

# General Terms and Conditions

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## **1. Applicability; Conclusion of contract**

- 1.1 Sarah Mischinger (hereinafter "Agency") shall provide its services exclusively on the basis of the following General Terms and Conditions (GTC). They shall apply to all legal relationships between the Agency and the Customer, even if they are not expressly referred to. The GTC shall exclusively apply to legal transactions with entrepreneurs, i.e. B2B transactions.
- 1.2 The version applicable at the time of conclusion of a contract shall be relevant. Deviations from these GTC and other supplementary agreements with the Customer shall only be effective if they have been confirmed by the Agency in writing.
- 1.3 Terms and conditions of the Customer, if any, shall not be accepted, even if the Agency knows them unless expressly agreed otherwise in writing on a case-by-case basis. The Agency expressly objects to GTC of the Customer. No other objection of the Agency to the Customer's GTC shall be required.
- 1.4 The Customer shall be informed about amendments to the GTC; they shall be deemed agreed unless the Customer objects to the amended GTC in writing within 14 days; in the information, the Customer will be expressly informed about the consequence of silence on his part.
- 1.5 If any provisions of these General Terms and Conditions are ineffective, the binding nature of the remaining provisions and the contracts concluded on the basis of the same shall not be affected. The ineffective provision shall be replaced by an effective provision which comes as close as possible to the meaning and purpose of the ineffective one.
- 1.6 The Agency's offers shall be subject to change without notice and non-binding.

## **2. Social Media Channels**

Before an order is placed the Agency expressly points out to the Customer that providers of "social media channels" (e.g. Facebook; hereinafter referred to as Providers), in their terms and conditions of use, reserve the right to reject or remove advertisements or promotional appearances for any reason whatsoever. Accordingly, Providers are not obliged to forward content or information to users. Thus, there is a risk, which cannot be calculated by the Agency, that advertisements or promotional appearances are removed for no reason. Although in the case of a complaint of a different user Providers do offer an opportunity to reply, the content will be

immediately removed also in that case. In that case restoring the original, lawful condition may take some time. The Agency works on the basis of the Providers' terms and conditions of use, on which it has no influence, and also makes them the basis of Customer orders. By placing the order the Customer expressly acknowledges that those terms and conditions of use (co-)determine the rights and duties of a contractual relationship if any. The Agency intends to execute the Customer's order to the best of its knowledge and belief and to comply with the policies of "social media channels". Due to the terms and conditions of use that are currently applicable and the fact that every user can easily allege a violation of the law with the aim that contents will be removed, the Agency cannot guarantee that the ordered campaign can be retrieved at any time.

### **3. Protection of Concepts and Ideas**

If a potential Customer has already invited the Agency beforehand to develop a concept and if the Agency accepts this invitation prior to the conclusion of the principal contract, the following shall apply:

- 3.1 By the invitation and acceptance of the invitation by the Agency the potential Customer and the Agency enter into a contractual relationship ("pitching contract"). That contract will also be based on the GTC.
- 3.2 The potential Customer acknowledges that already by developing a concept the Agency will render cost-intensive services, even though the Customer himself has not taken on any performance duties yet.
- 3.3 To the extent that they reach the level of originality required for copyright protection of the linguistic and graphics parts of the concept are protected by the Austrian Copyright Act [Urheberrechtsgesetz]. The potential Customer is not permitted to use or edit those parts without the Agency's consent due to the Austrian Copyright Act alone.
- 3.4 Furthermore, the concept contains ideas that are relevant to advertising which does not reach the level of originality required for copyright protection and is thus not protected by the Austrian Copyright Act. Such ideas are generated at the beginning of every creative process and may be defined as the creative spark for all subsequent work results and, thus, as the origin of the marketing strategy. Accordingly, those elements of the concept are protected which are unique and characterize the marketing strategy. For the purpose of this agreement, ideas shall in particular mean advertising slogans, advertising texts, graphics and illustrations, advertising means etc., even if they do not reach the level of originality required for copyright protection.
- 3.5 The potential Customer undertakes not to exploit or have exploited commercially and/or use or have used the creative advertising ideas which the Agency presented as part of the concept in any context other than the corrective of a principal contract to be concluded at a later time.
- 3.6 If the potential Customer is of the opinion that the Agency presented ideas to him which he already had before the presentation, he shall notify the Agency thereof via e-mail within 14 days of the day of the presentation and include means of evidence which allow a chronological allocation.

- 3.7 Otherwise the Parties will assume that the Agency has presented an idea to the potential Customer which is new to him. If the Customer uses the idea, it has to be assumed that the Agency received remuneration therefor.
- 3.8 The potential Customer may be released from his duties under this Clause if he pays a reasonable compensation plus 20% VAT. Such release shall become effective only after receipt of the full compensation payment by the Agency.

#### **4. The scope of services; Order processing; Customer's duties to co-operate**

- 4.1 The scope of the services to be rendered shall be based on the specifications of the Agency Agreement or the Agency's acknowledgment of order if any, and the briefing report, if any ("Offer Documents"). Subsequent modifications of the services shall be subject to the Agency's written confirmation. When executing the order the Agency shall be free in its discretion within the framework specified by the Customer.
- 4.2 All services of the Agency (including but not limited to all preliminary designs, sketches, and electronic files) shall be checked by the Customer and released within three working days of receipt by the Customer. If they are not released within that period, they shall be deemed approved by the Customer. After that period has expired with no reply from the Customer they shall be deemed accepted by the same.
- 4.3 The Customer shall make accessible to the Agency completely and in time all information and documents required for rendering the service. The Customer shall notify the Agency of all circumstances that are relevant to the execution of the order, even if they become known only in the course of execution of the order. The Customer shall bear the costs incurred due to the fact that work has to be done again by the Agency or is delayed because of his incorrect, incomplete or subsequently modified specifications.
- 4.4 In addition, the Customer is obliged to clear the documents made available by him for execution of the order (photos, logos, etc.) for potential copyrights, trademark rights, marks or other rights of third parties (rights clearance) and guarantees that the documents are free from rights of third parties and may, therefore, be used for the desired purpose. In the case of merely slight negligence or if it has fulfilled its duty to warn the Customer, the Agency shall not be liable (at least as regards the relationship between the Agency and the Customer) for an infringement of such rights of third parties by documents made available by the Customer. If the Agency is held liable for an infringement of such rights, the Customer shall indemnify and hold harmless the Agency and shall compensate the Agency for any and all disadvantages suffered by it due to third-party claims, including costs of reasonable legal representation. The Customer undertakes to support the Agency in defending claims of third parties if any. For this purpose, the Customer shall provide the Agency with all documents without request.

#### **5. External services; Commissioning of third parties**

- 5.1 The Agency shall be entitled at its own discretion to render the services itself, to employ expert third parties as agents [Erfüllungsgehilfen as defined by Section

1313a of the Austrian General Civil Code [ABGB]] and/or to commission a third party to render such services ("External Service").

5.2 Commissioning of third parties in connection with an External Service shall be done either in the Agency's own name or in the name of the Customer. The Agency shall select the relevant third party with care and ensure that it is appropriately qualified.

5.3 The Customer shall assume obligations vis-à-vis third parties which survive the contract. This shall expressly apply also in the case of termination of the agency contract for cause.

## **6. Deadlines**

6.1 Unless expressly agreed to be binding, delivery or service periods stated shall only be approximate and non-binding. Binding agreements on deadlines shall be recorded in writing or confirmed by the Agency in writing.

6.2 If the delivery/service of the Agency is delayed for reasons for which the Agency is not responsible, such as, e.g. events of force majeure or other unforeseeable events that cannot be prevented by reasonable means, the service obligations shall be suspended for the duration and to the extent of the impediment and the deadlines shall be extended accordingly. If such delays continue for more than two months, the Customer and the Agency shall be entitled to rescind the contract.

6.3 If the Agency is in default, the Customer may only rescind the contract after having granted the Agency a reasonable grace period of at least 14 days in writing and after such period has expired fruitlessly. Claims of the Customer for damages on the ground of non-performance or default shall be excluded unless intent or gross negligence can be proved.

## **7. Early termination**

7.1 The Agency shall be entitled to terminate the contract for cause with immediate effect. Causes shall include but not be limited to situations where

- (a) provision of a service becomes impossible for reasons for which the Customer is responsible or is further delayed even though the Customer was granted a grace period of 14 days;
- (b) the Customer continues to violate material obligations under this contract, such as, e.g. the obligation to pay an amount payment of which has been demanded or duties to co-operate, despite a written warning and having been granted a grace period of 14 days.
- (c) legitimate concerns exist regarding the Customer's credit standing and, upon the Agency's request, the Customer fails to make advance payments or to furnish suitable security prior to provision of the service by the Agency;

7.2 The Customer shall be entitled to terminate the contract for cause without having to grant a grace period. A cause shall be, in particular, where the Agency repeatedly violates material provisions of this contract despite a written warning and having been granted a grace period of at least 14 days to remedy the breach of the contract.

7.3 Already used services have to be paid regardless.

## **8. Fees**

- 8.1 Unless otherwise agreed the Agency's entitlement to fees shall arise for any specific service once the same has been rendered. The Agency shall be entitled to ask for advances up to 50%. Contracts extending over a prolonged period of time, the Agency shall be entitled to render interim accounts or issue advance invoices. The (remaining) fee claim is due upon project approval.
- 8.2 The fees shall be stated as net fees plus statutory value-added tax. If in a specific case no agreement on fees has been concluded, the Agency shall be entitled to fees at market rates for the services rendered and for transfer of copyrights and marks.
- 8.3 All services of the Agency which are not expressly covered by the agreed fees shall be paid for separately. All cash expenses incurred by the Agency shall be reimbursed by the Customer.
- 8.4 Cost estimates provided by the Agency shall be non-binding. If it becomes clear that the actual costs will exceed the Agency's written cost estimate by more than 15 percent, the Agency shall advise the Customer of such higher costs. The increase in costs shall be deemed accepted by the Customer if the Customer does not object to such increase in writing within three working days of the advice and states cheaper alternatives at the same time. Cost increases of up to 15 percent shall not have to be advised separately. Such a deviation from the cost estimate shall be deemed accepted by the Customer from the beginning.
- 8.5 If the Customer unilaterally modifies or cancels work ordered without involving the Agency and notwithstanding other regular support from the same, the Customer shall pay the Agency for the services provided by then according to the agreement on fees and shall reimburse all costs incurred. Unless work is canceled on the ground of a breach of the Agency's duties by gross negligence or willful intent, the Customer shall, in addition, pay the Agency the total fee (commission) agreed for that contract, and the allowance [Anrechnungsvergütung] as defined in Section 1168 of the Austrian Civil Code [ABGB] shall be excluded. Furthermore, the Agency shall be indemnified and held harmless from and against any third-party claims, in particular of the Agency's contractors. By payment of the fees, the Customer shall acquire no rights to use work already carried out; concepts, drafts and other documents which were not implemented shall rather be returned to the Agency without delay.

## **9. Payment; Retention of title**

- 9.1 The fee shall be due for payment immediately upon receipt of the invoice without any deductions unless special payment terms are agreed in writing on a case-by-case basis. The same shall apply to all cash and other expenses charged. The Agency shall retain title to the goods delivered by it until full payment of the fee including all ancillary liabilities.
- 9.2 In the case of payment default of the Customer statutory default interest at the rate applicable to business-to-business transactions will be charged. In the case of default, the Customer also undertakes to reimburse the Agency the dunning and collection charges incurred to the extent they are necessary for an appropriate pursuit of the claim. This shall, in any case, include the costs of two dunning letters

at the market fee of currently at least EUR 10 per letter plus those of one dunning letter of a lawyer who has been instructed to collect the receivables outstanding. An assertion of further rights and claims shall remain unaffected.

- 9.3 If the Customer is in default of payment, the Agency may call for immediate payment of services or partial services rendered under different contracts concluded with the Customer.
- 9.4 Furthermore, the Agency is not obliged to render other services until payment of the amount outstanding (right to withhold services). The obligation to pay the fees shall not be affected.
- 9.5 If payment by installments has been agreed, the Agency reserves the right to demand immediate payment of the total debt outstanding if installments or ancillary claims are not paid in time (acceleration clause).
- 9.6 The Customer shall not be entitled to set off claims of the Agency against his own claims unless the Customer's claim has been recognized by the Agency in writing or ascertained by court.

## **10. Title and copyright**

- 10.1 The Agency shall retain title to all services of the Agency, including services in connection with presentations (e.g., suggestions, ideas, sketches, preliminary designs, scribbles, concepts, slides, texts), including parts thereof, as well as the individual workpieces and original designs and the Agency may demand at any time, in particular in the case of termination of the contractual relationship, that they be returned to it. By paying the fees the Customer shall acquire the right to use the services for the designated purpose agreed. Unless otherwise agreed the Customer shall, however, use the Agency's services exclusively in Austria. Acquisition of rights to use and exploit the Agency's services shall, in any case, be subject to full payment of the fees charged by the Agency for the same. If the Customer uses the Agency's services already prior to that time, such use shall be based on a loan relationship that may be revoked at any time.
- 10.2 Modifications and/or editing of services of the Agency, including but not limited to further development of the same by the Customer or third parties working for the Customer, shall only be permitted with the express consent of the Agency and, to the extent that services are protected by copyright, of the author.
- 10.3 Use of the Agency's services beyond the originally agreed purpose and scope of use shall be subject to the Agency's consent irrespective of whether such service is protected by copyright or not. In consideration thereof the Agency and the author shall be entitled to a separate reasonable fee.
- 10.4 After expiration of the Agency Agreement use of services of the Agency and/or advertising means for which the Agency developed concepts, text or designs shall also be subject to the Agency's consent irrespective of whether the service is protected by copyright or not.
- 10.5 In the first year after termination of the contract the Agency shall be entitled to the full agency fees agreed in the expired contract for any use described in paragraph 4. In the second and third year after expiration of the contract the Agency shall only be

entitled to half or one fourth of the consideration agreed in the contract. From the fourth year after termination of the contract no agency fees shall be payable.

- 10.6 The Customer shall be liable to the Agency for any unlawful use in the amount of twice the reasonable fees for such use.

## **11. Identification marks**

- 11.1 The Agency shall be entitled to make reference to the Agency and the author, if applicable, on all advertising means and in any advertising and promotion measures, without the Customer being entitled to any payment in this respect.
- 11.2 The Agency shall be entitled to make reference to its current or former business relationship with the Customer on its own advertising media, including but not limited to its website, by referring to the Customer's business name and business logo, with the Customer having the right to revoke his consent in writing at any time.

## **12. Warranty**

- 12.1 The Customer shall notify any defects immediately and in any case within eight days of delivery/provision of the service by the Agency and hidden defects not later than eight days after they were identified in writing including a description of the defect; otherwise the service shall be deemed accepted. In that case assertion of any warranty claims or claims for damages as well as the right to assert claims on account of mistake shall be excluded.
- 12.2 In the case of a justified and timely notification of defects the Customer shall be entitled to improvement or replacement of the delivery/service by the Agency. The Agency shall repair the defects within a reasonable period of time and the Customer shall enable the Agency to take all measures which are necessary for examination and repair of the defects. The Agency shall be entitled to refuse improvement of the service if such improvement is impossible or if the Agency were to incur disproportionately high costs. In that case, the Customer shall be entitled to cancel the contract or get a fee reduction as provided for by law.
- 12.3 The Customer shall also be obliged to examine the service for its lawfulness, including but not limited to competition law, trademark law, copyright law, and administrative law. The Agency is obliged only to roughly examine lawfulness. In the case of slight negligence or after it has fulfilled its duty to warn the Customer, if any, the Agency shall not be liable for lawfulness of contents if they were advised or accepted by the Customer.
- 12.4 The warranty period shall be six months as of delivery/service. The right of recourse to the Agency as defined in Section 933 b (1) ABGB shall be forfeited one year after delivery/service. The Customer shall not be entitled to withhold payments on the ground of complaints. The presumption rule [Vermutungsregel] of Section 924 ABGB shall be excluded.

## **13. Liability and product liability**



- 13.1 In cases of slight negligence liability of the Agency and its employees, contractors or other agents [translator's note: Erfüllungsgehilfen as defined by Section 1313a ABGB] ("People") for damage to property or pecuniary loss suffered by the Customer shall be excluded, be it indirect or direct damage, lost profit or consequential damage resulting from a defect, damage due to default, impossibility, breach of obligation, culpa in contrahendo or due to defective or incomplete performance. The harmed party shall have to prove gross negligence. To the extent that the Agency's liability is excluded or limited this shall also apply to personal liability of its People.
- 13.2 Any liability of the Agency for claims asserted vis-à-vis the Customer on the ground of services rendered by the Agency (e.g. advertising and promotion measures) shall be expressly excluded, provided that the Agency complied with its duty to inform or if it was unable to see such a duty, even due to slight negligence. The Agency shall, in particular, not be liable for costs of legal proceedings, lawyer's fees of the Customer or costs of publication of judgments or for claims for damages, if any, or other claims of third parties; the Customer shall indemnify and hold harmless the Agency in this respect.
- 13.3 Claims of the Customer for damages shall be forfeited six months after knowledge of the damage and in any case three years after the Agency's infringement. Claims for damages shall be limited to the net contract value.

#### **14. Data protection**

**The Customer agrees that his personal data, namely name, occupation, date of birth, Business Register Number, powers to represent the company, contact person, business address and other addresses of the Customer, phone number, fax number, e-mail address, bank details, credit card details, VAT number) may be collected, stored and processed electronically for the purpose of performance of the contract and support of the Customer and for the Agency's own advertising and promotion purposes, for example by sending him offers, advertising brochures or newsletters (in hard copy or electronic form) and for the purpose of making reference to the current or former business relationship with the Customer.**

**The Customer agrees to be sent electronic mail for advertising purposes until further notice.**

**Such consent may be revoked in writing via e-mail to the contact details stated in the header of these GTC at any time.**

#### **15. Applicable law**

The Agreement and all mutual rights and duties resulting therefrom, as well as any claims between the Agency and the Customer, shall be subject to Austrian substantive law, and its conflicts of laws rules and UN Sales Law shall be excluded.

#### **16. Place of performance and place of jurisdiction**



- 16.1 The place of performance shall be the registered office of the Agency. In the case that goods are shipped the risk shall pass to the Customer once the Agency has delivered the goods to the carrier chosen by it.
- 16.2 The agreed place of jurisdiction for all legal disputes arising between the Agency and Customer in connection with this contractual relationship shall be the court having jurisdiction over the subject-matter and the Agency's registered office.  
Notwithstanding the foregoing the Agency shall be entitled to sue the Customer at his general place of jurisdiction.
- 16.3 If only the masculine form is used herein for describing natural persons it shall equally refer to women and men. If a specific person is referred to, the respective gender-specific form shall be used.