

SAMPLE TEXT

for

General Terms and Conditions of Business for consumer transactions

This is a non-binding sample for professional photographers, the text must be tailored to the specific needs of each company.

The requirements according to the Data Protection Act (*Datenschutzgesetz 2018*) have been taken into account. Photographers are reminded that these terms and conditions do not absolve them from compliance with their information obligations. They must therefore specify

- **Name and contact details of the responsible processor**
- **Processing purpose and further processing for other purposes**
- **Expected duration of storage**
- **Recipients of the data (third parties)**
- **Information about the rights in question**
- **Information on the legal basis of data processing (justification)**

General terms and conditions cannot provide relief here, especially since processing takes a different form in each business transaction and/or orders placed will differ; in cases where the parties agree to pass on the data to media companies or the like, for example, the contents of a data protection notice will, of course, be different from cases where the data is merely sent to the other party (who is then the data subject, anyway) and will only be saved by the photographer and not used any further.

We expressly reserve the right to incorporate new findings based on the - as yet non-existent - case law on the Data Protection Act.

I. Applicability and scope of the GTC

1.1 The following General Terms and Conditions shall apply in all cases where the photographer enters into a transaction with an entrepreneur as defined in sec. 1 of the Austrian Consumer Protection Act (*Konsumentenschutzgesetz, KSchG*).

1.2. The photographer provides his services exclusively on the basis of the following General Terms and Conditions. By placing the order, the client acknowledges their applicability. Unless the photographer announces any changes, these shall also apply to all future business transactions, even if no express reference is made to them. The general terms and conditions of the other party - if any - are not part of the contract.

1.3. Should individual provisions of these general terms and conditions prove to be ineffective, this will not affect the binding nature of the remaining provisions of the contracts based thereon. Any ineffective provision shall be replaced by an effective one that reflects the meaning and purpose of the original provision to the greatest possible extent.

1.4. Offers from the photographer are subject to modification and are non-binding.

II. Copyright provisions

2.1 The photographer is entitled to all copyrights and related rights of the creator of a photograph (sections 1, 2, para 2, 73 et seq. of the Austrian Copyright Act (*Urheberrechtsgesetz, UrhG*)). Usage permits (publication rights, etc.) will only be deemed to have been granted if expressly agreed. In such a case, the client acquires a simple (non-exclusive), non-transferable (non-assignable) license only for the expressly agreed purpose and within the agreed limits (number of copies, time and location restrictions, etc.); in case of doubt, the scope of use stated in the invoice or in the delivery note shall be deemed to have been agreed. In any case, the client only acquires as many rights as are required in view of the disclosed purpose of the contract (the order placed). In the absence of any other agreement, the usage license will be valid only for a single publication (in one edition), only for the client's expressly designated medium and not for advertising purposes.

2.2 With every use (reproduction, distribution, broadcast, etc.), the client shall be obliged to display the manufacturer's name (naming) and/or the copyright notice as defined in the World Copyright Agreement), clearly and legibly (visibly), not upside down, and in normal letters, right next to the photograph and clearly identifiable, in the following way: Photograph: (c) ... name/company/artist name of the photographer; place and, if published, year of first publication. In any case, compliance with this provision corresponds to the attachment of the manufacturer's name within the meaning of sec. 74 para 3 of the Copyright Act. In cases where the photograph is signed on the front (within the picture), the publication of this signature will not replace the manufacturer's note described above.

2.3 Any change in the photograph shall require the photographer's written consent. This requirement will only be waived in cases where the change is necessary for the purpose of the contract as known to the photographer.

2.4 The license for use will only be valid upon full payment of the agreed recording and usage fee and will only be deemed to have been granted if the manufacturer is properly named/referred to (see sub-paragraph 2.2 above).

2.5 In case of publication, two free specimen copies must be sent. In the case of expensive products (art books, video cassettes) the number of specimen copies is reduced to one piece. When publishing on the Internet, the photographer must be provided with the web address.

III. Ownership of films – archiving

3.1.1 Analogue photography

The photographer is the owner of the exposed film material (negatives, slides, etc.). In return for an agreed and appropriate fee, the photographer will transfer ownership of the photographs required for the agreed use to the client.

The photographs supplied remain the property of the photographer until full payment of the purchase price.

Slides will only be made available to the client on loan, subject to being returned after use at the risk and expense of the client, unless otherwise agreed in writing; negatives will only be made available if there is a written agreement).

3.1.2 Digital photography

The photographer retains ownership of the image files. A right to a transfer of digital image files only exists if there is an express written agreement and, unless otherwise agreed, only applies to a selection, rather than all, of the image files produced by the photographer.

In any case, the usage license shall only be deemed to have been granted within the scope of sub-paragraph 2.1.

3.2 The reproduction or distribution of photographs in online databases, in electronic archives, in the Internet or in intranets not intended for exclusively internal use by the client, on

floppy disks, CD-ROMs or similar data carriers is only permitted on the basis of a special agreement between the photographer and the client. This will not, however, affect the right to a security backup.

3.3 Without being legally obliged to do so, the photographer will archive the photograph for a period of one year. In the event of loss or damage, the client will not be entitled to any claims.

IV. Identification

4.1 The photographer is entitled to label the photographs as well as the digital image files in any way he deems suitable (including on the front) with his manufacturer's designation. The other party shall be obliged to ensure that the integrity of the manufacturer's designation is preserved, particularly if it is passed on to third parties (printers, etc.). If necessary, the manufacturer's designation must be attached or renewed. This shall apply, in particular, to all means of reproduction created during production or when making copies of digital image files.

4.2 The other party shall be obliged to save digital photos in such a way that the manufacturer's designation remains electronically linked to the images, so that it is retained in any type of data transmission and the photographer as the author of the images can be clearly and unambiguously identified.

V. Secondary obligations

5.1 The client must ensure that any necessary third-party usage permits are obtained and that people have given their consent to the use of their images. It must indemnify the photographer and hold him harmless in this regard, particularly with regard to claims based on the right to one's own image pursuant to sec. 78 of the Copyright Act, as well as with regard to usage claims pursuant to sec. 1041 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*). The photographer guarantees the consent of authorised persons only in cases where an express written promise to this effect has been given and only for the contractual purposes (sub-paragraph 2.1).

5.2 If the client instructs the photographer to process third-party photographs electronically, the client hereby affirms that he is entitled to do so and releases the photographer from all third-party claims based on a breach of this obligation.

5.3 The client undertakes to retrieve any objects to be photographed immediately after the photograph has been taken. If such objects are not retrieved within two working days after the party has been requested to do so, the photographer is entitled to charge storage costs or to have the objects stored at the client's expense. In such a case, transport and storage costs must be borne by the client.

VI. Loss and damage

6.1. In the event of loss or damage to photographs made on order (slides, negative material, digital image files), the photographer will only be liable - regardless of the legal ground invoked - for willful intent and gross negligence. Liability will be limited to his own fault and that of his employees; liability for third parties (laboratories etc.) on the part of the photographer will be limited to intent and gross negligence in the selection of the third party in question. Any liability will be limited to the material costs and to free-of-charge taking of new photographs (if and to the extent this is possible). The client is not entitled to any further claims; in particular, the photographer accepts no liability for any travel and accommodation expenses or for third-party costs (models, assistants, make-up artists and other staff required for the session) or for lost profits, consequential and immaterial damage. Claims for damages based on slight negligence are excluded.

6.2 Sub-paragraph 6.1 shall apply, *mutatis mutandis*, in the event of the loss or damage of templates (films, layouts, display pieces, other templates, etc.), products and props that have been handed over. Items of value must be insured by the client.

VII. Early termination

The photographer is entitled to terminate the contract with immediate effect for cause. The existence of cause shall be assumed, in particular, in cases where bankruptcy or settlement proceedings are instituted with respect to the assets of the client or a petition in bankruptcy is dismissed due to insufficient assets to cover the costs of the proceedings, if the client suspends payments or if there are legitimate concerns regarding the client's creditworthiness and the latter fails to provide an advance payment or suitable security at the photographer's request, or if the performance of the service is impossible for reasons attributable to the client or is further delayed despite the setting of a 14-day grace period, or if the contractual partner, despite a written warning and the granting of a grace period of 14 days, continues to

violate essential obligations from the contract, such as the payment of accelerated partial amounts due or obligations to cooperate.

VIII. Performance and warranties

8.1 The photographer will carefully execute the order placed. He may also have the order carried out - entirely or in part - by third parties. In the absence of written instructions from the client, the photographer will be free to decide how to carry out the order. This applies particularly to the composition of the image, the selection of photographic models, the location and the photographic means used. Differences by comparison with earlier deliveries do not, as such, constitute a defect.

8.2 There will be no liability for defects that can be traced back to incorrect or inaccurate instructions from the client (sec. 1168a of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*)). In any case, the photographer will only be liable for willful intent and gross negligence.

8.3 The client bears the risk for all circumstances not attributable to the photographer himself, such as weather conditions during outdoor shoots, timely provision of products and props, failure to appear of models, travel hindrances, etc.

8.4 Shipments travel at the expense and risk of the client.

8.5 There is no liability for minor defects. Differences in colour when re-ordering are not considered a significant defect. Sub-paragraph 6.1 applies mutatis mutandis.

8.6 Liability for compliance with fixed order dates will only be accepted if the dates in question have been expressly agreed in writing. In the event of delays in delivery, 6.1 will apply mutatis mutandis.

8.7 Any authorisations for use by the photographer do not include the public performance of audio works in any media.

IX. Remuneration / fee

9.1 In the absence of an express written agreement, the photographer is entitled to remuneration (fees) in accordance with his currently valid price lists, or, if no such lists are available, to an appropriate fee.

9.2 The fee is also due for layout or presentation photographs, as well as in cases where the pictures are not used or where their use depends on the decision of a third party. In such cases, no reductions of the fee for taking the photographs will be granted.

9.3 All material and other costs (props, products, models, travel costs, accommodation expenses, make-up artists, etc.), even if they are procured by the photographer, must be paid for separately.

9.4 Changes requested by the client in the course of the work will be made at the expense of the client.

9.5 Conceptual services (advice, layout, other graphic services, etc.) are not included in the fee for taking the photographs. The same applies to any above-average organisational expenses or expenses for meetings and discussions.

9.6 If the client fails to carry out the order for reasons that lie within his own sphere of influence, the photographer shall, in the absence of any other agreement, be entitled to the agreed fee. In the event of unavoidable changes of date (e.g. due to weather conditions), a fee corresponding to the time spent or reserved in vain, as well as all ancillary costs, must be paid.

9.7 The net fee does not include sales tax at the respective statutory rate.

9.8 The client waives the option of offsetting. However, this does not apply in the event of the photographer's insolvency or with regard to counterclaims that are legally linked to the photographer's claims, have been established by a court or have been admitted by the photographer.

X. Licence fee

Unless otherwise expressly agreed in writing, the photographer is entitled to a separate fee, in the agreed or appropriate amount, for granting a licence to use the work,

XI. Payment

11.1 In the absence of other express written agreements, a payment on account of 50% of the expected invoice amount must be made when the order is placed. Unless otherwise expressly agreed in writing, the remaining fee - if it can be determined by the client - will be due for payment after completion of the work; otherwise, payment must be made immediately after invoicing in cash. The invoices are payable without any deduction and free of expenses. In the case of a transfer, the payment will only be considered to have been made once the photographer has been informed of the receipt of payment.

11.2 In the case of orders that comprise several units, the photographer is entitled to invoice each individual service after delivery.

11.3 If the client is in arrears with payment, the photographer is entitled to charge interest on arrears at an annual rate of 5 percent above the base rate, irrespective of any claims for damages over and above the relevant amount.

11.4 In cases where the images delivered are to become the property of the client, this will only happen upon full payment of the fee for taking the photographs, including any additional costs. The enforcement of the reservation of title does not constitute withdrawal from the contract, unless such withdrawal is expressly declared.

XII. Data protection

Unless a further notification has been received, the client acknowledges the following data protection notice and confirms that by adding this, the photographer has fulfilled the information obligations imposed on him:

The photographer, as the person responsible, will process the client's personal data in the following way:

1. Purpose of data processing

The photographer processes the personal data referred to in paragraph 2 for purposes of meeting his contractual obligations and/or filling the orders requested by the client, or for the use of the images for the advertising of the photographer, as well as the additional disclosed personal data for advertising of the photographer's own services.

2. Processed data categories and legal basis for processing

The photographer processes the personal data, specifically names, addresses, telephone and fax numbers, e-mail addresses, bank details and image data, in order to achieve the purposes mentioned under point 1.

3. Transmission of the client's personal data

4. Storage period:

The client's personal data will only be stored by the photographer for as long as this is reasonably considered necessary to achieve the purposes mentioned in sub-paragraph 1, and as permitted under applicable law. The client's personal data will be stored as long as there are statutory retention requirements or the statute of limitations for potential legal claims has not yet expired.

5. The client's rights in connection with personal data

According to applicable law, the client is entitled, inter alia,

- to check whether and which personal data the photographer has stored in order to receive copies of this data - with the exception of the photographs themselves;
- to request the correction, supplementation or deletion of personal data that is incorrect or has not been processed in accordance with the law;
- to require the photographer to restrict the processing of personal data - provided the legal requirements are met;
- to object to the processing of his personal data under certain circumstances or to revoke the consent previously given to processing;
- to request data portability;
- to be informed of the identity of third parties to whom the personal data are transmitted; and
- to lodge a complaint with the competent authority if the legal requirements are met.

6. Contact details of the data controller

If the client has any questions regarding the processing of his/her personal data, he/she may contact the photographer whose name and address are known to him/her.

XIII. Use of images for advertising purposes by the photographer:

Unless there is an express written agreement to the contrary, the photographer is entitled to use photographs produced by him to promote his work. The client grants the photographer his express and irrevocable consent to the publication of the images for advertising purposes

and waives any claims, particularly those based on the right to one's own picture according to sec. 78 of the Austrian Copyright Act as well as usage claims according to sec. 1041 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*).

The client gives his consent, taking into account the applicable data protection regulations, to his personal data and, in particular, the photographs produced being processed by publishing them for the photographer's advertising purposes.

XIV. Final provisions

14.1 All actions brought against any client of the photographer's who has his domicile, habitual residence or place of employment in Austria shall fall within the jurisdiction of one of the courts that have territorial jurisdiction over the district within which the consumer has his domicile, habitual abode or place of employment. For consumers who do not have a place of residence in Austria at the time the contract is concluded, the statutory rules regarding territorial jurisdiction shall apply.

14.2 Any recourse claims that the client or third parties may direct against the photographer based on product liability as defined by the Austrian Product Liability Act (*Produkthaftungsgesetz, PHG*) shall be excluded, unless the person entitled to recourse is able to prove that the mistake has been caused within the photographer's sphere of influence and was at least due to gross negligence. In all other respects, Austrian substantive law shall apply. The application of UN sales law is excluded. The language of the contract is German. If the requirements of Art. 5 para 2 of the Convention on the Law Applicable to Contractual Obligations (Rome Convention), are met, but not those of Art. 5 para 4 in conjunction with para 5 of the said Convention, the choice of law will not deprive the other party to the contract of the protection provided by the mandatory law of the state in which he has his habitual residence.

14.3 These general terms and conditions also apply, mutatis mutandis, to film works or moving images produced by photographers to order, regardless of the process and technology used (film, video, etc.).

PLEASE NOTE:

THESE SAMPLE TERMS AND CONDITIONS ARE MADE AVAILABLE FREE OF CHARGE, AS A SUGGESTION FOR THE CREATION OF INDIVIDUAL COMPANY T&C.

LIABILITY VIS-À-VIS ANYONE FOR THE ACCURACY OR COMPLETENESS OF THE CONTENT OF THE TERMS AND CONDITIONS IS EXPRESSLY EXCLUDED.

THE USER ACKNOWLEDGES THAT THE DRAFT OF THE TERMS AND CONDITIONS HAS NOT YET BEEN SUBJECTED TO REVIEW BY THE COURTS WITH REGARD TO THE ADMISSIBILITY OF INDIVIDUAL PROVISIONS.

BEFORE THE INDIVIDUAL PROVISIONS OF THE GTC ARE APPLIED, LEGAL INFORMATION MUST BE OBTAINED BY THE USER. THE VALIDITY OF INDIVIDUAL PROVISIONS WILL ALWAYS DEPEND ON THE CIRCUMSTANCES OF THE INDIVIDUAL CASE.

MUSTER