



CYFERD

ASSUMED UTILISATION FAIR USE POLICY

1. Scope

- 1.1 This 'Cyferd – Assumed Utilisation Fair Use Policy' (this "**Policy**") applies to how and when Excess Utilisation can be charged to Customers whose Utilisation Fees are calculated on an Assumed Utilisation basis (each as defined below). This Policy is made in connection with the provision by Cyferd Ltd ("**Cyferd**") of Access to and use of the Cyferd Product and the Services (each as defined below) to its customers (including those whose Access to and use of the Cyferd Product and the Services is/ was procured through a Cyferd Partner (as defined below)) who have an ongoing Professional Agreement (as defined below) for Access to and use of the Cyferd Product and the Services and where any Utilisation Fees are calculated on an Assumed Utilisation basis (in this Policy each a "**Customer**" and, in respect of each Customer, "**each Customer**", "**the Customer**", "**the Customer in question**" and "**that Customer**" shall be construed accordingly).
- 1.2 This Policy is supplemental to the MSA (as defined below) and, for each Customer, forms part of the Agreement (as defined below) with that Customer in respect of that Customer's Access to and use of the Cyferd Product and the Services.
- 1.3 This Policy is a Cyferd Policy (as defined below).
- 1.4 The Customer's acceptance of this Policy is as provided in the MSA (where 'acceptance' is as defined in the definition of 'Cyferd Policies' in the MSA).
- 1.5 In this Policy "**MSA**" means, in respect of the Customer in question, the master services agreement forming part of the Agreement with that Customer in respect of that Customer's Access to and use of the Cyferd Product and the Services (each version of the MSA (<https://cyferd.com/cyferdcomm/>)).
- 1.6 Terms defined in the MSA (including without limitation "**Access**", "**Agreement**", "**Applicable Currency**", "**Assumed Utilisation**", "**Customer's Expected Utilisation**", "**Cyferd Partner**", "**Cyferd Policy**", "**Cyferd Product**", "**Excess Utilisation**", "**Further Term**", "**Meter Based/ Unit Based Utilisation Pricing Policy**", "**Metered Utilisation**", "**Minimum Term**", "**Ordered**", "**Order Form**", "**month**", "**monthly**", "**Professional Agreement**", "**Services**", "**Tenancies**", "**Tenancy**", "**Tenancy(ies)**", "**Term**", "**Update**", "**Update Notification**", "**Updates**", "**Utilisation**", "**Utilisation Fees**", "**VAT**", "**year**") shall have the same meaning in this Policy unless the context otherwise requires or such term is defined separately in this Policy.
- 1.7 In this Policy:

"Accrued Credit Amount"

(in respect of a year of the Term and subject always to the operation of

paragraph 5.7) the balance from time to time in respect of that year of all amounts added under **paragraph 5.2.7** in respect of that year and the “**then Accrued Credit Amount**” shall be construed accordingly

“**Accrued Excess Amount**”

(in respect of the Term and subject always to the operation of **paragraph 5.7)** the balance from time to time of all amounts added under **paragraph 5.5.3** and/or **paragraph 5.5.4** and the “**then Accrued Excess Amount**” shall be construed accordingly

“**Adjusted Monthly Excess**”

as defined in **paragraph 5.4.3**

“**AU Monthly Amount**”

(in respect of a Customer and the applicable Tenancy(ies) of that Customer (the Utilisation of which being calculated on an Assumed Utilisation basis)) an amount equal 1 (one) 12th (twelfth) of the annual Utilisation Fees (calculated on an Assumed Utilisation basis) provided for in the applicable Order Form (as the same may be amended from time to time in accordance with this Policy)

“**CEU Underlying Information and Assumptions**”

(in respect of a Customer) the assumptions/ input details that underpin the Customer’s Expected Utilisation (as the same may be amended from time to time in accordance with this Policy)

“**EU Determination**”

as defined in **paragraph 5.2.6.2**

“**Monthly Credit Amount**”

as defined in **paragraph 5.2.4.1**

“**Monthly Excess Amount**”

as defined in **paragraph 5.2.4.2**

“**MU Monthly Amount**”

as defined in **paragraph 5.2.2**

1.8 In this Policy:

1.8.1 references to paragraphs are to paragraphs of this Policy;

1.8.2 a reference to this Policy or to any other agreement or document referred to in this Policy is a reference to this Policy or such other agreement or document as amended in accordance with its terms and/or the MSA from time to time;

- 1.8.3 a reference to an “**amendment**” includes a novation, re-enactment, restatement, supplement, extension, variation or an amendment (and “**amend**” and “**amended**” shall be construed accordingly);
- 1.8.4 a reference to “**amended from time to time by Cyferd**” in the context of a Cyferd Policy or other document referred to in this Policy includes where Cyferd can amend the same by itself in accordance with its terms and/or the MSA;
- 1.8.5 a reference to a “**person**” includes a natural person, corporate or unincorporated body (in each case whether or not having separate legal personality) and that person’s personal representatives, successors and permitted assigns;
- 1.8.6 any words that follow “**include**”, “**includes**”, “**including**”, “**in particular**”, “**for example**” or any similar words and expressions shall be construed as illustrative only and shall not limit the sense of any word, phrase, term, definition or description preceding those words;
- 1.8.7 a reference to “**writing**” or “**written**” includes any method of reproducing words in a legible and non-transitory form including email but excluding fax;
- 1.8.8 where the context permits, “**other**” and “**otherwise**” are illustrative and shall not limit the sense of the words preceding them;
- 1.8.9 any obligation on a Customer not to do something includes an obligation not to allow that thing to be done; and
- 1.8.10 references to any English legal or accounting term for any action, remedy, method of judicial proceeding, insolvency proceeding, event of incapacity, legal or accounting document, legal or accounting status, court governmental or administrative authority or agency, accounting body, official or any legal or accounting concept practice or principle or thing shall in respect of any jurisdiction other than England be deemed to include what most approximates in that jurisdiction to the English legal or accounting term concerned.

2. Last Updated

This Policy was last updated on 1 March 2023. For previous versions of this Policy see <https://cyferd.com/cyferdcomm/>.

3. Changes to this Policy

- 3.1 ***For any person who is not a Customer at the time of such posting*** - Cyferd shall, at its absolute discretion, be entitled to amend this Policy or any part of it by posting an updated version of this Policy at <https://cyferd.com/cyferdcomm/> and such updates will be effective upon such posting or, if later, the ‘Last Updated’ date specified in such updated version of this Policy.
- 3.2 ***For any person who is a Customer at the time such Update Notification is made*** – Cyferd may at its absolute discretion make, and notify the Customer of, updated versions of this Policy by notifying the Customer of any such Update(s) by way of Update Notification. Such Update(s) will be effective in respect of the Customer in question in accordance with the applicable provisions of the MSA which relate to Updates. The provisions of the MSA which relate to Updates shall apply in respect of any such Update(s).
- 3.3 If Cyferd makes any amendments to this Policy, it will change the ‘Last Updated’ date in **paragraph 2** above in such updated version of this Policy.

3.4 An Update Notification could be sent/ made by Cyferd in respect of this Policy by e-mail (together with a copy of the Update(s) or a link to a copy of the Update(s)) in accordance with the notices provision in the MSA or by adding a statement to Cyferd's main website page referencing such Update(s) (together with a copy of the Update(s) or a link to a copy of the Update(s)) or by any other reasonable means which Cyferd elects.

4. The rationale behind Assumed Utilisation

4.1 Utilisation Fees calculated on an Assumed Utilisation basis is an assumed/ estimated aggregate annual fee based on the Customer's Expected Utilisation and is subject to this Policy.

4.2 The benefit to the Customer in question of Assumed Utilisation is, providing that Customer's actual Utilisation (calculated on a Metered Utilisation basis) does not infringe/ breach this Policy and trigger Excess Utilisation being chargeable, to be able to budget for and pay such Utilisation Fees in equal monthly payments during the year in question.

4.3 To achieve this, the Customer's Expected Utilisation and the CEU Underlying Information and Assumptions need to be true, accurate and hold. Ultimately the Customer's Expected Utilisation will be based on information provided by the Customer to Cyferd/ Cyferd and the relevant Cyferd Partner (as applicable). It is for this reason that:

4.3.1 (where **not** Ordered through a Cyferd Partner) the following needs Cyferd's agreement: (i) the amount of the Utilisation Fees in question; and (ii) the justification and rationale behind setting such amount and the contents of the Customer's Expected Utilisation; and/or

4.3.2 (where Ordered through a Cyferd Partner) the Cyferd Partner shall **not** be entitled to agree any Assumed Utilisation deal/ amount of Utilisation Fees and the Customer's Expected Utilisation with a Customer without Cyferd's prior written approval of: (i) the amount of the Utilisation Fees in question; and (ii) the justification and rationale behind setting such amount and the contents of the Customer's Expected Utilisation.

4.4 Cyferd's agreement/ prior written approval referred to in **paragraph 4.3** does **not** mean that the amount of Utilisation Fees in question and the Customer's Expected Utilisation or the CEU Underlying Information and Assumptions are/ will be true, accurate and does/will hold.

4.5 All of this results in the operation of **paragraph 5** of this Policy, pursuant to which, if the Customer's actual Utilisation (calculated on a Metered Utilisation basis) for the month in question infringes/ breaches this Policy, then Cyferd shall be entitled to (but not obliged to) charge the Customer for any Excess Utilisation in accordance with this Policy.

5. Excess Utilisation

5.1 This **paragraph 5** applies to each Customer and in respect of each applicable Tenancy of that Customer (the Utilisation of which calculated on an Assumed Utilisation basis).

5.2 Pursuant to and in accordance with/ as referred to in the **Meter Based/ Unit Based Utilisation Pricing Policy** (<https://cyferd.com/cyferdcomm/>) (being a Cyferd Policy and as amended by Cyferd from time to time), Cyferd shall, during the Term:

5.2.1 (on a Metered Utilisation basis) calculate that Customer's actual Utilisation of the Cyferd Product for each of the Tenancy(ies) in question monthly;

- 5.2.2 (on a Metered Utilisation basis) for each month calculate what the Utilisation Fees would be for that month for each of the Tenancy(ies) in question (being, in each case, the Units Consumed multiplied by the Unit Price - both terms as defined in the **Meter Based/ Unit Based Utilisation Pricing Policy**) if the Utilisation Fees were calculated on a Metered Utilisation basis and then calculate the aggregate of such Utilisation Fees for all of the Tenancy(ies) in question for that month (the “**MU Monthly Amount**”);
- 5.2.3 compare (for that month) the MU Monthly Amount against the AU Monthly Amount;
- 5.2.4 following such comparison having been made by Cyferd:
- 5.2.4.1 if the MU Monthly Amount is **less than or equal** to the AU Monthly Amount then no further action shall be taken by Cyferd in respect of that month and that Customer will pay the AU Monthly Amount for that month in the ordinary course. For this purpose (if applicable) the amount by which the MU Monthly Amount is less than the AU Monthly Amount is the “**Monthly Credit Amount**”; or
- 5.2.4.2 if the MU Monthly Amount is **greater than** the AU Monthly Amount then **paragraphs 5.2.5** and **5.2.6** shall apply and that Customer will pay the AU Monthly Amount for that month in the ordinary course. For this purpose the amount by which the MU Monthly Amount exceeds the AU Monthly Amount for that month is the “**Monthly Excess Amount**”; and
- 5.2.5 consider (in its sole discretion and acting reasonably) from the underlying transaction data available to Cyferd in respect of that Customer’s actual Utilisation of the Cyferd Product for each of the Tenancy(ies) in question for that month giving rise to the MU Monthly Amount, whether or not the CEU Underlying Information and Assumptions are true, accurate and held for that month.
- 5.2.6 following such consideration by Cyferd, if Cyferd determines (in its sole discretion and acting reasonably) that:
- 5.2.6.1 the CEU Underlying Information and Assumptions are true, accurate and held for that month then no further action shall be taken by Cyferd in respect of that month and (as stated above) that Customer will pay the AU Monthly Amount for that month in the ordinary course and the Monthly Excess Amount for that month will be ignored; or
- 5.2.6.2 the CEU Underlying Information and Assumptions (or any of them) are untrue, inaccurate and did not hold for that month then **paragraphs 5.3** or **5.4** (as applicable) and **paragraph 5.5** shall apply and (as stated above) that Customer will pay the AU Monthly Amount for that month in the ordinary course (such a determination under this **paragraph 5.2.6.2** being an “**EU Determination**”); and
- 5.2.7 (if any) add the Monthly Credit Amount to the then Accrued Credit Amount.
- 5.3 In the circumstances where, for a particular month:
- 5.3.1 there exists a Monthly Excess Amount where there is no then Accrued Credit Amount; and

- 5.3.2 a corresponding EU Determination,
- then Cyferd shall be entitled (but not obliged) to charge that Customer (whether direct or via the Cyferd partner in question where that Customer has Ordered through a Cyferd Partner) for the Monthly Excess Amount for that month (being Excess Utilisation) in addition to the AU Monthly Amount for that month.
- 5.4 In the circumstances where, for a particular month:
- 5.4.1 there exists a Monthly Excess Amount where there is a then Accrued Credit Amount; and
- 5.4.2 a corresponding EU Determination,
- then Cyferd shall set off as much of the Accrued Credit Amount against such Monthly Excess Amount as is possible until it is used in full or such amount set off is equal to the Monthly Excess Amount (as the case may be). Any balance of the Accrued Credit Amount remaining following such set off shall be the then Accrued Credit Amount. If following such set off:
- 5.4.3 there still exists any of the Monthly Excess Amount (the “**Adjusted Monthly Excess**”) then Cyferd shall be entitled (but not obliged) to charge that Customer (whether direct or via the Cyferd partner in question where that Customer has Ordered through a Cyferd Partner) for the Adjusted Monthly Excess Amount for that month (being Excess Utilisation) in addition to the AU Monthly Amount for that month;
- 5.4.4 all of the Monthly Excess Amount has been set off against in full then no further action shall be taken by Cyferd in respect of that month and (as stated above) that Customer will pay the AU Monthly Amount for that month in the ordinary course.
- 5.5 Notwithstanding the entitlement referred to in **paragraph 5.3** or **paragraph 5.4.3** , Cyferd shall (at its sole discretion) do one or (if applicable) more of the following:
- 5.5.1 (where that Customer has **not** Ordered through a Cyferd Partner) invoice that Customer for all or part of the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be) for that month (being Excess Utilisation) **plus VAT** (in which case such invoice shall be payable by the Customer in full within 30 (thirty) days of the date of such invoice);
- 5.5.2 (where that Customer has Ordered through a Cyferd Partner) require that Cyferd Partner promptly invoices that Customer for all or part the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be) for that month (being Excess Utilisation) **plus VAT** (in which case such invoice shall be payable by the Customer in full within 30 (thirty) days of the date of such invoice);
- 5.5.3 add the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be) to the then Accrued Excess Amount and hence defer making a decision as to if and when it shall be invoiced/ dealt with;
- 5.5.4 add any part of the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be) not invoiced pursuant to **paragraphs 5.5.1** or **5.5.2** to the then Accrued Excess Amount and hence defer making a decision as to if and when it shall be invoiced/ dealt with;
- 5.5.5 consult with that Customer (and if applicable the Cyferd Partner in question) to increase the applicable annual Utilisation Fees (calculated on an Assumed Utilisation basis) and to amend the Customer’s Expected Utilisation and the CEU Underlying Information and Assumptions accordingly for the remainder of the Minimum Term or the then Further

Term (as the case may be) to take into account and hopefully avoid future breaches/ infringements of this Policy. Any such increase and amendments must be to Cyferd's satisfaction. If no such increase and amendments are agreed (to Cyferd's satisfaction) within 30 (thirty) days then such consultation and discussions shall cease. If any such increase and amendments are agreed they shall be documented accordingly (to Cyferd's satisfaction) and the increased Utilisation Fees (and the resulting increased AU Monthly Amount), the amended Customer's Expected Utilisation and the amended CEU Underlying Information and Assumptions shall apply for the purpose of this Policy with effect from such agreement. If and to the extent that such increased Utilisation Fees takes into account all or any of the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be) and/or any then Accrued Excess Amount/ Accrued Credit Amount then such amount(s) shall be reduced by Cyferd accordingly beginning with the Monthly Excess Amount or the Adjusted Monthly Excess Amount (as the case may be); the amount of any such reduction being determined by Cyferd (in its sole discretion).

- 5.6 Cyferd shall be entitled at any time (in its sole discretion) to:
- 5.6.1 (where that Customer has **not** Ordered through a Cyferd Partner) invoice that Customer for all or part of the then Accrued Excess Amount **less** an amount equal to the then Accrued Credit Amount (being Excess Utilisation) **plus VAT** (in which case such invoice shall be payable by the Customer in full within 30 (thirty) days of the date of such invoice);
 - 5.6.2 (where that Customer has Ordered through a Cyferd Partner) require that Cyferd Partner promptly invoices that Customer for all or part of the then Accrued Excess Amount **less** an amount equal to the then Accrued Credit Amount (being Excess Utilisation) **plus VAT** (in which case such invoice shall be payable by the Customer in full within 30 (thirty) days of the date of such invoice); and/or
 - 5.6.3 waive (in writing) off all or part of the then Accrued Excess Amount.
- 5.7 At the end of each year of the Minimum Term/ the end of any Further Term in question (as the case may be) any then Accrued Credit Amount relating to that year will be irrevocably and unconditionally waived and extinguished (resulting in the Accrued Credit Amount being zero at that time) and an equal amount of the then Accrued Excess Amount (or all of the then Accrued Excess Amount if it is less than such amount) will be irrevocably and unconditionally waived and extinguished and any remaining balance will be the then Accrued Excess Amount.
- For the avoidance of doubt the Customer is not entitled to any financial compensation in respect of any Monthly Credit Amount or Accrued Credit Amount other than by way of set off as expressly provided for in this paragraph 5.**
- 5.8 Cyferd shall, from time to time, notify (and keep informed) the Customer (and if applicable the Cyferd Partner in question) of:
- 5.8.1 any Monthly Credit Amount (and any transactions using/ involving it);
 - 5.8.2 any Monthly Excess Amount and if adjusted any resulting Adjusted Monthly Excess Amount;
 - 5.8.3 any EU Determination;
 - 5.8.4 (if any) the then Accrued Excess Amount (and any transactions involving it);

- 5.8.5 (if any) the then Accrued Credit Amount (and any transactions using/ involving it);
 - 5.8.6 any allocations made under **paragraph 5.5.3** and/or **paragraph 5.5.4**;
 - 5.8.7 any waiver made under **paragraph 5.6.3**; and
 - 5.8.8 any irrevocable waiver made under **paragraph 5.7**.
- 5.9 All invoices raised under this **paragraph 5** shall be in the Applicable Currency.
- 5.10 If Cyferd makes any calculation/ determination/ allocation/ setting under or in connection with this Policy and/or issues any certificate, determination or notification of a rate or any amount under or in connection with this Policy, it shall be (in the absence of manifest error) conclusive evidence of the matter to which it relates and binding on the Customer in question.

6. Failure to comply with/ breach of this Policy by the Customer

If a Customer fails to comply with or otherwise breaches the terms of this Policy then such failure to comply/ breach will be considered to be a material breach by the Customer of the MSA and that Customer's Agreement.

7. Law

The provisions of this Policy shall be governed by the laws of England and Wales.

[End of Policy]