

§ 1 Scope of Application

1. These General Terms and Conditions of Business and Delivery (hereinafter referred to as „GTCs“) apply to all sales contracts that Magnetec GmbH (hereinafter referred to as „MAGNETEC“), as seller, concludes with its customers (hereinafter referred to as „Purchasers“).
2. These GTCs shall apply only if the Purchaser is an entrepreneur (§ 14 of the German Civil Code (“BGB“)), a legal person under public law or a special public-sector fund.
3. The GTCs apply exclusively. Any different, conflicting or supplementary terms and conditions of the Purchaser (e.g., Purchaser's General Terms and Conditions) will become part of the contract only if and to the extent that MAGNETEC has expressly consented to their applicability. Such consent will always be required, even if, for example, MAGNETEC, with knowledge of conflicting or different terms and conditions of the Purchaser, makes an unconditional delivery to the Purchaser.
4. These GTCs shall also apply to, and serve as a framework contract for, all similar types of transactions with the Purchaser in the future, without MAGNETEC having to refer to these GTCs again each time.
5. Any individual agreements, which are made with the Purchaser on a case by case basis (including side agreements, addenda and amendments), shall always take precedence over these GTCs. With respect to the content of such agreements and unless there is evidence to the contrary, a written contract or the written confirmation from MAGNETEC shall be dispositive. The telecommunication transmission (including via fax or email) will suffice to meet the written form requirement in the event a copy of the signed declaration is transmitted.

§ 2 Contract Formation, Contract Modifications

1. Purchase orders placed by the Purchaser will be deemed binding contractual offers. Unless otherwise indicated, such purchase orders may be accepted by MAGNETEC either in writing or in text form within fourteen (14) days or if MAGNETEC delivers the ordered product within that time period. The time period will begin to run when MAGNETEC receives the offer.
2. Offers made by MAGNETEC may be changed at any time and are non-binding.
3. Any subsequent modifications of the contracts concluded with MAGNETEC must be in writing.

§ 3 Delivery, Delay in Delivery

1. MAGNETEC is entitled to make installment deliveries only if
 - the Purchaser is able to use the installment delivery in accordance with the stated contractual purpose,
 - the delivery of the remaining ordered goods is secured, and
 - the Purchaser does not thereby incur any significant additional expense or other costs (unless MAGNETEC has declared its willingness to absorb such costs).
2. The agreement to a fixed-dated transaction requires the express written confirmation from MAGNETEC.
3. The issue of whether MAGNETEC is in default of delivery will be governed by the applicable statutory provisions. In any case, a formal dunning notice from the Purchaser will be required in order to place MAGNETEC in performance default. Section 9 (Liability and Limitations on Liability, Compensatory Damages based on Fault) will apply to any damages that the Purchaser incurs as a result of the performance default. MAGNETEC's statutory rights, specifically in the event the duty of performance is disclaimed, will remain unaffected thereby.
4. If, based on reasons for which MAGNETEC cannot held responsible, MAGNETEC is unable to comply with any binding deadline for delivering the goods (unavailable delivery), then MAGNETEC must inform the Purchaser thereof without undue delay and at the same time communicate the expected new delivery date. If delivery is unavailable within the new delivery period, then MAGNETEC will be entitled to rescind all or part of the contract. MAGNETEC will reimburse the Purchaser without undue delay any consideration that the latter has paid. In particular, a late self-supply by a supplier of MAGNETEC shall also be deemed to be a non-availability of performance if neither MAGNETEC nor its supplier is at fault or if MAGNETEC has no procurement obligation in the given case. Statutory rights of rescission remain unaffected by the provisions of this § 3, para. 4.

§ 4 Delivery Terms and Conditions, Transfer of Risk, Place of Performance, Default of Acceptance

1. Unless otherwise agreed, the goods shall be delivered DAP Incoterms 2010, to the place of delivery agreed with the Purchaser. The agreed place of delivery is the place of performance for both the delivery and any subsequent performance. Unless otherwise agreed, the transfer of risk shall be based on the agreed Incoterm.

2. If the Purchaser is in default of acceptance, if it fails to provide cooperation or if MAGNETEC's delivery is delayed for other reasons that are attributable to the Purchaser's responsibility, then MAGNETEC will be entitled to demand compensation for the losses arising therefrom. MAGNETEC is further entitled to demand compensation from the Purchaser for the additional expenses (e.g., storage costs) caused by the default of acceptance.

§ 5 Price, Invoices

1. The prices quoted by MAGNETEC are net prices; i.e., they do not include value-added tax. The prices are stated in EURO, unless otherwise indicated.
2. The invoices issued by MAGNETEC to the Purchaser will be considered complete and correct in all respects, unless the Purchaser objects, with legitimate grounds, within thirty (30) days after receipt of the invoice. The claims under § 8 (Legal Consequences from the Breach of Warranties, Liability for Defects) remain unaffected.

§ 6 Terms of Payment

1. The purchase price shall be paid by the Purchaser within thirty (30) days after invoicing and delivery of the goods. If the Purchaser does not pay within the aforementioned payment period, then it will be deemed in performance default, unless it is not responsible for the non-performance. During the period of performance default, interest shall accrue on the purchase price at the statutory default interest rate prescribed from time to time. MAGNETEC reserves the right to enforce more extensive damages caused by performance default.
2. If circumstances later arise or become known that cast doubt on the Purchaser's solvency and credit-standing and thereby signal that MAGNETEC's purchase price claim is in jeopardy due to the Purchaser's inability to pay, then MAGNETEC will be entitled – notwithstanding any other rights –
 - I. to refuse performance pursuant to the statutory provisions and – if applicable, after setting a grace period – to rescind the contract (§ 321 BGB);
 - II. to demand additional security for the delivered goods up to the threshold amount defined in § 7 para. 5 below;
 - III. to demand prepayment for any outstanding deliveries; and
 - IV. to demand the immediate payment of all outstanding (and still not-yet-due) invoices with regard to any deliveries previously made.

3. The Purchaser may offset any counterclaims it has against MAGNETEC, only if they have been established in a legally binding judgement or are not disputed by MAGNETEC. Likewise, the Purchaser may enforce rights to withhold counter-performance only insofar as its claim has been established in a legally binding judgement or are not disputed by MAGNETEC. The Purchaser's rights in the event of defects of the delivered goods, especially according to § 8 para. 4, remain unaffected.

§ 7 Retention of Title

1. Until all claims, to which MAGNETEC is entitled against the Purchaser based on the business relationship, have been paid in full, MAGNETEC will retain title to the goods sold to the Purchaser (hereinafter referred to as „Secured Goods“). However, the Purchaser is authorized to resell and process the Secured Goods in the ordinary course of business. The Purchaser is not entitled to pledge, conditionally convey title for security purposes, or otherwise encumber the Secured Goods.
2. The Purchaser here and now assigns to MAGNETEC receivables held against third parties arising from the resale of Secured Goods. The Purchaser is authorized to collect on these receivables until revoked by MAGNETEC. MAGNETEC is especially entitled to revoke this collection authority, if the Purchaser stops making payments to MAGNETEC, if there is an inability to pay or if MAGNETEC asserts its rights under § 7 para. 4. After revocation, the Purchaser is obligated, upon MAGNETEC's request, to provide MAGNETEC with all information regarding the assigned receivables that is necessary for collection, including the documents needed for enforcement, and to notify its debtors about the assignment. The Purchaser is not entitled to assign, pledge or otherwise encumber these receivables. This also applies to the assignment for purposes of collecting the receivables pursuant to a factoring arrangement, unless an obligation is simultaneously imposed on the factor to ensure that the consideration or counter-performance in the amount of MAGNETEC's share of the receivable is directly attributable to MAGNETEC for as long as MAGNETEC's claims or receivables against the Purchaser still exist.
3. The Purchaser must without undue delay notify MAGNETEC about any enforcement measures and other third-party action taken against the Secured Goods.
4. If the Purchaser is in breach of contract (e.g., a payment default), then MAGNETEC is entitled to rescind the contract according to the statutory provisions and/or to demand the return of the Secured Goods on the basis of its retention of title. The demand for return of the Secured Goods does not constitute a declaration of rescission, unless such declaration is expressly provided by MAGNETEC.

Where the Purchaser does not pay the purchase price due, then MAGNETEC may assert these rights only if MAGNETEC has first afforded the Purchaser a reasonable grace period to make payment and such payment is in fact not made or if a payment grace period is not required by law.

5. If the realizable value of the security (collateral) granted to MAGNETEC exceeds MAGNETEC's claims against the Purchaser by 10% or more, then at the Purchaser's request, MAGNETEC shall release certain items of security based on its own selection.
6. For the period of time during which MAGNETEC retains title to the Secured Goods, the Purchaser will be obligated
 - I. to maintain these goods in a conforming condition that ensures that they can be sold;
 - II. to compensate MAGNETEC for any damages caused to these goods during that period of time; and
 - III. to ensure that the goods subject to MAGNETEC's retention of title rights are labeled in a manner that any third party could readily recognize that the goods are owned by MAGNETEC.
7. MAGNETEC is entitled to insure, at the Purchaser's expense, the Secured Goods against damages that may be caused by fire, water and theft, up to the amount of the purchase price of these goods, unless the Purchaser itself has taken out such insurance policy in favor of MAGNETEC and proves to MAGNETEC that such policy is in place. In the event of any loss, damage or destruction of the Secured Goods, the Purchaser here and now assigns to MAGNETEC any indemnity claims held against third parties (e.g., insurance claims or claims based on tort).
8. If the Purchaser adapts or processes the Secured Goods, then the parties hereby agree that the processing will take place in the name and on behalf of MAGNETEC as manufacturer – without MAGNETEC incurring any obligations arising therefrom – and that MAGNETEC will directly acquire sole ownership or – if the processing is done from materials of several owners or the value of the processed item is higher than the value of the Secured Goods – co-ownership (fractional ownership) of the newly created item of property in the ratio of the value of the Secured Goods to the value of the newly created item of property. If MAGNETEC acquires no such (co-)ownership interest, then the Purchaser shall here and now transfer its future ownership interest or – in the above mentioned ratio – its co-ownership interest in the newly created item of property to MAGNETEC. If the Secured Goods are combined or comingled with other items of property to form a single, integrated item of property, and if one of the Purchaser's other items of property is to be considered the main item of property,

then the Purchaser, to the extent it owns the main item of property, shall transfer to MAGNETEC the proportionate co-ownership interest in the uniform item of property in the same ratio that is set forth in sentence 1 of this § 7, para. 8.

§ 8 Legal Consequences for Breach of Warranties, Liability for Defects

1. All statements from MAGNETEC regarding the characteristics (e.g., intended use, processing, application, etc.) of the delivered goods are made to the best of MAGNETEC's knowledge, but do not constitute representations or guarantees, but simply statements about features and characteristics. They do not release the Purchaser from its own inspections and other examinations of the delivered goods in accordance with the provisions of these GTCs or the applicable statutory provisions.
2. The Purchaser's claims for defects are subject to the condition that the Purchaser has discharged its obligations to inspect and give notice of defects with regard to the goods delivered by MAGNETEC in accordance with §§ 377, 381 of the German Commercial Code ("HGB"). If a defect is revealed to the Purchaser upon delivery, inspection or at a later time, then the Purchaser shall without undue delay notify MAGNETEC thereof in writing. In any case, obvious defects (including a wrong delivery and shortfall delivery) must be reported to MAGNETEC in writing at the latest within ten (10) business days from delivery, and any defects that were not identifiable during inspection (latent defects) must be so reported within the same period of ten (10) working days from date the defect is discovered. If the Purchaser fails to carry out the inspection required under this paragraph or to duly notify defects, then the goods shall be deemed to have been accepted with regard to the defect that was not notified or that was not timely or duly notified. In this respect, the Purchaser can no longer assert claims for defects.
3. All Purchaser claims based on defects (defects in quality and title) in the delivered goods will be barred by prescription one (1) year after delivery. The statutes of limitations under § 438 para. 1 no. 1, no. 2 BGB and § 444 BGB remain unaffected thereby. The Purchaser's claims for compensatory damages caused by an intentional or grossly negligent breach of duty, for losses resulting from death, bodily injury or impairment of health and for liability arising under the Product Liability Act shall, however, become barred by prescription exclusively in accordance with the applicable statutes of limitation.
4. If the delivered goods are defective, then MAGNETEC is entitled to choose, within a reasonable period of time, either to cure the defect (subsequent improvement) or to deliver a conforming item of property (substitute delivery).

MAGNETEC retains the right to refuse subsequent performance under the statutory conditions. MAGNETEC is entitled to condition any subsequent performance, which it may owe, on the Purchaser first paying the purchase price due. Nevertheless, the Purchaser is entitled to holdback a portion of the purchase price that is reasonably commensurate with the defect.

5. The Purchaser must afford MAGNETEC the time and opportunity necessary to conduct the subsequent performance due, and must above all hand over the rejected goods to MAGNETEC for inspection purposes. In the case of the substitute delivery, the Purchaser must return the defective goods to MAGNETEC in accordance with the statutory provisions. The subsequent performance encompasses neither the removal of the defective goods nor reinstallation, if MAGNETEC had not been originally obligated to install them. The expenses necessary for the purpose of inspection and subsequent performance, especially transport, travel, labor and material costs, shall be borne or reimbursed by MAGNETEC according to statutory law, provided that there is in fact a defect. Otherwise, MAGNETEC may demand that the Purchaser reimburse it for the costs arising from the unjustified demand for curing the defect (especially testing and transport costs), unless the lack of defectiveness was not recognizable to the Purchaser.
6. If the subsequent performance fails, or if a reasonable period of time set by the Purchaser for the subsequent performance has expired without success, or if such a period of time is not required under the statutory provisions, then the Purchaser may rescind the contract or reasonably abate the purchase price. The purchaser will not be entitled to rescind the contract, however, if the defect is insignificant.
7. MAGNETEC's liability for compensatory damage claims held by the Purchaser or claims for compensating futile expenses incurred due to defects shall be limited in accordance with § 9 (Liability and Limitations of Liability, Compensatory Damages based on Fault).
8. The Purchaser may return the rejected goods to MAGNETEC only with MAGNETEC's express consent. The Purchaser's rights based on the existence of defects under these GTCs remain unaffected thereby.

§ 9 Liability and Limitation of Liability, Compensatory Damages based on Fault

1. MAGNETEC's liability – regardless of the legal basis, including liability based on performance default, defective delivery, breach of contract, breach of duties arising during contract negotiations and tort – is limited, if fault is involved, in accordance with the provisions of this § 9. Otherwise, MAGNETEC's liability is subject to the statutory provisions.

2. Irrespective of the legal basis, MAGNETEC will be subject to unlimited liability for intentional acts or omissions and for gross negligence in connection with liability based on fault.
3. MAGNETEC is not liable for any simple negligent conduct of its officers and directors, lawful representatives, employees or other vicarious agents, unless the matter involves a breach of material contractual duties. Material contractual duties are those duties, the fulfillment of which makes the proper performance of the contract even possible in the first place and is a fact upon which the Purchaser routinely relies and can be expected to rely.
4. If MAGNETEC is essentially liable for damages under § 9 para. 3, then MAGNETEC's liability will be limited to foreseeable damages that are typical for the contract in question.
5. In cases of liability based on simple negligence, MAGNETEC's obligation to pay compensation for property damage and any additional financial losses resulting therefrom is limited to an amount of EUR 5,000,000.00 per loss event (an amount that matches the current coverage under the product liability insurance carried by MAGNETEC), even if the breach involved material contractual duties.
6. The foregoing disclaimers and limitations of liability also apply to the same extent to MAGNETEC's officers and directors, its lawful representatives, its employees and its other vicarious agents.
7. The foregoing disclaimers and limitations of liability under this § 9 do not apply to MAGNETEC's liability in the event that there is a fraudulent concealment of defects, a guarantee is given about the quality or features of the goods, there has been death, bodily injury or an impairment of health or the Purchaser asserts claims under the German Product Liability Act.

§ 10 Indemnification for Infringement of any Intellectual Property Rights

1. If MAGNETEC delivers the goods according to drawings, samples, models or other specifications of the Purchaser, then the Purchaser agrees to indemnify MAGNETEC with respect to all third-party claims for alleged infringement of third-party industrial property rights or the infringement of copyrights based on the use of such drawings, samples, models or other specifications, and shall reimburse MAGNETEC for all necessary expenses incurred in connection with these third-party claims resulting from such infringements of third-party industrial property rights or copyrights, provided that MAGNETEC is not at fault. Furthermore, the Purchaser shall be liable to MAGNETEC for all damages resulting from such an infringement or violation of third-party rights.

The claims under this paragraph 1 will not arise, insofar as the Purchaser can prove that it is not responsible for the infringement of intellectual property rights or copyrights and would not have been able to know about such infringement at the time the materials were made available upon having exercised the due care owed by a merchant.

2. MAGNETEC reserves the right to enforce more extensive statutory rights beyond the foregoing provisions of this § 10.

§ 11 Jurisdiction and Venue, Governing Law

1. Exclusive – even international – jurisdiction and venue for all disputes arising from or connected with the contractual relationship between MAGNETEC and the Purchaser shall lie with the competent courts located at MAGNETEC's registered place of business, provided that the contracting parties are merchants, legal persons under public law or special public-sector funds. In addition, MAGNETEC is entitled at its option to file legal actions at the Purchaser's courts of general jurisdiction or the place of performance for the delivery duty. Any overriding statutory provisions, including those regarding exclusive jurisdiction, will remain unaffected thereby.
2. These GTCs and the contracts concluded between MAGNETEC and the Purchaser are governed by and shall be construed in accordance with the laws of the Federal Republic of Germany.
3. The UN Convention on Contracts for the International Sale of Goods (CISG) shall not apply.
4. Should any provisions of these GTCs be or become invalid, then the validity of the remaining provisions hereof will not be affected thereby. Any invalid provisions shall be replaced by the relevant statutory provisions, if they exist. If remaining bound by the contract would create an unreasonable hardship for a contracting party even after incorporating the changes prescribed in sentence 2, then this contract in its entirety will be rendered void and invalid.