

**DRAFT as of April 2018**

**General terms and conditions of sale, service, delivery and payment of ESL Elektronik GmbH**

**1. General Provisions / Scope**

1.1 The following general terms and conditions of sale, service, delivery and payment (hereinafter: "Terms and Conditions") of ESL Elektronik GmbH (hereinafter "ESL") shall apply exclusively for all business relationships of ESL and its customers, who are entrepreneurs, legal entities under public law, or special funds under public law. They particularly apply to contracts of sale and / or delivery of moveable properties (hereinafter also "goods"), regardless whether ESL produces the goods herself or buys them from suppliers.

1.2 The respectively current version of these Terms and Conditions shall also apply as a framework agreement for future contracts concerning the sale and / or delivery of moveable properties as well as for repair and maintenance with respect to the same customer, whereby it is not necessary that we have to refer to them again in each individual case.

1.3 Any general terms and conditions of business of the customer at variance with, contradicting, or in addition to these Terms and Conditions only become part of the contract when we have expressly acknowledged their effectiveness. This prerequisite of approval shall apply in any and all cases, including, by way of example, even if we, being aware of the customer's general terms and conditions, execute delivery to them without reservation.

1.4 Modifications of these terms and conditions shall become valid if the customer does not object, in text form, within one month after being notified. Such notification of change shall include an indication to this right of objection. If the customer does object, we are entitled to a termination of contracts for the performance of a continuing obligation with four weeks' notice, to the end of a calendar month.

**2. Offers and orders**

2.1 Our offers are subject to change and non-binding. If we send out order confirmations or letters of acknowledgement, these shall govern the contract.

2.2 Images, drawings, weight specifications, descriptions, etc. in price lists, offers and other general printed matters are compiled and/or determined in the best possible way. Provided that they are not explicitly described to be binding, we reserve the right to make changes. We shall retain the title and copyrights to cost estimates, drawings and other documents. These materials may only be made accessible to third parties after prior approval from us and have to be returned to us upon request, when no contract is being entered into.

2.3 The customer's order shall be considered as a binding offer of contract. Unless otherwise stipulated in the order, we are entitled to accept this offer to contract within two weeks. The acceptance may be effected in text form (for example by a letter of confirmation) or, by implication, by way of actual performance, or shipment.

2.4 All cancellations of orders which have already been confirmed by ESL must be made in writing. ESL reserves the right to invoice a lump sum of 50 % of the order value in the event of a cancellation within 6 weeks before the confirmed delivery date, and of 80% of the order value in the event of a cancellation within 2 weeks before the confirmed delivery date. The customer may furnish proof that we have suffered no damages at all, or only a substantially smaller damage than the abovementioned lump sum. ESL shall reserve the right to enforce a claim for any actual higher damage.

**3. Prices and Terms of Payment**

Unless otherwise explicitly agreed to in writing, the following applies with regard to the prices of ESL and the payment terms for our customers:

3.1 Our prices shall apply ex works, excluding packaging, plus the applicable statutory value added tax.

3.2 If deliveries or other services are provided on open account, our invoices are payable within 14 days after the issue of the invoice, without deductions. If the above payment period lapses, the customer will be in default.

3.3 Any fees for bank transfers or check processing shall be borne by the customer.

3.4 The customer shall be entitled to a right of retention or offsetting only to the extent to which his claim is undisputed or has become res judicata. Upon defective delivery, Section 7.5 of these Terms and Conditions shall remain unaffected.

3.5 We are entitled, at any time and without stating reasons, to subject our delivery to counter-performance, and we retain the right to deliver against cash on delivery and / or to require payment in advance.

3.6 We retain the right to add a minimum order charge of EUR 25.00 (USD 40.00) for any orders under EUR 150.00 (USD under USD 250.00).

**4. Delivery Dates, Delays in Delivery**

4.1 Fixed dates must be explicitly agreed upon as such in writing.

4.2 When placing an order for goods, the delivery date shall, usually, be communicated to the customer together with the order confirmation.

4.3 If we are unable to meet binding delivery dates for any reasons for which we cannot be held responsible (unavailability of performance), we will inform the customer without undue delay and state an estimated new delivery date. If the performance is still unavailable within the new delivery period, we shall be entitled to withdraw from the contract in whole or in part; we shall immediately reimburse the customer for any counter-performance already realised.

A case of unavailability of performance within the meaning of this clause is, in particular, our supplier's failure to supply us in good time, if we have entered into a congruent covering transaction.

Our statutory rights to rescission and termination as well as the statutory provisions concerning the processing of the contract in the event of an exclusion of the obligation to perform (for example because of impossibility, or unreasonableness, of performance and / or subsequent performance) shall remain unaffected. Furthermore, the customer's rights to rescission and termination shall remain unaffected in accordance with Section 11 of these Terms and Conditions.

4.4 Whether delivery is in default shall be determined according to statutory law. This notwithstanding, however, a reminder by the customer is required in any case.

4.5 If, and to the extent that, the customer fails to fulfil his duty to co-operate, or if he fails to perform another duty which lies in his responsibility, resulting in a delay, a hindrance, or an unreasonable difficulty of the performance by ESL, then ESL's obligation to perform shall be repealed accordingly.

**5. Delivery, sale by delivery to a place other than the place of performance**

5.1 Delivery shall be carried out ex works, which is also the place of performance. Upon the buyer's request, the goods shall be shipped to another destination (sale by delivery to a place other than the place of performance).



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5.2 In the event of a sale by delivery to a place other than the place of performance, the buyer shall bear the transport costs and / or the shipping costs ex works as well as, if applicable, the costs of a requested transportation insurance. Normally, the transportation will be carried out by UPS. However, the choice of the mode of shipment (carrier, dispatch route, packaging) is made by ESL according to the circumstances of each individual case. Unless ESL charges the costs which were actually incurred, a flat fee for shipping and handling (exclusive of transportation insurance, but including packaging) of EUR 20.00 applies for domestic orders. Any tolls, charges, taxes and other public charges shall be borne by the buyer.

5.3 The carrier shall be notified immediately in an appropriate way about damages to the shipment which are discernible externally. Moreover, we shall be notified in writing.

5.4 We shall be notified immediately of any damages not discernible externally, which are revealed only upon unwrapping, and the goods are to be kept, including the original package, for a possible inspection by us.

### **6. Reservation of title**

6.1 The sold / supplied goods remain our property until payment in full of all our current and future claims from the contract and a current business relationship (hereinafter: "secured claims").

6.2 The goods subject to reservation of title may neither be pledged to third parties, nor assigned as collateral before the full payment of the secured claims. The customer must inform us immediately in writing about any accesses of third parties to the goods which belong to us.

6.3 The customer is authorised to resell and/or to process the goods which are subject to reservation of title in proper business transactions. In this case, the following provisions shall apply additionally.

6.3.1 The reservation of title covers the products which are produced by processing, mixing or a combination of our goods, at their full value, whereby we are deemed to be the manufacturer. If the ownership right of third parties continues to exist with a processing, mixing, or a combination with goods of third parties, we shall acquire co-ownership with respect to the relation of the invoice values of the processed, mixed or combined goods. Incidentally, the same provisions shall apply to the produced product, as those that apply to the goods delivered under reservation of title.

6.3.2 The customer hereby now already assigns the claims against third parties, which are established from the resale of the goods or product, in total or in the amount of our possible co-ownership share, to us as collateral, according to the preceding paragraph. We hereby accept the assignment. The obligations of the customer set out in Section 6.2 shall also apply regarding the assigned claims.

6.3.3 The customer shall remain authorised to collect the claim in addition to us. We undertake not to collect the claim as long as the customer meets his payment obligations towards us, is not in default of payment, no application has been filed for the opening of insolvency proceedings and there is no other deficiency to their ability to perform. Failing this, we can request that the customer informs us of the assigned claims and their debtors, provides all information which is necessary for the collection, hands over the relevant documents and informs the debtors of the assignment.

### **7. Defects, Warranty**

7.1 The statutory regulations shall apply to the rights of the customer in case of defects of quality and title (including

false and short delivery as well as improper assembly by ESL or faulty assembly instructions) unless otherwise agreed upon or otherwise stated below. The special legal provisions relating to the ultimate delivery of the goods to a consumer shall remain unaffected in all cases.

7.2 We shall not be held liable for any public statements by the manufacturer or other third parties (e.g. advertising messages). Furthermore, we do not accept any liability for the outcome of proceedings.

7.3 It is a prerequisite for the buyer's claims for defects that the buyer has satisfied his statutory obligations for inspection and reporting of complaints (§§ 377, 381 HGB (Handelsgesetzbuch, German Commercial Code)). If a defect is determined during the inspection, or subsequently, then this is to be reported to us immediately in writing.

Irrespective of this, obvious defects must be reported within two weeks from delivery in writing, whereby the timely despatch of the report is also sufficient in order to keep the deadline. If the customer fails to carry out the proper inspection and/or to report the defects, our liability shall be excluded.

7.4 If the delivered object is faulty, we may initially choose whether we will provide subsequent performance by remedying the defect (subsequent rectification), or by delivery of a faultless object (substitute delivery). Our right to refuse the chosen type of subsequent performance under the statutory pre-requisites remains unaffected. The customer must give us the time and opportunity which are necessary for the subsequent performance owed, in particular, he has to hand over the goods for which a complaint was made for purposes of inspection.

7.5 ESL is entitled to make the subsequent performance owed dependent on the fact that the customer pays the due purchase price. However, the customer is entitled to retain a part of the purchase price which is appropriate in relation to the defect.

7.6 If ESL is not willing to provide subsequent performance, or unable to do so, or if subsequent performance is refused by ESL or

is delayed beyond a reasonable period for reasons for which ESL is responsible, or if it fails for other reasons, the customer shall be entitled, according to his choice, to either withdraw from the contract or to reduce the payment. There shall, however, be no right of rescission if the defect in the goods is insignificant. Claims for damages or reimbursement of fruitless expenses shall only exist according to Section 11 and shall be otherwise excluded.

7.7 Notwithstanding Section 438 Subsection 1 No. 3 BGB (Bürgerliches Gesetzbuch, German Civil Code), the general statute of limitations for claims arising from defects of quality and title is one year from delivery. The aforementioned limitation period also applies to contractual and non-contractual claims for damages of the customer based on a defect in the goods. The periods of limitation under the Produkthaftungsgesetz (German Product Liability Act) shall remain unaffected in any case.

### **8. Repairs by ESL beyond guarantees and warranties**

8.1 We shall provide written estimations of costs for repair orders.

The customer must provide a written authorization of the repair.

8.2 Should we discover during the repair that the repair price quoted in the estimation of costs will be exceeded, the customer shall be notified immediately by us. We then must receive a renewed written authorization of the repair by the customer. Our estimations of costs are generally non-binding, it is possible that some defects may be determined only upon opening the device or the component assembly.



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8.3 If the customer does not authorize the repair, at the estimated price, we will invoice EUR 40.00 for the inspection of the goods, and we will send them, with the invoice – freight forward – back to the customer.

8.4 No legal claim for performance of the repair order can be inferred from an acknowledgement of receipt of a repair issued by us.

8.5 Consignments of goods to ESL for purposes of repair must be delivered carriage free in suitable packaging.

**9. Proofs of warranty, terms of service**

9.1 In order to check your warranty claim, a copy of the invoice, as well as of the delivery note, is required. Furthermore, we need the serial number and, in the event of a manufacturer's warranty, the name of the manufacturer, if ESL is not the manufacturer, but someone else is (the original manufacturer). Should this information not be provided, we are entitled to send the goods, unrepaid, freight forward, back to the customer, and to charge a processing fee of EUR 20.00.

9.2 With regard to goods which are delivered to us without a specific description of the faults ("faulty" or "to be repaired" is not sufficient), we are entitled to choose between the undertaking of a chargeable fault diagnosis, or returning the unrepaid goods against a processing fee.

9.3 In the event of unjustified complaints, the goods shall be sent back against a processing fee of EUR 40.00 plus shipping fees (shipping flat rate of EUR 20.00 domestically).

9.4 Please use exclusively the original packaging when returning faulty goods. When using improper packaging, the warranty claim is at risk.

9.5 Repairs beyond the warranty period are chargeable. The provisions according to Section 8 shall apply.

9.6 The following operations and parts are not included in the standard repair and service fees: Kalrez O-rings / hot calibration / calibration regarding special adjustments (smallest fluencies / pressures), faulty gas supplies / blocks-PCB's-missing parts-repair within 24 hours (extra charge) / delivery by courier.

9.7 We shall endeavour to dispatch the repaired goods within 30 days. Should we, in the event of a repair, have to contact the original manufacturer, the repair might be delayed. You will then receive a notification regarding the estimated duration of the repair.

**10. Force Majeure**

10.1 ESL shall not be liable for impossibility of performance or delay of performance, in so far as these have been caused by force majeure or other hindrances that were not foreseeable at the time of the conclusion of the contract (e.g. breakdowns in business operations or traffic, lack of raw materials or supplies, strikes, lock-outs, measures imposed by official bodies), for which ESL is not responsible. In these cases, the periods of delivery or performance shall be extended by the duration of the hindrance plus an appropriate start-up period. ESL shall notify the customer immediately about the occurrence of the hindrance due to force majeure.

10.2 Where, as a consequence of an event or a delay according to Section 10.1, the performance or the acceptance are no longer reasonable, the respective party shall be entitled to withdraw from the contract immediately upon obtaining knowledge about the force majeure and its consequences for the performance.

**11. Further liabilities**

11.1 ESL shall only be liable – subject to further contractual or statutory liability prerequisites – for damages of the customer's, arising out of whatsoever legal reason, in the case of intention or gross negligence.

11.2 The liability of ESL is limited, except in the case of an intentional breach of contract, to the amount of damages foreseeable and typical for that kind of contract. The customer is obliged to indicate to ESL any special risks, atypical possibilities of damage and potentially unusual amounts of damage upon concluding the contract, or when they emerge subsequently.

11.3 Notwithstanding Section 11.3, ESL is already liable in case of slight negligence in the event of a breach of an essential contractual obligation (an essential obligation whose fulfilment is a prerequisite for enabling the proper fulfilment of the contract in the first place, and in which the customer may generally trust). The liability of ESL is in this case limited to the damage which is foreseeable and typical for that kind of contract.

11.4 The liability for cases of mandatory statutory liability, in particular due to culpable injury to life, body or health, if a warranty has been assumed, or in the case of fraudulent concealment of a defect, as well as the mandatory liability according to the Produkthaftungsgesetz (German Product Liability Act) shall remain unlimited and unaffected by these provisions.

11.5 To the extent that the liability of ESL is excluded or limited, this applies likewise to the personal liability of the employees, staff, co-workers, representatives, persons employed to assist in performance and / or agents, of ESL.

**12. Place of jurisdiction, place of performance**

12.1 These provisions and all legal relations between us and the customer shall be governed exclusively by the laws of Germany excluding the UN Convention on Contracts for the International Sales of Goods. Prerequisites and effects of the reservation of title pursuant to Section 6, however, shall be governed by the laws of the respective location of the object, if, under said law, a choice of law made in favour of German law is not permitted or void.

12.2 The exclusive – including international – place of jurisdiction for all disputes resulting directly or indirectly from the contractual relationship is the place of business of ESL in Munich. However, ESL is also entitled to take legal action at the general place of jurisdiction of the customer.

**13. Final provisions**

13.1 The assignment of claims arising from the contractor from the business relationship with ESL is excluded.

13.2 Ancillary agreements and amendments of the contracts beyond Section 1.4 of these Terms and Conditions must be in writing. This shall also apply to any waiver of this stipulation requiring written form or to an abandonment of the written form in individual cases.

13.3 If any of the provisions in the performance contract or in these Terms and Conditions, or a part thereof, are ineffective, the other provisions or other parts shall nevertheless remain effective. The parties to the agreement undertake to replace an ineffective provision or a part thereof, or an unintended gap, in good faith with an effective regulation which comes closest to the economic purpose of the original regulation or which, with respect to gaps in the contract, comes closest to the mutually pursued purpose.



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