General Terms and Conditions of Kerb-Konus-Vertriebs-GmbH

1. Scope of Application/General

1.1 These General Terms and Conditions of Contract, Delivery and Service (GTC) shall exclusively apply vis-à-vis entrepreneurs within the meaning of Section 14 BGB (German Civil Code), i.e. natural or legal persons who acquire the goods or services for commercial or professional use.

1.2 The terms below (GTC) shall exclusively apply to the business relationship with our customers, including for information and consultation.

Deviating terms of the customer and/or orderer - hereinafter "Customer(s)" - shall apply only if and to the extent that we explicitly acknowledge them in writing. Our silence regarding any such deviating terms shall not operate, in particular, as a recognition or consent, not even for future contracts.

Our GTC shall apply in lieu of any Terms and Conditions of Purchase of the Customer, even if acceptance contract pursuant thereto is provided for as an unconditional acknowledgement of the Terms and Conditions of Purchase or if we perform delivery following the Customer's reference to the applicability of its General Terms and Conditions of Purchase, unless we have expressly waived the applicability of our GTC. The exclusion of the Customer's General Terms and Conditions shall also apply if the General Terms and Conditions on individual regulation clauses contain a separate regulation. By accepting our order confirmation, the Customer shall explicitly acknowledge that it waives its demurrer derived from the Terms and Conditions of Purchase.

1.3 Where any reference is made to damages claims below, this shall equally mean claims for reimbursement of expenses within the meaning of Section 284 BGB.

2. Surrendered Documents and Data/Samples/Quotations

We reserve all property rights and copyrights to any samples, illustrations, drawings, data, quotations and other documents on our products and services that are communicated or surrendered to the Customer. The Customer undertakes to not make the samples, data and / or documents specified in the sentence above accessible to third parties, unless we give our explicit written approval. They must be returned to us upon request to the extent that any order based thereon is not placed with us.

3. Contract Conclusion/Default of Acceptance

3.1 Our offerings are made without engagement, unless they have been explicitly marked as binding or contain expressly binding commitments or their binding force had explicitly been agreed otherwise. They shall be requests for orders.
The Customer shall be bound to its order as a contract application for 14 calendar days - 5 business days for electronic orders (to hour registered office in each case) - after receipt of the order by us, unless the Customer must regularly also expect any later acceptance by us (Section 147 BGB). This shall also apply to repeat orders of the Customer.

3.2 A contract shall materialise - also in day-to-day business - only after we confirm the Customer's order in writing or in text form (i.e. also by telefax or e-mail) by order confirmation.
In case of any delivery or service within the Customer's commitment period as subject-matter of the offer, our order confirmation may be replaced by our delivery, with the date of dispatch of the delivery being authoritative.

3.3 The Customer must point any special demands on our products out to us in good time before the contract is concluded. However, such references shall not extend our contractual obligations and our liability.

3.4 If acceptance of the products or their dispatch is delayed for any reason attributable to the Customer, we shall be entitled, at our option, after setting and expiry of a 14-days' grace period, to immediately demand remuneration payment or to rescind from the contract or to refuse fulfilment and to claim damages in lieu of the entire performance. The period must be set in writing or in text form. We do not need to refer to the rights from this clause therein again.
In case of the demand for damages stipulated above, the damages to be paid shall be 20% of the net delivery price. Demonstration of any other damage amount or non-occurrence of a damage shall remain reserved to both parties.

3.5 If any delivery order or call-off is delayed by the Customer, we shall be entitled to postpone such delivery by the same period as the Customer's backlog, plus a scheduling period of four workdays, at the location of our registered office.

4. Delivery/Place of Performance/Delivery Time/Packaging

4.1 Binding delivery dates and deadlines must be expressly agreed in writing. If delivery dates and deadlines are non-binding or approximate (around, about, etc.), we shall endeavour to make every effort to adhere to them.

4.2 Delivery and/or performance deadlines shall commence upon receipt of our order confirmation by the Customer or, in the absence of such confirmation, within five calendar days after receipt of the Customer's order by us, but not before all details regarding the execution of the order have been clarified and all other conditions to be fulfilled by the Customer are satisfied, especially agreed down payments or collaterals and necessary cooperation services have been provided in full. The same shall apply to delivery dates and performance dates. If the Customer has required changes after the order was placed, a new reasonable delivery and/or service deadline shall commence upon confirmation of such change by us.

4.3 If we fall in default of delivery, the Customer must initially set us a reasonable grace period of at least - unless inappropriate - 14 days to render the service. If such period elapses in vain, damages claims for breach of duty, for any reason whatsoever, shall exist only in accordance with the regulation in clause 10.

4.4 We shall be entitled to carry out partial deliveries. We shall be permitted to perform excess or short delivery of up to 10% of the agreed delivery quantity at identical prices.

5. Force Majeure

5.1 In any case of force majeure or other impairments to our delivery possibilities through no fault of our own, which shall include any circumstances and incidents that cannot be prevented by exercising due diligence of proper business management, we shall inform our Customer thereof in good time in writing or in text form. In this case, we shall be entitled to postpone delivery for the duration of the impediment or to rescind from the contract in whole or in part for the part not yet executed, provided that we have met our information obligation above and have not assumed the risk of procurement or any guarantee of delivery. Cases of force majeure shall also include, but shall not be limited to, transport impediments, operational disruptions (e.g. due to fire, water and mechanical breakdown), delays in raw material supply, official measures, any form of labour dispute and all other impediments not culpably brought about by us from an objective point of view.

5.2 If any delivery date or delivery deadline has been agreed as binding and is exceeded due to events acc. to clause 5.1, the Customer shall be entitled, following fruitless elapsing of a reasonable grace period, to rescind from the contract for the part not yet executed. In this case, any farther-reaching claims of the Customer, especially for damages, shall be excluded.

5.3 The regulation above acc. to clause 5.2 shall apply mutatis mutandis if, for the reasons specified in clause 5.1, it would be objectively unreasonable for the Customer to continue to adhere to the contract even without a contractual agreement on a fixed delivery date.

6. Dispatch/Passing of Risk/Acceptance

6.1 Unless agreed otherwise in writing, delivery shall be performed ex works Incoterms 2010, Amberg. In case of any debt to be collected by the creditor and any debt to be discharged by remittance, the goods shall be dispatched at the Customer's risk and expense. This shall also apply if we use own vehicles for such dispatch.

6.2 Unless agreed otherwise, and where dispatch has been agreed, selection of the transport route and of the means of transport shall remain reserved to us. Nevertheless, we shall endeavour to consider the Customer's requirements regarding dispatch method and dispatch route into account; however, the Customer shall have no right to claim such consideration. Any resulting additional costs, also for any agreed free-paid delivery, as well as the transport and insurance costs shall be borne by the Customer.

6.3 Where any debt to be collected by the creditor has been agreed, the risk of accidental destruction or accidental deterioration shall pass to the Customer upon handover of the products to be delivered; where any debt to be discharged by remittance has been agreed, it shall pass to the carrier, freight forwarder or other undertakings otherwise engaged to execute dispatch, at the latest, however, once they leave our works or our warehouse or our branch office or the manufacturer's works, unless any debt to be delivered to the creditor has been agreed. The regulations above shall also apply if any agreed partial delivery is performed.

7. Warranty

7.1 The Customer must inspect the goods to a reasonable extent immediately after receipt. The Customer must give notice of recognisable material defects to us without delay, at the latest, however, 14 days after collection for delivery ex works or storage location, otherwise after delivery; notice of hidden material defects must be given to us immediately after detection, within the warranty limitation period acc. to clause 7.2 at the latest. Any notice not given in due time shall exclude any claim of the Customer from any breach of duty for material defects. This shall not apply if we act intentionally, grossly negligently or maliciously, in case of any violation of limb, life or health or to the assumption of any guarantee for freedom from defects or any procurement risk acc. to Section 276 BGB or other legally mandatory liability cases.

7.2 Unless explicitly agreed otherwise in writing or in text form, we shall assume warranty for material defects for a period of twelve months, calculated from the date of passing of risk or, if the Customer refuses receipt or acceptance, from the date on which notice of provision for takeover of the goods is given. This shall not apply to damages claims from any guarantee, the assumption of any procurement risk within the meaning of Section 276 BGB, claims due to the violation of limb, life or health, any malicious, intentional or grossly negligent act on our part or if any longer limitation period has been mandatorily laid down in the cased of Sections 478, 479 BGB (recourse in the supply chain), Section 438 (1) No. 2 BGB (erection of structures and delivery of items for structures) and Section 634a (1) No. 2 BGB (construction defects) or to any other extent. Section 305b BGB (priority of individually agreed terms in verbal or text or written form) shall remain unaffected. Any reversal of the burden of proof shall not be associated with the foregoing regulation.

7.3 Our goods shall be deemed free from material defects if they correspond to the agreed specification upon passing of the risk. If we have not agreed any specification with the Customer, the goods shall be deemed free from material defects if their quality upon passing of the risk is conform to the one customary for goods of the same kind and the one the Customer may expect in light of the nature of the goods. Unless explicitly agreed otherwise in writing, we shall not be obliged to render any service, except for delivery of goods free from defects.

7.4 If the delivered goods exhibit any defect that had already been existing upon the passing of risk, we shall, at our option and subject to timely notice of defects, subsequently improve the goods or deliver replacement goods. In any case of replacement delivery, the exchanged parts must be returned to us. We shall always be provided with an opportunity to perform subsequent improvement within a reasonable time limit. Recourse claims shall remain unaffected by the regulation above without limitation. If subsequent performance fails, the Customer may rescind from the contract or reduce the remuneration notwithstanding any damages claims. Our consent must be obtained before any goods are sent back.

7.5 Claims of the Customer due to the expenses required for subsequent performance, in particular transport, infrastructure, labour and material costs, shall be excluded to the extent that the expenses increase because the goods delivered by us have been subsequently transported to a place other than the Customer's branch office, unless such transport complies with their intended use.

7.6 Recourse claims of the Customer against us shall exist only to the extent that the Customer has not made agreements with its buyers beyond the statutory mandatory claims for defects. Furthermore, the regulation in clause 7.4 shall apply, mutatis mutandis, to the extent of the Customer's recourse claim against us.

8. Payment Terms

8.1 Unless agreed otherwise, the purchase price must be paid immediately after receipt of the invoice, without deductions, in cash or by direct debit or transfer.

8.2 Any payment methods other than cash payment or bank transfer shall require a separate agreement between us and the Customer; this shall apply, in particular, to the issuing of cheques and bills of exchange.

8.3 The Customer shall have a right of retention or set-off only regarding any counter-claims that are not disputed or have been finally established. The Customer may exercise a right of retention only to the extent that its counter-claim is based on the same contractual relationship.

8.4 Upon occurrence of default, default interest of nine percentage points above the respective basic rate of interest of the European Central Bank applicable upon maturity of the payment claim shall be charged. The assertion of any farther-reaching damage shall remain reserved.

9. Retention of Title

9.1 We retain title to all goods delivered by us (hereinafter jointly "goods subject to retention of title") until all of our receivables from the business relation with the Customer, including claims arising in future from contracts concluded at a later date, have been settled. This shall also apply to any balance in our favour where we include individual or all receivables in an open account (current account) and the balance has been struck.

9.2 The Customer must insure the goods subject to retention of title adequately against fire and theft. Claims against the insurance company due to any event of damage related to the goods subject to retention of title shall herewith already be assigned to us at the value of the goods subject to retention of title.

9.3 The Customer shall be entitled to resell the delivered products in the ordinary course of business. The Customer shall not be permitted to effect any other disposals, especially pledges or granting of ownership by way of security. If the third-party acquirer does not immediately pay for the goods subject to retention of title in case of any re-alienation, the Customer shall be obliged to re-alienate them only subject to retention of title. The entitlement to re-alienate the goods subject to retention of title shall cease to apply without further ado if the Customer stops its payment or falls in default of payment vis-à-vis us.

9.4 The Customer shall herewith already assign to us any receivables including collaterals and ancillary rights that accrue to it against the end buyer or against third parties from or in connection with the re-alienation of goods subject to retention of title. It must not reach any agreement with its buyers that excludes or impairs our rights in any manner whatsoever or defeats the advance assignment of the receivable. If goods subject to retention of title are alienated with other objects, the receivable against the third-party buyer shall be deemed assigned in the amount of the delivery price agreed between us and the Customer, unless the amounts attributable to the individual goods can be calculated from the invoice.

9.5 The Customer shall remain entitled to collect the receivable assigned to us until our revocation, which shall be permitted at any time. We undertake, however, to revoke the direct debit authorisation only where a legitimate interest exists. Such legitimate interest shall exist, for example, if the Customer fails to meet its payment obligations in due form or falls in default of payment. It shall be obliged, at our request, to provide us with the entirety of any information and documents required to collect the receivables assigned and, unless we do so ourselves, to immediately notify its buyers of the assignment to us.

9.6 If the Customer includes receivables from the re-alienation of goods subject to retention of title into a current account relationship existing with its buyers, it shall already now assign to us any acknowledged closing balance resulting in its favour in the amount corresponding to the total amount of the receivable included in the current account relationship from the re-alienation of our goods subject to retention of title.

9.7 In case of any behaviour contrary to contract through the Customer's own fault, especially upon default of payment, we shall be entitled, following rescission from the contract, to take back all goods subject to retention of title. In this case, the Customer shall be obliged to perform surrender without further ado and shall bear the transport costs required for such taking back. Taking back of the goods subject to retention of title by us shall operate as a rescission from the contract. In the event of rescission, we shall be entitled to utilise the goods subject to retention of title. The utilisation proceeds, less reasonable utilisation costs, shall be offset against the receivables owed by the Customer to us from the business relationship. To establish the inventory of the goods delivered by us, we may enter the Customer's business premises during the normal business hours at any time. The Customer must immediately notify us in writing of all accesses by third parties to goods subject to retention of title or any receivable assigned to us.

9.8 If the value of the collaterals existing for us pursuant to the provisions above exceeds the collateralised receivables by more than 10% altogether, we shall be obliged, at the Customer's request, to release collaterals at our option in this respect.

9.9 Any treatment and processing of the goods subject to retention of title shall be made for us as the manufacturer, but without resulting in any obligation for us. If the goods subject to retention of title are processed or inseparably combined with other items not belonging to us, we shall acquire joint ownership of the new item in the ratio of the net invoice amount of our goods to the net invoice amounts of the other items processed or combined. If our goods are combined with other movable items to form a uniform item, which is to be considered as the main item, the Customer shall already now transfer joint ownership thereof in the same ratio. The Customer shall hold the ownership or joint ownership free of charge for us. The co-ownership rights arising in accordance therewith shall be regarded as goods subject to retention of title. Upon our request, the Customer shall be obliged at any time to provide us with the information required to pursue our ownership or co-ownership rights.

9.10 In the event of pledges other intervention by third parties, the Customer must notify us immediately in writing to ensure that we can institute legal proceedings acc. to Section 771 ZPO (German Code of Civil Procedure). Where the third party is unable to reimburse us for the judicial or extrajudicial costs of any proceedings acc. to Section 771 ZPO, the Customer shall be liable for the loss incurred by us.

10. Exclusion/Limitation of Liability

10.1 Subject to the exceptions below, we shall not be liable, especially not for claims of the Customer for damages or reimbursement of expenses for any legal reason whatsoever in case of any breach of duties from the contractual obligation.

10.2 The limitation of liability above acc. to clause 10.1 shall not apply to the extent that liability is mandatorily required by law, as well as to any own intentional or grossly negligent breaches of duty and any intentional or grossly negligent breach of duty by legal representatives or auxiliary agents; to the violation of essential contractual obligations; "essential contractual obligations" shall be any obligations that protect legal positions of the Customer which are essential for the contract, must be especially granted to it by the contract in accordance with its content and purpose; furthermore, such contractual obligations shall be essential if their fulfilment enables proper implementation of the contract in the first place and on compliance with which the Customer has regularly relied and may regularly rely; in case of any violation of limb, life and health, including by legal representatives or auxiliary agents; in case of any default, where a fixed delivery and/or performance date had been agreed; where we have assumed the guarantee for the quality of our goods or for the existence of successful performance or a procurement risk within the meaning of Section 276 BGB; to any liability pursuant to the German Product Liability Act or any other legally mandatory cases of liability.

10.3 In case that only slight negligence is laid to our or to the charge of our auxiliary agents and none of the cases of clause 10.2 above, i.e. the 4th, 5th and 6th bullet point thereof, exists, we shall be liable only for the contract-typical and foreseeable damage also in case of any violation of essential contractual obligations.

10.4 The amount of our liability for each individual event of damage shall be limited to a maximum liability total of € 10 million. This shall not apply if malice, wilful intent or gross negligence is laid to our charge, to claims due to the violation of limb, life or health as well as in case of any receivable based on a tortious act or an expressly assumed guarantee or the assumption of a procurement risk acc. to Section 276 BGB or in cases of any higher liability totals that must mandatorily differ by law. Any farther-reaching liability shall be excluded.

10.5 The exclusions and/or limitations of liability acc. to clauses 10.1 to 10.4 above shall apply to the same extent for the benefit of our bodies, our executives and non-executives and other auxiliary agents as well as our subcontractors.

11. Place of Performance/Place of Jurisdiction/Applicable Law

11.1 The place of performance for all contractual obligations, except in case of any assumption of a debt to be delivered to the creditor or any other agreement, shall be our company's registered office.

11.2 The place of exclusive jurisdiction for all disputes, provided that the Customer is a merchant within the meaning of the German Commercial Code, shall be our company's registered office. However, we shall also be entitled to sue the Customer at its place of general jurisdiction.

11.3 All legal relationships between the Customer and us shall be exclusively governed by the laws of the Federal Republic of Germany, excluding, in particular, the UN Sales Law (CISG).

12. Written Form/Severability Clause

12.1 All agreements, side agreements, representations and contractual amendments shall require written form. This shall also apply to any waiver of the written form requirement itself.

12.2 If any provision of these contractual terms is or becomes ineffective / invalid or unenforceable in whole or in part for reasons of the laws applicable to General Terms and Conditions acc. to Sections 305 to 310 BGB, the legal regulations shall apply.
If any present or future provision of the contract is or becomes ineffective / invalid or unenforceable in whole or in part for any reasons other than the provisions relating to the laws applicable to General Terms and Conditions acc. to Sections 305 to 310 BGB, this shall not affect the validity of the remaining provisions, unless the implementation of the contract, also taking into account the regulations below, would place undue hardship on either party. The same shall apply if any loophole requiring to be filled arises after the contract has been concluded. The parties shall replace the ineffective / invalid / unenforceable provision or loophole requiring to be filled caused by any reasons other than the provisions relating to the laws applicable to General Terms and Conditions acc. to Sections 305 to 310 BGB by an effective provision, which shall correspond to the ineffective / invalid / unenforceable provision and the overall purpose of the contract in its legal and economic substance. Section 139 BGB (partial invalidity) shall be explicitly excluded. If the invalidity of any provision is based on a measure of performance or time stipulated therein (deadline or date), the provision with a legally permissible measure coming closest to the initial measure must be agreed.