

General Terms and Conditions (GTC)

(Smarter Ecommerce GmbH, FN 298859z)

Valid from 1 December 2017

1. Scope

1.1. These General Terms and Conditions (hereinafter “GTC”) apply for all contracts concluded between Smarter Ecommerce GmbH (FN 298859z) (hereinafter “smec”), with headquarters at Peter-Behrens-Platz 9, 4020 Linz, Austria, and its clients (hereinafter “Client”) now or in the future, regardless of whether said contracts are concluded through digital or analogue means.

1.2. The use of general terms and conditions of the Client that contradict these GTC is explicitly excluded, unless otherwise agreed between the parties in writing in an individual agreement.

1.3. smec is a service company that serves national and international clients in the fields of e-commerce and online marketing through the provision of software (software as a service) and comparable tools, consulting activities and/or paid provision of expertise.

2. Scope of performance and achievement of objectives

2.1. The contractually agreed service to be provided by smec extends exclusively to providing consultation and support to the Client in relation to its online marketing activities. In particular, this consultation and support will be provided through market analysis, conceptual design of advertising campaigns, ongoing assistance therewith and/or provision of software.

2.2. The achievement of certain predefined campaign objectives or an associated increase in revenue is explicitly not owed by smec. Likewise, smec is not obliged to achieve specific parameters used to determine the success of a campaign, such as click rates, conversion rates, costs per click, and/or other determinable or measurable parameters with regard to the Client’s revenue or sales numbers.

2.3. The success of an online marketing campaign is dependent on many factors that cannot be influenced by smec or the Client, regardless of the measures implemented or the advertising budget used. In particular, these factors include supply and demand in the respective target market, availability of the advertised products, online trends and hype and market-relevant activities of competitors.

2.4. The Client’s perception of the success or failure of a campaign that was designed and/or managed by smec will not enable any conclusions to be drawn regarding defective performance or any other breach of contractual obligations. Such defectiveness or breach of contractual obligations can only apply if the campaign designed by smec based on the information provided by the Client was not suitable to achieve the campaign goals indicated by the Client and confirmed by smec even under favourable market conditions.

2.5. Insofar as sample key figures are presented in the context of advertising the services of smec, these figures only illustrate possible market opportunities from the use of services or campaigns provided by smec, based on prior experience. The potentials for improvement in conversion rates, costs per click or other relevant values presented in this context are approximate values that, based on an initial assessment of the market environment of the Client, could be achieved through the use of smec services based on prior experience. However, these improvements do not at any time constitute agreed contractual content or an achievement owed by smec.

3. Obligations of the Client

3.1. The Client shall always keep up to date the data and information that smec requires for the provision of the contractually owed services and shall provide this data and information in a format that is suitable for additional processing. smec is not responsible for adverse consequences resulting from the delayed or inaccurate provision of data.

3.2. If, when managing a campaign (e.g. Google AdWords), smec is required to administer or use a media budget for the Client, the Client shall provide the amounts to be administered to smec for transfer in advance in a timely manner. In the course of the fulfilment of its contractual services, smec is not obliged to pre-finance the media budget necessary for proper campaign management from its own means. If smec omits services due to a failure by the Client to provide the agreed media budget in a timely manner, the Client will have no claims for damages or a decrease in the remuneration entitlement of smec in this regard.

3.3. The Client is obligated to provide all login data and passwords required by smec for the fulfilment of the contract and, in the event of any changes, to immediately inform smec of the current data.

3.4. At the request of the Client, smec will surrender the provided login data and passwords. smec has no right of retention to this data.

3.5. The Client is obligated to keep all login data and passwords necessary for its use of the provided software safe and not to share them with third parties. In the event of loss or the intentional or unintentional dissemination of this data, the Client must immediately inform smec.

The Client indemnifies and holds harmless smec for all negative effects and damages resulting from the loss or dissemination of login data.

4. Warranty

4.1. smec is not liable for the achievement of the campaign success intended by the Client, but rather only for the performance of the contractually owed service.

4.2. The contractually compliant provision of the service owed by smec occurs both manually as performed by employees and automatically through software used by smec. The fact of whether in an individual case an activity was performed manually or with automated assistance cannot be used to justify a conclusion of defectiveness of the service.

4.3. The campaigns designed by smec during the provision of services always extend over several months. During this period, phases of active campaign operations (campaign initiation and updates) alternate with phases of fewer modifications (campaign observation and evaluation), and in some of these phases measures will neither be implemented by employees nor by the software used. This irregularity is an essential part of a long-term advertising campaign and will not under any circumstances be considered a defect in the service of smec.

5. Liability

5.1. Unless otherwise provided for by a special agreement or by law, smec's liability for contractual or statutory claims, damages, consequential damages or loss of profits is excluded, unless the Client proves intent or gross negligence against smec.

5.2. Liability for slight negligence on the part of smec is also excluded. In addition, liability for consequences or damages that could not be typically foreseen from the use of the services of smec is also excluded.

5.3. smec will not be liable for loss of data or damages resulting therefrom.

5.4. smec will not be liable in cases of damage to or loss of data belonging to the Client or other negative consequences and damages caused by malfunction of software that is used or provided where these cases were not caused by gross negligence or intent on the part of smec.

5.5. smec will not be liable for negative consequences and damage from cyberattacks, hacking or phishing attacks against smec or the Client. The same applies for negative consequences and damages that result from the theft during a cyberattack of software login data and/or passwords or other data for or used by smec and provided to smec by the Client.

5.6. The Client undertakes to regularly, but at least on a weekly basis, create backup copies or have copies created of any data sent to smec in connection with the services of smec and/or to which smec is granted access. In the event of loss, failure to create backup copies will constitute a breach of the Client's duty to mitigate damages.

5.7. If during the provision of services to the Client, smec is given the option to manually or automatically use, place or cause to be placed the advertising budget of the Client, smec will not be liable for financial disadvantages that result from malfunction of the software used. smec will only be liable for regularly checking that the tools used by smec for bid management are functioning correctly.

5.8. Any compensation for advertising costs paid out by the Client during advertising campaigns managed by smec and/or advertising costs administered by smec itself for third parties (e.g. Google AdWords) is excluded, except in the case of deliberate misuse by smec.

5.9. If third-party content or links to third-party content are present in the software or other online services provided, smec is not liable for this content.

5.10. Compensation for the Client's damages – excluding personal injury – is limited for each damage event to the insurance sum of the business liability insurance of smec provided in the damage event. If the damage is not covered by the business liability insurance, the damage compensation sum to be paid by smec for each damage event is limited to the amount of the annual payment rendered to smec by the Client, without consideration of the advertising costs that are administered.

5.11. If the Client is provided with clearly marked ALPHA and/or BETA functions for test use of the software delivered to them, any use is at the risk of the Client. The Client recognises that these functions are not fully technologically developed, may contain defects or errors and could cause damage to its system. In the event of use, any warranty and/or liability by smec is excluded.

5.12. The Client shall indemnify and hold smec harmless from all third-party claims asserted against smec due to an infringement of rights by advertising campaigns initiated by the Client in its Google AdWords account or inaccurate, anti-competitive or illegal information contained therein. This indemnity also includes all reasonable costs, including costs for corresponding legal prosecution and defence incurred by smec due to this infringement of third-party rights by the Client.

6. Consequences of late payment

6.1. Prices and payment terms for the smec services used by the Client will be stipulated in individual agreements or product-specific terms and conditions.

6.2. All smec services that are not performed on a one-off basis share the feature that costs associated with the implementation of the software necessary for the performance of the service as well as with market observation and campaign organisation will not initially be reimbursed in full, but will be taken into account in the ongoing support costs.

6.3. smec is entitled, in the event of qualified default of payment by the Client, to pause its own service and/or the functionality of the software used or provided until all uncorrected outstanding and currently due payments have been made in full by the Client. A qualified default of payment is present if payments or parts thereof have not been made punctually despite a written reminder and a subsequent period for remedy.

6.4. smec's right to pause its own service and/or the functionality of the software used or provided will not entitle the Client to refuse payment of current claims or (even only) withhold partial amounts. A justified pause by smec will not constitute grounds for the Client to end the contractual relationship with smec early for good cause.

6.5. If the Client is in default of an agreed (partial) payment, smec is entitled to charge default interest in the amount of 9.2 percentage points above the base interest rate per year. The assertion of additional default damages or reminder charges and the costs for corresponding legal prosecution will remain unaffected by this. In the event of default of payment, including for partial payments, all possible discount agreements become void. In the event of default of payment, pre-established instalment deadlines will also cease to apply. If the Client is in qualified default of payment (6.3), smec is also entitled to declare immediate dissolution of the contractual relationship with good cause.

7. Copyright and data protection

7.1. smec explicitly reserves all rights to the content of the provided software and the content of its website, particularly all rights guaranteed by the Austrian Copyright Act, trademark and patent law, and other legal norms, such as usage, exploitation, and performance rights.

The content of the provided software and the website may not be used by the Client without the prior written consent of smec.

7.2. Only data that is not personal will be recorded and processed using the software provided by smec. In the event that the Client wishes smec to process personal data, the parties undertake to create the legally necessary framework conditions in accordance with DSGVO 2018.

8. Confidentiality

Both contracting parties are obligated to keep confidential information of the contractual partner that is marked as confidential, to protect it appropriately, and not to disseminate it to third parties. This confidentiality obligation must be conferred by the contracting parties on their respective employees and external professionals (tax advisers, lawyers, IT service providers etc.). The confidentiality obligation does not extend to information that was known to the respective contractual partner before contract initiation or conclusion or that is or becomes public knowledge.

9. Place of jurisdiction and applicable law

9.1. The parties stipulate Austrian substantive law to the exclusion of conflict of law rules and the UN Convention on the International Sale of Goods.

9.2. For all disputes resulting from this contractual relationship or its initiation or dissolution, the jurisdiction of the respective court in 4020 Linz with subject-matter jurisdiction is stipulated.

10. Final provisions

10.1. If a provision of these GTC is legally void or ineffective, this will not affect the validity of the remaining provisions. (Severability clause) All void or ineffective provisions must be replaced with valid provisions that come as close as possible to the intended economic goal of the void or ineffective provisions.

10.2. The Client explicitly agrees to electronic correspondence and agrees that its contact information may be processed by smec for the purpose of regularly informing the Client of current offers, new products or other relevant news by telephone or via a newsletter.

10.3. There are no oral ancillary agreements. Addenda and changes to the contractual relationship require the written form. This also applies to the revocation of the written form requirement.

10.4. Any translation of this user agreement is provided solely for your convenience and is not intended to modify the terms of this agreement. In the event of a conflict between the German version of this agreement and a version in a language other than German, the German version shall control.