

Questionmark European OnDemand and Services Agreement

Questionmark provides assessment management technology that enables trainers, educators and testing professionals to author, schedule, deliver and report on exams, tests, quizzes and surveys. These terms and conditions ("Agreement") shall be applicable to Questionmark's provision of its "OnDemand" service for assessments and related support (the "Service") to Customer ("Customer") and shall govern all Order forms entered into between the Parties with respect to such Services. Questionmark and Customer shall herein be referred to individually as a "Party" and collectively as the "Parties."

Questionmark expressly limits acceptance to the terms and conditions set forth in this Agreement and the applicable Order form. Any terms and conditions contained in a purchase order, request for proposal, order acceptance or similar document from Customer shall not constitute a part of the contract of sale between the Parties. Customer's registration for, or use of, the Service shall constitute acceptance on the terms and conditions set forth in this Agreement and any additional or different terms proposed by Customer are hereby rejected.

1. Definitions

1.1. In this Agreement, the following words will have the following meanings:

Admin Users means any person that uses Questionmark Technology to manage, monitor and report on Assessments and/or Participants;

Affiliate means any entity that directly or indirectly through one or more intermediaries majority owns or controls, is majority owned or controlled by, or is under common majority ownership or control with, Questionmark or Customer;

Assessment means the exam, test, quiz, survey, or other systematic ways of collecting data produced using the Questionmark Technology whether by Questionmark on behalf of a Customer or by the Customer;

Assessment Content means the questions, assessment structure and any other supporting content forming part of Assessments licensed to Customer as described in the Order. Assessment Content shall not include the software, scripts, documentation and templates provided by Questionmark and excludes Customer Data and Results Data;

Assessment Delivery Service means the part of the Service used by Participants in answering online Assessments and excludes other parts of the Service including those parts relating to authoring, administering, printing, scanning and reporting on Assessments;

Author means any Admin User that uses Questionmark Technology to author Assessments;

Business Day means every day excluding Saturdays, Sundays and any national holidays throughout the United Kingdom unless otherwise defined in the Order;

Commencement Date means the date set out in the Order;

Confidential Information means all information (in whatever format) which relates to the business, affairs, networks, customers, products, developments, trade secrets, know-how and personnel of the disclosing Party or information which is marked a confidential or which may reasonably be regarded as the confidential information of the disclosing Party. Confidential Information includes Assessment Content;

Consultancy Services means the consultancy and/or training services provided by Questionmark to Customer (as more particularly described in clause 17) as set forth on an applicable, mutually agreed Order;

Customer means the Party purchasing the Services provided by Questionmark;

Customer Data means the data, information and material provided or submitted by the Customer or Users in the creation, participation or reporting of the Assessment and any output of the Assessments. Customer Data shall expressly not include the software, scripts, documentation and templates that are provided by Questionmark;

Customised Service Configuration means a customised configuration of the OnDemand Service that Questionmark develops and provides specifically for Customer as set forth on an applicable, mutually agreed Order;

Enterprise Support means the support and maintenance of the OnDemand Service as more particularly described in Schedule 2;

Fees means the sums payable by the Customer to Questionmark in consideration of the OnDemand Service together with sums payable in consideration of Enterprise Support, Consultancy Services (as applicable), as more particularly described in the Order;

Force Majeure Event means any act, event, omission or accident beyond the reasonable control of either Party including, but not limited to, acts of God, extreme adverse weather conditions, natural disaster, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, breaking off of diplomatic relations or similar actions, terrorist attack, civil war, civil commotion or riots, nuclear, chemical or biological contamination or sonic boom, compliance with any law, regulation or directive, restrictions on access to the open internet, fire, explosion or accidental damage, failure of plant machinery, machinery, computers or vehicles, any labour dispute, including (but not limited to) strikes, industrial action or lockouts, non-performance by suppliers or subcontractors and interruption or failure of utility or transport service;

Initial Term means the initial period specified in the Order which shall start on the Commencement Date;

Minimum Fee means the sum stated in the Order and described as the "Minimum Fee";

OnDemand Service means the software-as-a-service using Questionmark Technology and provided by Questionmark to the Customer for the creation, delivery, monitoring and reporting of Assessments;

Order means the written quotation for Services provided by Questionmark, which has been accepted by the Customer;

Participant means any User that has access to the system to participate in an Assessment by answering questions or otherwise responding to the Assessment process;

Permitted Use means the use of the OnDemand Service that has been agreed and documented on the Order;

Questionmark means Questionmark Computing Limited whose registered office is at 30 Coleman Street, London EC2R 5AL, England (company number 02278553);

Questionmark Technology means all and any part of Questionmark's proprietary services, software, hardware, products, processes, algorithms, user interfaces, know how, techniques, designs and other tangible and intangible material or information which is provided by Questionmark to the Customer (and, at the Customer's request, Participants) as part of the Services. Questionmark Technology does not include Assessment Content.

Renewal Fees means the Fees payable in respect of each Renewal Term;

Renewal Term means the period specified in the Order for which the Agreement shall automatically renew following the end of the Initial Term or a Renewal Term which shall run from the end of the Initial Term unless this Agreement is terminated in accordance with clause 9;

Service Configuration means options and application program interfaces ("APIs") that have been enabled for the OnDemand Service and the limitations on the number of Assessments and Users that are permitted which shall be more particularly described in the Order;

Services means the services provided by Questionmark to the Customer including (but not limited to) those relating to access to the OnDemand Service and Support and, if selected by the Customer, Enterprise Support and Consultancy Services. The Services selected shall be more particularly described in the Order;

Set Up Fees means the sum set out in the Order and described as a Set Up Fee;

Support means the support and maintenance of the OnDemand Service as more particularly described in Schedule 1;

Term means the Initial Term together with any Renewal Term;

User Account means the User profile stored within the OnDemand Service for an Admin User, Author and/or Participant;

Users means Admin Users, Authors and Participants.

Working Hours means the hours between 0900 to 1700 in the United Kingdom on Business Days unless otherwise defined within the Order.

2. Questionmark's Obligations

- 2.1 Questionmark shall supply the Services to the Customer using reasonable care and skill and in accordance with the terms of this Agreement.
- 2.2 On or before the Commencement Date, Questionmark shall provide the Customer with an individual password, identity code or other security code by which the Customer may access the OnDemand Service via the internet.
- 2.3 Any changes to the Services shall be agreed between the Parties and may be subject to additional Fees as agreed between the Parties in writing.
- 2.4 Without releasing it from any of its duties or obligations, Questionmark may, at any time, without notice, use companies in its group or subcontractors to perform some or all of its duties and obligations under this Agreement.
- 2.5 Questionmark may change the configuration of its network, equipment or any other item material to the provision of the Services at any time provided that such change does not adversely affect the Services.
- 2.6 In the event that an Assessment does not perform properly due to the fault of Questionmark Technology, Questionmark shall allow the affected Participants to retake the Assessment at no additional charge to the Customer. This shall be the Customer's sole remedy for Questionmark's non-performance.
- 2.7 Questionmark accepts no liability for any failure in the OnDemand Service owing to:
 - 2.7.1 the Customer's failure to follow correctly Questionmark's reasonable instructions;
 - 2.7.2 malfunctioning of the Customer's software or failure of its software to interoperate with other software (including firmware) or operating systems and applications necessary for the Services;
 - 2.7.3 malfunctioning of the Customer's hardware;
 - 2.7.4 loss or corruption of any password, security code or other identification code unless such corruption or loss was caused by Questionmark;
 - 2.7.5 loss of or corruption of data caused while the data is in transit to or from Questionmark's storage facility, where such loss/corruption is not within the control of Questionmark; or

2.7.6. the Customer being frozen out of access to the Services owing to a denial of service attack (unless Questionmark did not implement reasonable safeguards against denial of service attacks).

2.8 Notwithstanding the definition of “Order” set forth in clause 1, if Customer has purchased the OnDemand Service from a Questionmark reseller, the definition of “Order” shall refer to the Order between Questionmark and such reseller. Questionmark shall be obligated to provide the Services only in conformity with such Order, including with regard to the Term and the Service Configuration, regardless of whether the order or other documentation between Customer and such reseller provides different terms. Customer’s sole recourse and remedy for any loss, damage, expense or other liability caused by such discrepancy shall be against such reseller.

3. Customer Obligations

3.1 Customer may use the OnDemand Service during the Term solely in conformance with the terms of this Agreement and the Service Configuration. Customer understands that Questionmark has priced the OnDemand Service based on the Service Configuration, and if Customer requires an increase in the Service Configuration further charges may be due. In the event that Customer exceeds the limitations of the Service Configuration, Questionmark may charge Customer for any excess use on a pro rata basis. Questionmark will use commercially reasonable efforts to advise Customer of any such excess use of which it becomes aware.

3.2 The Services require use of the open internet. The Customer shall, at its own cost, provide all internet connections, hardware, software and all other equipment necessary to use the Services and shall have sole responsibility for the maintenance and upkeep of such items, unless otherwise expressly agreed between the Parties. Customer is responsible for ensuring prior to entering into this Agreement and during the Term that it is able to access and use the open internet in all jurisdictions in which it intends to use the Services. The inability of Customer or Participants to access and use the Services due to open internet restrictions in any jurisdiction shall not constitute a Service Incident, Unscheduled Downtime or failure by Questionmark to perform its obligations under this Agreement.

3.3 The Customer shall keep confidential all usernames, passwords, identification codes and security codes provided by Questionmark and shall notify Questionmark promptly in the event that it suspects the loss or unauthorised use or disclosure of any such username, password or code. The Customer acknowledges that except for any activity that occurs more than one (1) Business Day after notifying Questionmark of the suspected loss or disclosure or any unauthorized use of a username, password or code, it shall be liable for any activity carried out by a User or under any password, identification code or security codes issued to it as if it were the party using it and shall take all reasonable efforts to prevent such breach and mitigate any losses.

3.4 Where the Order permits access to the OnDemand Service through Questionmark APIs, the Customer shall only access the OnDemand Service through the APIs listed in the Order and in accordance with the documentation and instructions provided by Questionmark in relation to that access.

3.5 Customer acknowledges that in the performance of the Services, Questionmark may require the disclosure by Customer of certain information, or access to certain of Customer’s computer systems or databases. Customer agrees to provide Questionmark all access reasonably requested to enable Questionmark to complete the Services in accordance with the Order. Questionmark will have no liability for any failure or delay to provide the Services where such failure or delay is caused by or arises from the Customer’s failure to provide necessary information or access.

3.6 The Customer may use the OnDemand Service as it may determine without any restriction provided that such use is in accordance with this Agreement, the Permitted Use and any applicable laws.

3.7 The Customer may not modify or make derivative works based upon the OnDemand Services or any associated documentation except as permitted by law or hide or attempt to hide copyright information or identification of Questionmark’s ownership of the OnDemand Services. Customer is prohibited from reverse

engineering or accessing the Services in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the OnDemand Services, or (c) copy any ideas, features, functions or graphics of the OnDemand Services. Customer may monitor performance of the OnDemand Service but such information is Confidential Information of Questionmark under this Agreement.

- 3.8 Customer acknowledges that the OnDemand Service may be used to correspond with Participants and to assess a Participant's knowledge, skills and attitudes and allocate a score. Customer is solely responsible for all correspondence with Participants. Scores should be considered one piece of evidence about a Participant's knowledge, skill and/or attitude. When the OnDemand Service is being used to make decisions about a Participant (such as whether to hire, promote or fire the Participant), Customer is solely responsible for the fairness, quality and validation of the Assessment and should review and evaluate the Participant's score to ensure that the appropriate decision has been made. Customer is solely responsible for its use of the OnDemand Service and Assessment, including entering and maintaining the Assessment material, validating the Assessment, checking this material, checking scores and checking reports. Customer shall indemnify and hold Questionmark, its suppliers, and/or its licensors harmless from any and all third party claims, liabilities, damages, costs and/or expenses and suits arising out of the use of Services or use of the scores or outcomes to make decisions relating to Participants, including, but not limited to, any and all such claims, liabilities, damages, costs and/or expenses, and suits arising from, related to, or caused by any employment decisions, whether favourable or adverse in nature or effect, made by Customer based upon Customer's use of the Service or scores produced from Customer's use of the Service, including, but not limited to, employment termination or discharge, or discipline; employee compensation; and/or employment promotions or advances.
- 3.9 The Customer undertakes not to use the OnDemand Service in such a way as to store or transmit anything that is reasonably likely to be offensive, harassing, threatening, abusive, obscene, illegal, or defamatory, breaches the rights of any third party, or contains software viruses, worms, Trojan horses or other harmful computer code, spyware, adware, malware, files, scripts, agents or programs.

Customer is prohibited from:

- (i) using the OnDemand Service to support criminal activity or illegal purpose;
- (ii) undertaking penetration testing of the OnDemand Service without advance written permission of Questionmark obtained through completion of Questionmark's standard form, to Questionmark's reasonable satisfaction;
- (iii) undertaking large-scale performance testing of the OnDemand Service without advance written permission of Questionmark;
- (iv) impersonating another user of the OnDemand Service or a Questionmark employee;
- (iv) hiding or removing Questionmark's copyright statements;
- (v) attempting, whether successful or not, to violate the security of a network, service, or other system, including but not limited to hacking, cracking into, monitoring, or using systems without authorization, scanning ports, and conducting denial of service attacks;
- (vi) interfering with or disrupting the integrity or performance of the OnDemand Service or the data contained therein;
- (viii) attempting to gain unauthorized access to the OnDemand Service or its related systems or networks;
- (ix) using the OnDemand Service to send unsolicited e-mails or communications in any form, including without limitation, posting messages similar in content to more than five (5) online forums or newsgroups or that violate the rules of the applicable forum or newsgroup;
- (x) sending solicitations, such as charity requests, petitions for signatures, or any chain mail related materials;
- (xi) knowingly violating an internet service provider's acceptable use policy and/or terms of service;
- (xii) assisting or permitting any persons in engaging in any of the activities described above.

If Customer becomes aware of any such activities, Customer will take all actions necessary to stop such activities immediately, including, if necessary, terminating a User's access to the OnDemand Service. Questionmark may check system files, email and other data for illegal content and materials, or for any other reasons deemed reasonably necessary.

To the extent Questionmark is aware of any violation of this clause 3.9, Questionmark will use commercially reasonable efforts to notify Customer. Questionmark may take all necessary action that it deems appropriate to address violations of this clause 3.9, including, without limitation suspension or termination of the Services. Repeated or persistent violations may result in termination of Customer's access to the OnDemand Service following reasonable notice by Questionmark to Customer. Refunds or credits are not issued in connection with actions taken for violation of this clause 3.9.

- 3.10 The Customer is solely responsible for the accuracy, quality, integrity, legality, reliability, appropriateness and intellectual property ownership and right of use of all Customer Data, including without limitation ensuring that Customer Data is transmitted to and processed in the Services by Customer and provided to Questionmark in accordance with applicable laws, including for operation and maintenance of the Services, which Customer instructs Questionmark to undertake as necessary. Customer shall indemnify and hold harmless Questionmark against any third-party claims, losses or damages arising from or in connection with Questionmark's processing of the Customer Data pursuant to the provision of the Services and in accordance with the terms of this Agreement, including that results from Customer's breach of Schedule 4.
- 3.11 Any access control system which identifies or authenticates Users may not provide access to the OnDemand Service if it contains more User records than the number of Users authorized in the Service Configuration. Customer shall not allow any persons to be registered in, to access or use the OnDemand Service in excess of the number of Users authorized in the Service Configuration. In the event that a Participant is removed from or no longer uses the OnDemand Service, his or her allocated username may not be reassigned to another individual, unless otherwise expressly agreed in the Order. In the event that an Admin User or Author is removed from or no longer uses the OnDemand Service, his or her allocated username may be reassigned to another individual. Customer shall not allow more than one individual to use a User Account and shall not share any User Account credentials with more than one individual.
- 3.12 Customer acknowledges that the Services may only be used via compatible systems and/or compatible browsers. Questionmark maintains a list of compatible systems and/or browsers on its web site and reserves the right to update the system specifications at any time and for any reason at its reasonable discretion.
- 3.13 The OnDemand Service includes a function for archiving and exporting Assessments, results and other data. Questionmark shall not be responsible or liable for Customer's deletion, correction, destruction, damage, loss or failure to store any such information or Customer Data including, but not limited to, an event where Customer fails to make regular backups. Without limiting Customer's obligation to backup and Questionmark's disclaimer of responsibility or liability as described in the immediately foregoing sentence, Questionmark shall make commercially reasonable efforts to make at least daily backups of Customer Data.
- 3.14 Customer shall comply with Schedule 4 in the event an Order refers to Customer licensing Assessment Content from Questionmark.

4. Licence and Authorisation

- 4.1 In consideration of, and subject to, payment of the Fees, Questionmark hereby grants to the Customer a non-exclusive, royalty-free, non-transferable (except in the event of a permitted assignment of this Agreement), non-sublicensable licence and authorisation to access and use the OnDemand Service for the Term of this Agreement. The scope of the licence and authorisation is determined by this Agreement and the Order. All rights not expressly granted to Customer hereunder are reserved by Questionmark, its suppliers, and its licensors.
- 4.2 The Customer hereby grants to Questionmark the non-exclusive, royalty-free licence to use the Customer Data in connection with the provision of the Services for the Customer.

5. Fees

- 5.1 In consideration of the Services, the Customer shall pay the Fee or the Minimum Fee, whichever shall be the greater amount, without deduction or set off, in full and cleared funds and in the currency specified within the Order to the account nominated by Questionmark from time to time, in accordance with the terms of this clause 5.
- 5.2 Following the Commencement Date Questionmark shall invoice and the Customer shall pay the Fees and the Set Up Fees in accordance with the terms of this clause 5.
- 5.3 Where the Customer has selected Consultancy Services, Questionmark shall invoice, and the Customer shall pay, the relevant Fee for such services (as set out in the Order or agreed between the Parties from time to time in writing) in accordance with the terms of this clause 5.
- 5.4 Unless otherwise stated in the Order, all invoices shall be due and payable by the Customer within 14 days of receipt of a valid invoice.
- 5.5 All Fees are non-refundable except in the event of termination by the Customer under clauses 9.1.1 or 9.1.2, as set out in clause 9.2.
- 5.6 Questionmark may charge interest on any sum which remains unpaid after the due date for payment referred to in clause 5.4, such interest to be calculated from the due date for payment until payment (whether before or after judgment) at the monthly rate of 1.5% above the base rate from time to time of the Bank of England.
- 5.7 All Fees are exclusive of value added tax and any other sales taxes, import duties or other taxes, fees or levies imposed on the Fees (as opposed to taxes on Questionmark's business generally) which, if applicable, will be payable by the Customer at the then-prevailing rate.
- 5.8 Where on-site visits have been requested by the Customer, the Customer shall pay Questionmark's reasonable out of pocket expenses incurred pursuant to such on-site visit including travel, lodging and subsistence together with an additional Fee which shall be agreed between the Parties.
- 5.9 In the event that the Customer requests additional services not comprising the Services (including but not limited to troubleshooting with third party products, Assessment content development, Assessment content conversion, programming, configuration, assistance with template creation and Assessment style modification), these shall be charged on an as-quoted basis and shall be subject to the terms of this Agreement and any other terms agreed in writing between the Parties.
- 5.10 Questionmark may change the levels of any Renewal Fees by giving 60 days' written notice to the Customer prior to expiration of the Term then in effect and such change shall become effective upon commencement of the Renewal Term.
- 5.11 If Customer has purchased the OnDemand Service from a Questionmark reseller, the terms of this clause 5 that contemplate payment directly from Customer to Questionmark are superseded by Customer's payment arrangement with such reseller and payment to Questionmark shall be made by such reseller. Notwithstanding the prior sentence, in the event that such reseller fails to make timely payment of fees to Questionmark, Questionmark shall be entitled to all remedies available herein with regard to the termination of this Agreement and/or termination or suspension of the OnDemand Service as if such payment had been due directly from Customer and, in the event that Customer has made payment to such reseller, Customer's sole recourse and remedy shall be against such reseller.

6. Services Suspension

- 6.1 Without prejudice to its other rights under this Agreement, Questionmark may, at its sole discretion, elect to suspend immediately the provision of the Services until further notice in the event that:

- 6.1.1. Questionmark is obliged to comply with an order, instruction or request of a court, government agency, emergency services organisation or other competent administrative or regulatory authority;
 - 6.1.2. Questionmark (or a subcontractor of Questionmark) needs to carry out emergency works to its facilities;
 - 6.1.3. Questionmark reasonably suspects that the Services are being used fraudulently, illegally or for criminal activities;
 - 6.1.4. Questionmark is entitled to terminate this Agreement; or
 - 6.1.5. any Fees remain unpaid in whole or in part after their due date for payment.
- 6.2 Questionmark shall use all reasonable endeavours to give prior written notice of suspension and in the case of clauses 6.1.1 or 6.1.2 to minimise the effect of and the duration of any such suspension.

7. Warranties

- 7.1 In performing its obligations and providing the OnDemand Service under this Agreement, Questionmark will at all times exercise reasonable skill and care.
- 7.2 Questionmark warrants that:
- 7.2.1. it has and will for the duration of this Agreement have all licences, consents and authorisations or rights under any relevant law, legislation, regulations or administrative orders that are generally required and applicable to Questionmark in its provision of services;
 - 7.2.2. it will provide the OnDemand Services and will carry out its obligations in this Agreement in accordance with all laws, licences and regulations of jurisdictions from which Questionmark provides the OnDemand Service that are generally applicable to Questionmark in its provision of services; and
 - 7.2.3. it has the full right, power and authority to enter into and perform this Agreement in accordance with its terms.
- 7.3 The Customer warrants that:
- 7.3.1. it is, or is acting on behalf of, a business or lawfully constituted institution and shall continue to do so for the duration of the Term and that it has the full right, power and authority to enter into and perform this Agreement in accordance with its terms;
 - 7.3.2. it acknowledges that the Services are provided on an “as is” basis and that they are acceptable for the needs and requirements of the Customer;
 - 7.3.3. it has and will continue to have such licences and/or other authorisations or rights as may be necessary under any relevant law, legislation, regulation or administrative order, to receive the Services in accordance with this Agreement; and
 - 7.3.4. entry and performance of this Agreement and use of the Services by the Customer does not, and will not, violate or infringe the intellectual property or other rights of any other persons.
- 7.4 EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, QUESTIONMARK HEREBY DISCLAIMS ANY AND ALL EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF

8. Liability and Indemnity

- 8.1 Subject to clause 8.4, Questionmark excludes liability for loss of profit, loss of anticipated savings, loss of reputation, interest, penalties, legal or other professional costs and expenses, in each case whether direct or indirect, and for all indirect, or consequential loss or damage suffered or incurred by the Customer arising out of or in connection with Questionmark's breach or negligent performance or non-performance of this Agreement.
- 8.2 Subject to clause 8.4, the maximum aggregate liability of Questionmark to the Customer under or in connection with this Agreement (whether in contract or tort, including negligence, misrepresentation or otherwise) shall be a sum no greater than the higher of 105% of the Fees actually paid in accordance with clause 5 in the year in which the liability is incurred or twenty-five thousand UK pounds sterling (£25,000), the Customer acknowledging that where Questionmark is providing a free trial, the cap shall be zero.
- 8.3 The Customer shall indemnify Questionmark for all direct costs, expenses, damages and losses suffered or incurred by Questionmark, and indemnify and hold harmless Questionmark from any claim from a third party in each case, arising out of or in connection with the Customer's breach or negligent performance or non-performance of this Agreement to the full extent of such liability.
- 8.4 Nothing in this Agreement shall exclude either Party's liability for:
- 8.4.1. death or personal injury caused by its negligence;
 - 8.4.2. fraud or fraudulent misrepresentation; or
 - 8.4.3. any other liability which cannot be properly excluded by law.
- 8.5 Notwithstanding any other provision of this Agreement, in the event Customer orders Services for a Renewal Term, Customer expressly waives and forever releases Questionmark from any and all claims, demands, damages, lawsuits, liabilities, losses, judgments, and/or costs related to or in any way connected with its use of the Services during the Initial Term and any prior Renewal Terms.

9. Termination

- 9.1 Either Party may terminate this Agreement, without prejudice to any of its rights and remedies, at any time during the Term on giving written notice to the other:
- 9.1.1. in the event of a material breach by the other Party which is incapable of remedy;
 - 9.1.2. in the event of a material breach by the other Party which is capable of remedy but which the other Party fails to remedy within thirty (30) Business Days of having been notified of such breach;
 - 9.1.3. if the other Party has a receiver, administrative receiver, administrator or other similar officer appointed over it or over any part of its undertaking or assets or passes a resolution for winding up (other than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction) or a court of competent jurisdiction makes an order to that effect or if the other Party becomes subject to an administration order or enters into any voluntary arrangement with its creditors or ceases or threatens to cease to carry on business or is unable to pay its debts or is deemed by section 123 of the Insolvency Act 1986 (or similar applicable law of another jurisdiction) to be unable to pay its debts, or undergoes or is subject to any analogous acts or proceedings under any foreign law and such petitions or proceedings are not dismissed within ninety (90) days of filing;

- 9.1.4. if a Force Majeure Event continues for more than 60 days;
 - 9.1.5. at least fifteen Business Days prior to the expiry of the Initial Term or any Renewal Term.
- 9.2 Where the Customer terminates this Agreement under clause 9.1.1 or 9.1.2 above, it shall be entitled to a pro rata refund of Fees which have been prepaid but for which no Services have been provided by Questionmark.
- 9.3 Where Questionmark is providing a free trial of the OnDemand Service or any part thereof it may terminate such free trial at any time in its sole discretion without further liability to the Customer or any third party.

10. Effect of Termination

10.1 Following termination for whatever reason:

- 10.1.1. all outstanding invoices and all Fees which have not yet been invoiced shall become immediately due and payable;
- 10.1.2. Questionmark shall within 30 days make available to the Customer a file (in a standard file format) of the Customer Data and thereafter Questionmark may delete such Customer Data. If Customer requests its Customer Data in a different media or format, Questionmark may charge Customer for its time and materials at its reasonable standard rates then in effect for such services.

11. Force Majeure

11.1 Neither Party shall be in breach of this Agreement, nor liable for any failure or delay in performance of any obligations under this Agreement (save for obligations on the Customer to make payment) arising from or attributable to a Force Majeure Event provided that it promptly notifies the other Party in writing of the nature and extent of the Force Majeure Event and it uses all reasonable endeavours to mitigate the effect of the Force Majeure Event.

12. Intellectual Property

12.1 The Customer acknowledges:

- 12.1.1. that any and all patents, registered and unregistered designs, copyrights, trademarks and all other intellectual property rights whatsoever and wheresoever enforceable, in Questionmark Technologies and any relevant documentation or material provided by Questionmark will remain the sole property of Questionmark and its licensors; and
- 12.1.2. without limitation to the foregoing, that the Customer will not be entitled to use the name, trade marks, trade names or other proprietary identifying marks or symbols of Questionmark or its licensors without prior written consent of Questionmark or its licensors respectively.

12.2 Questionmark shall retain ownership of all proprietary rights to any Customised Service Configuration developed, including certain rights, if any, that Questionmark has pursuant to a license from another party.

12.3 Upon full payment of the applicable Fees, Questionmark shall grant to the Customer a licence to use such Customised Service Configuration in accordance with the Service Configuration.

12.4 Questionmark is the owner, licensee or sub-licensee of various pre-existing development tools, routines, subroutines and/or other programs, data, and materials that Questionmark may use or implement in the development of any Customised Service Configuration ("Background Technology").

- 12.5 Questionmark retains all right, title and interest in and to the Background Technology, and hereby grants the Customer a non-exclusive license to use the Background Technology only to the extent necessary to use the Customised Service Configuration and OnDemand Service during the Term consistent with the terms of this Agreement and the Permitted Use.
- 12.6 Questionmark acknowledges that any and all patents, registered and unregistered designs, copyrights, trademarks and all other intellectual property rights whatsoever and wheresoever enforceable, which are contained in the Customer Data will remain the sole property of the Customer and its licensors.

13. Confidentiality

- 13.1 Each Party shall keep the other's Confidential Information secure and hold it in confidence and, unless required by law, shall not make the other's Confidential Information available to any third party or use the other's Confidential Information for any purpose other than the implementation of this Agreement.
- 13.2 Each Party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.
- 13.3 Questionmark acknowledges that the Customer Data is the Confidential Information of the Customer and Customer acknowledges that Assessment Content is as between the Parties the Confidential Information of Questionmark.
- 13.4 Any prior non-disclosure agreements in force between the Parties shall remain valid and binding obligations in respect of disclosures made prior the Commencement Date by Questionmark and Customer, notwithstanding execution of this Agreement, unless otherwise provided for in those earlier non-disclosure agreements.
- 13.5 This clause 13 shall survive termination of this Agreement, however arising.

14. Security and Data Protection

- 14.1 Questionmark shall maintain information and physical security policies and procedures to protect the Customer Data consistent with good industry practice.
- 14.2 Questionmark represents that it is certified by a reputable third party against the ISO 27001 standard or a comparable successor standard, and that its production data centre used to deliver Assessments is also audited against the SSAE 16 or ISO 27001 standards or comparable successor standards. On written request, Questionmark shall provide to Customer copies of its certificates and other reasonably requested documentation about its security.
- 14.3 Questionmark shall use reasonable efforts to respond to Customer questions regarding Questionmark's security practices. Any reports, summaries thereof or information provided pursuant to this clause 14 is Confidential Information of Questionmark.
- 14.4 Questionmark shall use commercially reasonable efforts not to include in the OnDemand Service any computer viruses, malware, disabling devices or contaminants the purpose of which is to damage Customer's computer systems ("Contaminants"), the Parties agreeing that any feature of the OnDemand Service that monitors the Service Configuration or disables access to the OnDemand Service at the end of the Term is not a Contaminant.
- 14.5 The Parties shall comply with their respective obligations as detailed in Schedule 3.

15. Anti-bribery

- 15.1 Each Party shall, in the performance of its obligations under this Agreement, comply with all anti-corruption and anti-bribery laws respectively applicable to each of them of the jurisdictions in which they conduct their businesses;
- 15.2 Each Party shall have, and maintain throughout the Term, its own policies and procedures to ensure compliance with the requirements of clause 15.1, and will enforce those policies and procedures where appropriate;
- 15.3 The Parties shall promptly report to each other any request or demand for any undue financial or other advantage of any kind offered to or received by it in connection with the performance of this Agreement.

16. Export Laws

- 16.1 The OnDemand Service may use encryption technology that may be subject to licensing requirements under Council Regulation (EC) No. 428/2009 (as amended) and the export control regulations of Switzerland and the European Union. Customer shall not use the OnDemand Service in, and shall not transfer or otherwise export or re-export any of the underlying information, software, or technology to, countries as to which Switzerland and/or the European Union maintains an embargo (collectively, "Embargoed Countries"). By using the OnDemand Service, Customer represents and warrants that Customer is not located in, under the control of, or a national or resident of an Embargoed Country. Customer shall comply strictly with all applicable Swiss and European Union export laws and assumes sole responsibility for obtaining licenses to export or re-export as may be required. Customer shall provide any reasonably required assistance to Questionmark in complying with the export controls including, but not limited to, supplying a statement as to ultimate destination and complying with any import regulations.

17. Consultancy Services

- 17.1 Following a Customer request for Consultancy Services, Questionmark shall produce a proposal which shall be reviewed by the Customer and the Parties shall agree a final form which, when accepted, shall be the Order for such Consultancy Services. The Customer acknowledges and agrees that it is the Customer's responsibility to confirm that the final form of the proposal satisfies the operational needs and requirements of the Customer's business.
- 17.2 The Consultancy Services shall be performed and delivered at the times and places listed on the Order. Questionmark shall use reasonable commercial endeavours to meet all timescales stated in the Order but time shall not be of the essence unless otherwise expressly agreed in writing between the Parties.
- 17.3 In the event an Order requires Questionmark to develop a Customised Service Configuration, the Customer agrees that upon the delivery of the Customised Service Configuration the Customer shall have ten (10) Business Days to review such Customised Service Configuration for any material non-conformance with the terms of the Order. In the event that the Customer does not report any such material non-conformance to Questionmark within the ten (10) Business Day period, the Customer will have been deemed to have accepted the Customised Service Configuration and the Customer waives and releases Questionmark from and against any claim, liability, damage, demand, cost and/or expense, or suit arising from or related to the Customised Service Configuration. Unless otherwise specified in the Order, the Customised Service Configuration shall not be covered by any support plan. For clarity, Customised Service Configuration does not include the standard OnDemand Service or any feature thereof generally provided by Questionmark to customers.
- 17.4 In the event the Customised Service Configuration is not in material conformance with the terms of the Order, Questionmark will remedy such material non-conformance to bring it into material compliance with the Order.

17.5 Questionmark warrants that the Customised Service Configuration at the time of delivery will not knowingly infringe any UK patent, or infringe any third party copyright, trade secret, or other intellectual property rights. This warranty will not apply to any infringement that would not be such except for Customer's contributed design, software or other elements. Customer's exclusive remedy for the breach of the above warranty will be the re-performance of the services within a commercially reasonable time.

17.6 The Customer warrants that it will not make a request of Questionmark to produce a Customised Service Configuration that Customer knows would infringe any Patent, or infringe any third party copyright, trade secret, or other intellectual property rights and shall fully indemnify Questionmark in the event of a breach of this warranty.

18. Assignment

The Customer may not assign this Agreement without prior written consent of Questionmark, such consent not to be unreasonably withheld.

19. No Waiver

Failure by either Party to exercise or enforce any right or benefit conferred by this Agreement will not be deemed to be a waiver of any such right or benefit nor operate so as to bar the exercise or enforcement thereof or of any other right or benefit on any later occasion.

20. Notices

Any notice required or authorised to be given under this Agreement may be delivered by hand, by first-class mail or prepaid registered post to the address notified by the Parties from time to time and will be deemed to have been served immediately if by hand or forty-eight (48) hours after such posting if by post. Any notice to Questionmark must also be contemporaneously copied to legalnotices@questionmark.com. Questionmark shall have the right to notify Customer in the event of a general notice to all users of the OnDemand Service of important announcements regarding the operation of the Service, including by email correspondence.

21. Severability

If any provision, or part provision, of this Agreement, is held by a court or any competent authority to be invalid, illegal, or unenforceable, that provision or part provision shall be deemed deleted and the remainder of this Agreement shall continue in full force and effect.

22. Variation

No variation of this Agreement shall be effective unless it is in writing and signed by the Parties.

23. Entire Agreement

This Agreement, which include the applicable Schedules, contains the entire agreement and understanding of the Parties and supersedes all prior agreements, understandings or arrangements (both oral and written) relating to the subject matter of this Agreement. Nothing in this clause will operate to limit or exclude liability for fraud. If Customer has purchased the OnDemand Service from a Questionmark reseller and the terms of any agreement or documentation between Customer and such reseller conflict with the terms of this Agreement, (i) Questionmark shall be entitled to perform and enforce this Agreement in accordance with its terms, (ii) as between Questionmark and Customer, the terms of this Agreement shall govern, and (iii) Customer's sole recourse and remedy for any loss, damage, expense or other liability caused by such conflict shall be against such reseller.

24. Rights of Third Parties

This Agreement is not intended to convey upon any person who is not a Party to this Agreement any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

25. Independent Contractor

- 25.1 The relationship of the Parties is that of independent contractor, and nothing herein shall be construed to create a partnership, joint venture, franchise, employment, or agency relationship between the Parties.
- 25.2 Neither Party shall have the authority to enter into agreements of any kind on behalf of the other Party nor shall have the power or authority to bind or obligate that other Party in any manner to any third party.

26. Governing Law

This Agreement shall be governed and construed in accordance with the laws of England and Wales and the Parties irrevocably agree to the exclusive jurisdiction of the Courts of England.

Schedule 1 - Standard Support for OnDemand Service "Support"

1. Where the Customer receives Support this Schedule 1 shall apply in addition to the provisions of the Agreement.
2. The Customer shall notify Questionmark of the individuals up to the limit specified in the applicable Order that will be Customer's designated contacts for the purpose of requesting support via phone and email ("Designated Contacts").
3. Questionmark shall provide support services in English (unless otherwise specified on the applicable Order) to Designated Contacts.
4. Customer may substitute the Designated Contacts on a permanent or temporary basis (as long as temporary is not less than 6 months) upon written notice to Questionmark.
5. Customer shall ensure that Customer's Designated Contacts subscribe to Questionmark's OnDemand Services new feed during the Term.
6. Questionmark will use reasonable efforts to respond to requests for assistance (up to a maximum of twenty (20) hours per month without accumulation of hours from one month to the next) during Working Hours to the extent described below:

Service Name	Description	Provision
OnDemand Service Support	Maintenance of the OnDemand Service 24 x 7 to maintain uptime. Maintenance of OnDemand Service does not consume support hours.	Provided by Questionmark and/or its sub-contractors 24 x 7.
1st Line Technical Support	Providing assistance by phone and email to Designated Contacts to resolve technical issues that might result in resetting servers, keeping people informed of server status, and answering questions where the answers could be found in the Questionmark manuals or knowledge base items.	Provided by Questionmark during Working Hours as standard and 24 x 7 for an additional fee.
2nd Line Technical Support	Providing assistance by phone and email to Designated Contacts to resolve technical issues where answers could not be found in the manuals or knowledge base items.	Provided by Questionmark during Working Hours as standard and 24 x 7 for an additional fee.
3rd Line Technical Support	Fix technical issues with the OnDemand Services	Provided by Questionmark and included as standard.
Chat Technical Support	Assistance provided to Designated Contacts using 24 x 7 browser text chat sessions and VoIP when connectivity helping to resolve issues.	Provided by Questionmark for an additional fee.
Participant Support	Any assistance provided by phone, email, chat sessions, etc. to the Participant to assist them to use any part of the Service.	This is NOT a service currently provided by Questionmark, and is the responsibility of Customer.

Proctor/Invigilator Support	Any assistance provided by phone, email, chat sessions, etc. to Proctor/Invigilators to assist them with the proctoring/invigilation process including but not limited to the use of Service.	This service is available from Questionmark for an additional fee.
Consulting Support	Assistance with template creation and modification to change look-and-feel of assessment, assessment content import, content transformations, custom development, support of custom development, consulting services, training services, data format changes, etc.	Defined within an Order and delivered for a fee that depends on the scale of the work required.

- Questionmark may also provide free access to Designated Contacts to product and technical support information, online knowledge bases, manuals, best practice guides, white papers and news feeds. In addition, Customer will have the opportunity to send its employees to Questionmark's Annual User Conference at the prevailing rate for customers of the OnDemand Service.

Schedule 2 – Enterprise Support Service Level Agreement

1. When Customer purchases Enterprise Support this Schedule 2 shall apply in addition to the provisions of Schedule 1 and the Agreement.
2. Questionmark will use commercially reasonable efforts to respond to and remedy each Service Incident based on its severity level as set forth below. The severity level of a Service Incident will be determined by Questionmark in its sole discretion.
3. The Customer will use commercially reasonable efforts to provide accurate and immediate notification of any issue with the OnDemand Service to Questionmark so that Questionmark may promptly take any remedial action. Questionmark will respond to the Designated Contact within the Initial Response Time specified in the table below, based on the Service Incident’s severity level assigned by Questionmark’s Service Desk. Notwithstanding anything to the contrary contained in the Agreement, Questionmark is not obligated to remedy any OnDemand Service Incident caused by User error or by Customer’s or any User’s failure to access the Service with a compatible system or web browser.

Severity 1	An error isolated to the Questionmark OnDemand Service that renders the service inoperative or causes the service to fail catastrophically, i.e. major system impact or system outage. This issue must be resolved before the Customer can use the OnDemand Service. All Severity 1 Issues have no workaround and Customer and Questionmark shall work closely together in order to resolve the error as soon as possible. Severity 1 issues are extremely rare and Questionmark escalates these issues to its highest priority.	<u>Initial Response Time</u> (by email or callback) is within four (4) hours during Working Hours. <u>Maximum Time Between Updates</u> (by email or callback or implementation in the OnDemand Service) is four (4) hours during Working Hours.
Severity 2	An error isolated to the Questionmark OnDemand Service which causes a serious impairment to a critical feature of the OnDemand Service, but where overall functionality is not interrupted. Usually a workaround is available for this type of issue, but such is not always the case. Questionmark will resolve all Severity 2 issues as soon as possible.	<u>Initial Response Time</u> (by email or callback) is within eight (8) hours during Working Hours. <u>Maximum Time Between Updates</u> (by email or callback or implementation in the OnDemand Service) is four (4) hours during Working Hours during the first three (3) Business Days and then updated as needed thereafter.
Severity 3	An issue that causes the failure of a noncritical aspect of the OnDemand Service and a satisfactory work-around already exists but the presence of this issue will result in user dissatisfaction.	<u>Initial Response Time</u> (by email or callback) is within two (2) Business Days during Working Hours. <u>Maximum Time Between Updates</u> (by email or callback or implementation in the OnDemand Service) is two (2) Business Days for the first week and as needed thereafter. Solution is provided as part of a future release.
Severity 4	An issue of minor significance. A slight variance exists between the product documentation and how the application actually performs.	<u>Initial Response Time</u> (by email or callback) is within two (2) Business Days during Working Hours.

		Customer update is every five (5) Business Days, during the first month, and as needed thereafter. Solution is provided as part of a future release at Questionmark's discretion.
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4. Scheduled Maintenance is planned service downtime to proactively upgrade the OnDemand Service to resolve any issues and/or enhance functionalities. Typically, Scheduled Maintenance activities will be scheduled during non-peak and non-business hours to maximize the availability of the Service to the Participants. However, Questionmark, in its sole discretion, shall determine when the Scheduled Maintenance shall be performed.
5. Emergency Maintenance might cause downtime and is required to fix software and/or hardware issues, including applying security patches and replacing required hardware or software, which cannot be postponed until the next available Scheduled Maintenance period. Questionmark in its sole discretion, shall determine when Emergency Maintenance shall be performed.
6. During Scheduled Maintenance and Emergency Maintenance periods, the OnDemand Service may not be accessible by Users. Questionmark will provide the Customer with advance notice for all Scheduled Maintenance and, if possible, for Emergency Maintenance activities, which will impact the availability and usefulness of the OnDemand Service to Users.
7. Targeted Availability. The Assessment Delivery Service is targeted to be available to Customer twenty-four (24) hours a day, seven (7) days a week, at least 99.9% of the time measured on a monthly basis, excluding Scheduled Maintenance, Emergency Maintenance or due to a Force Majeure Event.

Schedule 3 – Data Protection

The Parties shall comply with this Schedule 3. Questionmark may make changes to this Schedule 3 at any time when required in accordance with updates to Data Protection Law and practice based upon the advice of its professional advisors. Questionmark will make any modified version of this Schedule 3 available to Customer on its website, which modified version becoming applicable on its date of posting providing such modifications do not involve additional obligations on Customer. Any conflict or inconsistency between this Schedule 3 and the other parts of this Agreement shall be resolved in favour of this Schedule 3 in respect of the subject matter hereof.

1. Definitions

The following definitions shall apply for this Schedule:

“Data Protection Law” means:

- (i) Prior to 25 May 2018, the Data Protection Act 1998 and Directive 95/46/EC; and
- (ii) On and after 25 May 2018, the General Data Protection Regulation (EU) 2016/679 (“GDPR”) and any future United Kingdom law or regulation relating to the processing of personal data and privacy.

“Data processor”, “data controller”, “data subject”, “personal data” and “processing” shall have the meanings given to such terms in Data Protection Law.

“Customer Personal Data” means all personal data comprised in Customer Data that Questionmark processes on behalf of Customer that is subject to Data Protection Law, which may include such data of Customer Affiliates that are subject to Data Protection Law and are permitted to use the Services.

“Subprocessor” means other processors engaged by Questionmark to process Customer Personal Data.

2. The subject-matter of the processing is running an assessment management system processing Customer Personal Data within the scope of Data Protection Law. The duration of the processing is the Term and until Customer Personal Data has been returned to Customer or deleted in accordance with the terms of this Agreement. The nature and purpose of the processing is to provide Services to Customer. The types of personal data are within the sole control and responsibility of Customer and include those specified in Article 4 GDPR and any other Customer Personal Data uploaded to the Services by Customer and answers and scores of Assessments. The categories of data subjects are solely determined by and the responsibility of Customer and typically include employees, students, contractors, candidates and other Participants in Assessments. The obligations and rights of Customer and Questionmark are set out in this Agreement, and any obligation that refers specifically to the GDPR shall become applicable on 25 May 2018.
3. The Customer agrees that:
 - 3.1 In respect of Customer Personal Data, Customer is the data controller and Questionmark is the data processor. Customer shall inform Questionmark if it acts as a joint controller with another party in respect of Customer Personal Data or if any Customer Affiliates are data controllers, and provide contact details for its Data Protection Officer if appointed. Customer’s obligations continue to apply for Customer Personal Data in respect of which a Customer Affiliate is the data controller.
 - 3.2 Customer shall be solely responsible for its compliance with Data Protection Law and all other laws applicable to Customer in using the Services including its use of Customer Personal Data. The Customer confirms that it is permitted to transmit to Questionmark for processing under this Agreement all Customer Personal Data without breach of any law, agreement, arrangement or duty or the rights of any third party.
 - 3.3 Customer has taken account of the technical and organisational measures employed by Questionmark and detailed at www.questionmark.com/go/eu-od-measures and determined these to be compliant with Data Protection Law in respect of the processing of all types of personal data within Customer Personal Data, including relating to children, vulnerable persons and special categories of personal data, if applicable.

Questionmark may update the technical and organizational measures from time to time and will make any updated version available to Customer at www.questionmark.com/go/eu-od-measures and notify Customer only if there is a material reduction in measures. Customer shall not submit to Questionmark for processing or cause Questionmark to process Customer Personal Data except where Customer has assessed that such processing by Questionmark in accordance with such technical and organisational measures is compliant with Data Protection Law.

4. Questionmark shall take all measures required pursuant to Article 32 of the GDPR, taking into account the state of the art, costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons.
5. Questionmark will ensure that persons authorized to access Customer Personal Data have committed themselves to confidentiality even after their engagement ends.

6. When processing Customer Personal Data, Questionmark shall:

- 6.1 Implement the appropriate technical and organizational measures referred to in clause 3.3 in such a manner designed to ensure that processing will meet the requirements of Data Protection Law and ensure the protection of the rights of data subjects.
- 6.2 Only process Customer Personal Data upon Customer's instructions (including for operation and maintenance of the Services and as otherwise present in this Agreement), including regarding transfers of Customer Personal Data to a third country, unless required to do so by EU or EU member state law (including UK law) to which Questionmark is subject; in such case Questionmark shall inform Customer of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest. 'Customer's instructions' include the terms of this Agreement and any configuration of the Customer's instance of the Services made by the Customer.

7. Questionmark may:

- 7.1 Engage Subprocessors in accordance with this Agreement.
 - 7.2 Continue to use the Subprocessors engaged by it prior to 25 May 2018, subject to compliance with its obligations under Data Protection Law. A list of Questionmark's current organizational Subprocessors is provided to Customer at www.questionmark.com/go/eu-od-subprocessors.
 - 7.3 Not engage a new Subprocessor without Customer's prior general written authorization. Questionmark shall satisfy this obligation by updating its list of organizational Subprocessors at least 28 days prior to authorizing a new organizational Subprocessor to provide Customer with a means to obtain notice and opportunity to object. Customer provides general written authorization to Questionmark's present and future engagement of individual, natural person contractors who are under obligations of confidentiality, and may obtain notice of such contractors at any time by requesting a list from Questionmark. Any objections to a new Subprocessor must be received within 28 days of notification, otherwise Customer is deemed to accept the new Subprocessor. If Customer reasonably objects to a new Subprocessor and such objection cannot be satisfactorily resolved within a reasonable time, Customer may terminate this Agreement without penalty upon 30 days' written notice to Questionmark. If Customer's objection remains unresolved 30 days after it was raised and no notice of termination has been received, Customer is deemed to accept the new Subprocessor. This clause 7.3 shall apply from 25 May 2018.
 - 7.4 Notwithstanding clause 7.3, Customer agrees that Questionmark may engage a new Subprocessor in emergencies and situations outside of Questionmark's reasonable control, including natural disaster or financial distress of an existing Subprocessor, subject to Questionmark updating the lists of Subprocessors referred to in clause 7.3 as soon as is reasonably practicable.
8. Questionmark shall respect the conditions referred to in Article 28 GDPR paragraphs 2 and 4 for engaging another processor. Questionmark shall ensure all Subprocessors are bound by written agreements requiring them to adhere to the same data protection obligations in accordance with Article 28(3) GDPR, as required by

Article 28(4) GDPR. Questionmark shall as between the Parties remain fully liable to Customer for any processing of Customer Personal Data by a Subprocessor.

9. Customer agrees that Questionmark may transfer Customer Personal Data to other countries (and process such data in those countries) as reasonably necessary to provide the Services. Questionmark shall only transfer Customer Personal Data from the European Economic Area (“EEA”), Switzerland and the United Kingdom to countries not subject to an adequacy decision of the European Commission if having in place a valid transfer mechanism recognized by the European Commission (including data processing agreements incorporating the EU Standard Contractual Clauses (Processors)). Questionmark’s US Affiliate is self-certified to the EU-U.S. and Swiss-U.S. Privacy Shield frameworks (“Privacy Shields”) and Questionmark will ensure that such entity maintains its self-certification and compliance with the Privacy Shields, or other appropriate mechanism whilst processing Customer Personal Data. Questionmark’s production data centre used to deliver Assessments is located in the United Kingdom or EEA.

10. Questionmark shall:

10.1 Taking into account the nature of the processing, assist Customer by appropriate technical and organizational measures, insofar as is possible, for fulfilment of Customer’s obligation to respond to requests for exercising data subject rights laid down in Chapter III GDPR in accordance with this clause 10.1.

10.1.1 Questionmark shall as permitted by applicable law and without undue delay notify Customer if it receives a request from a data subject in respect of that person’s Customer Personal Data. Questionmark shall not respond to a data subject request except to confirm the request relates to Customer.

10.1.2 To the extent Customer is unable to respond to the data subject request through general functionality of the Services, Questionmark shall upon request make commercially reasonable efforts to assist Customer for this purpose. In the event of assistance requiring significant time and/or resources by Questionmark, to be judged by Questionmark acting reasonably, Customer shall be responsible for costs arising from such assistance charged on a time and materials basis.

10.1.3 Notwithstanding the foregoing, Customer agrees that any restriction of processing Customer Personal Data shall be the exclusive responsibility of Customer.

10.2 Upon request provide reasonable assistance to Customer in ensuring compliance with the obligations pursuant to Articles 32 to 36 GDPR taking into account the nature of processing and information available to Questionmark. Such assistance shall be subject to Customer’s payment of reasonable charges on a time and materials basis where the assistance required is not part of Questionmark’s standard services then provided to all customers.

11. Questionmark shall notify Customer without unduly delay after becoming aware of a personal data breach in respect of Customer Personal Data.

12. Questionmark shall maintain a record of all categories of processing activities carried out on Customer Personal Data by Questionmark on behalf of Customer (for clarity excluding processing by Customer within the Services, which shall be Customer’s responsibility) required by Article 30(2) GDPR and make such record available to the supervisory authority on request.

13. Questionmark shall at the choice of Customer, delete or make available all Customer Personal Data stored in the OnDemand Service for return to Customer within thirty (30) Business Days after the end of the Services in a standard file format, and delete existing copies unless EU law or EU member state law requires storage of the Customer Personal Data.

14. Questionmark shall make available to Customer on request all information necessary to demonstrate compliance with Questionmark’s obligations in Article 28 GDPR and shall allow for and contribute to audits

including inspections, conducted by Customer or another auditor mandated by Customer in relation to Questionmark's processing of Customer Personal Data. The Parties agree that this obligation shall be fulfilled by Questionmark's making available, upon request and subject to confidentiality obligations, Questionmark's then current independent third-party certifications and answering reasonable questionnaires from Customer. Additional audit requirements shall be subject to separate written agreement of the Parties.

Schedule 4 – Assessment Content

This Schedule 4 applies if an Order refers to licensing of Assessment Content to Customer. Any conflict or inconsistency between this Schedule 4 and the other parts of this Agreement shall be resolved in favour of this Schedule 4 in respect of the subject matter hereof.

1. Definitions

The following definitions shall apply for this Schedule:

Benchmarks means aggregated data received, collected, analyzed, and maintained by Questionmark or its Affiliates that does not contain any personally identifiable data and which do not identify any customer, for example item statistics and average scores.

Licensors means the organization or test publisher that authors and owns the Assessment Content and who directly or with the assistance of Questionmark uploads this to and maintains it in the OnDemand Service.

Results Data means answers, scores and results and other information collected or derived from Participants taking Assessment Content. Results Data excludes Assessment Content.

2. Grant of License

2.1 Assessment Content License. In consideration of, and subject to, payment of the Fees, Questionmark hereby grants to the Customer as part of the Services a non-exclusive, non-transferable, non-sublicensable license and authorization to access and use Assessment Content with Participants in the OnDemand Service during the Term subject to the limits and terms of this Agreement and the Order. Unless the Order expressly permits wider use, Assessment Content may only be used for Customer's internal purposes including by its Affiliates and for assessing its partners, and may not be resold to third parties. All rights not expressly granted to Customer hereunder are reserved by Questionmark and Licensors, and their respective suppliers and licensors.

2.2 Assessment Content modification. No modification of Assessment Content is permitted other than as expressly provided for in an Order. Notwithstanding that an Order may permit Assessment Content modification, Customer acquires no ownership, proprietary or other rights in or to any such modifications or derivatives other than to use such modifications or derivatives to the same extent as it may use Assessment Content under this Agreement. All other rights in and to modifications to or derivatives of Assessment Content are reserved to Questionmark and Licensors, and their respective suppliers and licensors. Neither Assessment Content nor any modifications or derivatives thereof shall constitute "Work Product" or works-for-hire under any applicable laws.

2.3 Reports. It is possible to use the OnDemand Service to report on Results Data without including Assessment Content. However, if any Assessment Content, including question wording or question choices from Assessment Content, are produced in reports, such Assessment Content remains the copyright of Licensors and may be used by Customer only as expressly authorized by this Schedule and must be kept confidential.

2.4 Intellectual Property. Customer agrees that Licensors is the owner of the Assessment Content, and that no rights of ownership and/or intellectual property rights of any kind in Assessment Content are transferred to Customer. The license granted hereunder to Customer is expressly limited to the access and use rights conferred in this Schedule. Customer may not share the Assessment Content with any third party except as expressly provided for in this Agreement and any third party use shall be limited to the use permitted for Customer in this Schedule. Except as expressly permitted by this Schedule and any Order, Customer may not copy, download, transmit, redistribute, publish, modify or commercially exploit the Assessment Content or move Assessment Content outside the OnDemand Service. Customer may not hide or attempt to hide copyright information or identification of Licensors' ownership of the Assessment Content.

- 2.5 Email support.** Questionmark has licensed the Assessment Content from Licensor and is not itself able to answer questions about or provide assistance in using Assessment Content. If Customer has questions about Assessment Content or identifies possible issues in Assessment Content, Customer may contact Questionmark by email, and Questionmark will use reasonable efforts to pass questions or issues to the Licensor and pass responses received back. Neither Schedule 1 nor Schedule 2 of the Agreement shall apply for this Schedule.
- 2.6 Updates.** Neither Licensor nor Questionmark is obliged to provide Assessment Content updates, but if Questionmark and Licensor do produce an update, Questionmark will make such update available to Customer within the OnDemand Service along with information on any changes. Any permitted modifications made to Assessment Content by Customer may need to be recreated in the event of any update, which modifications shall be the exclusive responsibility of Customer.
- 3. Customer Obligations**
- 3.1 Assessment Content Configuration.** Customer may use the Assessment Content within the OnDemand Service during the Term solely in conformance with the terms of the Agreement and the Order.
- 3.2 Use of Assessments.** Customer agrees to take account of any information or documentation provided by Questionmark or Licensor regarding the validity and potential application of the Assessment Content. Notwithstanding the foregoing, Customer assumes sole responsibility for determining that Assessment Content and Assessments are appropriate and valid for its use purposes and requirements.
- 3.3 Confidentiality.** Customer shall protect Assessment Content as Confidential Information and use best efforts to ensure that Participants do not share it with others.
- 3.4 Anonymous benchmarking.** Customer authorizes Questionmark and its Affiliates to use Assessment results for Assessment validation, tracking content exposure and possible cheating, research and benchmarking purposes and product development including creating or updating Benchmarks (“collectively, “Research Data”). Research Data and Benchmarks shall be owned by Questionmark. Questionmark will only use, aggregate and present Research Data in anonymous form and will not include (directly or by inference) any information identifying Customer or any identifiable individual as the source of such data. Access to Research Data will be restricted to individuals directly involved in research supporting or related to Questionmark or Licensor products and/or services.
- 3.5 Data processing.** Customer instructs Questionmark to review Results Data to help run the Services including to obtain and analyze Research Data. Customer may use Licensor as a sub-processor to help perform such instructions in addition to other sub-processors set out in the Agreement and for clarity may share Research Data and Results Data with Licensor.