, practice or course of dealing. In the event of conflict between these Smart Messenger Terms and Conditions and the Supplier Conditions, these Smart Messenger Terms and Conditions shall prevail.

## Interpretation

<b>101</b>	refers to 101Smart Ltd, the provider of the products and services, and their agents
<b>Client</b>	refers to you, the person or organisation using the Smart Messenger products and services, or their authorised agent
<b>Data Controller</b>	refers to the client, who determines the purpose of the data processing
<b>Data Processor</b>	refers to the 101, which processes personal data on behalf of the controller
<b>Data Protection Legislation</b>	means all applicable legislation, regulations, guidelines and rules in the UK, including, without limitation, GDPR and PECR and ePrivacy
<b>Services</b>	refers to the Smart Messenger products and services
<b>Spam</b>	means all forms of unsolicited or “junk” mail
<b>Usage</b>	Refers to the number of emails sent and API calls made in a calendar month

## Services and Support

The Services are provided subject to the Service Agreement and any guidelines, rules or operating policies that 101 may establish and post from time to time. By posting updated versions of the Terms and Conditions at [www.101ltd.com](http://www.101ltd.com), or otherwise providing notice to you. 101 may modify the Terms and Conditions and may discontinue or revise any or all other aspects of the Services at its sole discretion. All such changes shall become effective upon posting of the revised Terms and Conditions.

The Services are available only to persons who can form legally binding contracts under applicable law.

Usage is metered by 101 and unused volume does not carry over from month to month.

Use of any Services indicates full acceptance of these Terms and Conditions, the Service Agreement together with the Data Processing Agreement and its Annexe.

## Charges, Invoices and Payment

The Client shall pay the charges for the Services in accordance with these Terms and Conditions, with any terms set out in the Service Agreement or in accordance with any other payment terms agreed in writing with 101.

The Services will be subject to an initial one (1) year period and then ongoing quarterly subscription.

All Billed Services will be invoiced monthly in advance, unless otherwise defined in the Service Agreement.

All Billed Usage will be invoiced monthly in arrears, unless otherwise defined in the Service Agreement. Usage pricing may vary based upon volume. You are responsible for reviewing your account online and the Services and Usage from time to time to remain aware of the fees chargeable by 101.

The Services and Usage costs are subject to change at any time.

If the Client fails, for any reason, to pay any sums due to 101 then 101 reserves the right to suspend the provision of the Services to the Client until all outstanding invoices have been settled in full in cleared funds, whereupon the Services will be reinstated. In some cases, a reinstatement fee may be applicable before the Services are reactivated.

All fees paid to 101 for Smart Messenger are non-refundable, unless the account is terminated by 101 for a reason other than violation of the Data Protection Legislation or a breach of these Terms and Conditions.

All amounts and fees are exclusive of VAT, payment can be made in GBP via BACS or Cheque.

## Restrictions and Responsibilities

The Service Agreement for Services does not grant a license to any software. You will not, directly or indirectly: reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code, object code, or underlying structure, ideas, or algorithms of, or found at or through the Services or any software, documentation, or data related to the Services; remove any proprietary notices or labels from the Services, modify, translate, or create derivative works based on the Services; or copy, distribute, pledge, assign, or otherwise transfer or encumber rights to the Services. The Services shall be used for your internal business (which includes civic or charitable) purposes only. If you are using the Services in

any country in the European Economic Area, the prohibition against modifying, translating, reverse engineering, decompiling, disassembling or creating derivative works based on the Services or the Software does not affect your rights under any legislation implementing the E.C. Council Directive on the Legal Protection of Computer Programs.

You acknowledge and agree that the Services and the Smart Messenger name and logos and all related product and service names, design marks and slogans, are the property of 101. You are not authorised to use any of the Marks in any advertising, publicity or any other commercial manner without the prior written consent of 101. Your use of the Services confers no title or ownership in the Service, the Software or the Marks and is not a sale of any rights in the Service, the Software or the Marks. All ownership rights remain with 101.

## Data Protection

The Client is the Data Controller and 101 is the Data Processor in respect of any personal data that 101 processes in the course of providing the Services. Personal data is derived from data provided by the Client and is not checked or monitored by 101. 101 has no liability or responsibility whatsoever howsoever arising directly or indirectly to the Client for the accuracy, content or use of such personal data, provided that such use is in accordance with the instructions of the Client and 101's obligations set out in the Data Processing Agreement.

The Services may only be used in compliance with all current and future Data Protection Legislation. Transmission or solicitation of any material that violates any laws that may apply in this jurisdiction or your local area is prohibited. This may include material that is obscene, threatening, harassing, libellous, or in any way a violation of intellectual property laws or a third party's intellectual property rights.

In using the varied features of the Services, you may provide information (such as name, contact information, or other registration information) to 101. 101 may use this information and any technical information about your use of the Services to tailor its presentations to you, facilitate your movement through the Services, or communicate separately with you. If you licensed the Services as a result of solicitation by a Partner of 101, 101 may share your information with that Partner. 101 will not provide information to any unauthorised third party.

101 will not use your data for any other purposes than those intended with the Services. Your data will not be shared with any other parties.

The Client is responsible for maintaining the security of account details, passwords, and files, and for all uses of your account and of the Services in your name. 101 reserves the right to refuse registration of, or cancel, accounts it deems inappropriate.

The Services are provided by our service providers:

[dotmailer](#)

[Instiller](#)

## Termination

You may terminate the Service Agreement at any time by contacting 101, at least one full quarters written notice is required. All Correspondence must include your name, and Services details. No refunds will be issued if you terminate this agreement.

101 may terminate this Agreement or the Services at any time with or without cause, and with or without notice. Upon termination by 101 for reason other than violation of Data Protection Legislation or a breach of these Terms and Conditions, 101 will provide you a proportionate refund of the advance quarterly payment based on the number of days remaining in the quarter following the date of termination. Except for such refund, 101 shall have no liability to you or any third party because of such termination. If 101 terminates this agreement because you violated Data Protection Legislation or a breach of these Terms and Conditions, no refund will be issued.

101 may delete any of your data after the date of termination. All sections of this Agreement, which by their nature should survive termination, will survive termination, including, without limitation, ownership, warranty disclaimers and limitations of liability.

## Warranty Disclaimer; Remedies

101 undertakes that the Services will perform substantially in accordance with the Service Agreement.

Use of the Services and any reliance by you upon the Services, including any action taken by you because of such use or reliance, is at your sole risk.

101 does not warrant that the services will be uninterrupted or error free; nor does it make any warranty as to the results that may be obtained from use of the services. The Services are provided "as is" and 101 disclaims all warranties, express or implied, including, but not limited to, implied warranties of merchantability, fitness for a particular purpose and non-infringement.

Your sole and exclusive remedy for any failure or non-performance of the Services shall be for 101 to use commercially reasonable efforts to adjust or repair the Services.

101 has no responsibility or liability for the backup of Client data and the Client remains solely responsible for making its own backups.

## Limitation of Liability

To the maximum extent permitted by law, under no circumstances and under no legal theory, tort, contract, or otherwise, shall 101 or any of its underlying service providers, business partners, information providers, account providers, licensors, employees, distributors or agents be liable to you or any other person for any money damages, whether direct, indirect, special, incidental, cover, reliance or consequential damages, even if 101 shall have been informed of the possibility of such damages, or for any claim by any other party. In the event that, notwithstanding the foregoing, 101 is found liable to you for damages from any cause whatsoever, and regardless of the form of the action (whether in contract, tort (including negligence), product liability or otherwise), the liability of 101 to you will be limited to the amount you paid for the Services.

## Miscellaneous

If any provision of the Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable.

101 and you agree that these Terms and Conditions, Service Agreement and Data Processing Agreement are the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications, and other understandings relating to the subject matter of the Agreement, and that all waivers and modifications must be in writing signed by both parties, except as otherwise provided herein. No delay or omission by either party in exercising any right or remedy under the Service Agreement or existing at law or equity shall be considered a waiver of such right or remedy.

No agency, partnership, joint venture, or employment is created as a result of the Agreement, and you do not have any authority of any kind to bind 101 in any respect whatsoever.

In any action or proceeding to enforce rights under the Service Agreement, the prevailing party will be entitled to recover its costs and legal fees.

## Choice of Law and Dispute Resolution

These Terms and Conditions shall be governed and construed in accordance with English Law. Any dispute, controversy or claim arising out of or in connection with this DPA shall be subject to the exclusive and final jurisdiction of the courts of England and Wales.

In the event that the Data Controller is located in a jurisdiction where judgments rendered by the above-mentioned courts cannot be enforced, any dispute, controversy or claim arising out of or in connection

with these Terms and Conditions shall be exclusively and finally settled by arbitration in accordance with the Arbitration Rules of The Arbitration Conciliation and Advisory Service (ACAS).