

General Terms and Conditions of Delivery and Payment



Ernst Benary Samenzucht GmbH, Hann. Münden, February 2020

This Price List is valid from April 1, 2020 until publication of the new price list.

Section 1 · General

1. These general terms and conditions of delivery and payment ("General Terms") shall form a material part of all offers made and contracts entered into with companies falling within the definition of §310 of the German Civil Code ("BGB") for deliveries and performance by Ernst Benary Samenzucht GmbH („Seller“), including but not limited to any consultation furnished by the Seller as well as any continuing and future business relations, without the need for any express inclusion or reference of the same. These General Terms apply for flower, spice and medicinal plant seeds.
2. Varying agreements and conditions are only binding when they are confirmed in writing with a signature. All references made by the buyer to its own terms and conditions are hereby expressly rejected. Oral promises and agreements are only binding upon their written confirmation.
3. When Incoterms are used, the 2010 version shall be applied.

Section 2 · Formation of Contract

1. All offers made by the Seller shall be understood to be revocable invitations to enter into a contract. A contract only arises when the Seller accepts the buyer's purchase order by way of a written confirmation or by means of due performance of the relevant purchase order.
2. Purchase orders made for goods, which have not been threshed or cleaned shall be deemed by the Seller to be orders made for goods that come from an average harvest of marketable goods. In the event that the Seller obtains a low harvest for the ordered goods, the Seller shall be entitled to make a proportional reduction in the goods delivered pursuant to the relevant purchase order. Upon establishing that the harvest for the relevant goods would be low, the Seller shall be obliged to inform the buyer of the same as soon as possible. In the event of a bad/failed harvest, and in the event that the resulting goods are not marketable, the Seller shall be released from its delivery obligations.
3. The Seller is entitled to rescind the contract without compensating the buyer if the performance of the contract is made impossible by force majeure.
4. The buyer shall not be entitled to rescind any agreement already made with the Seller on the basis of the deterioration of its financial situation/ circumstances.
5. The buyer may assign claims arising from the purchase contracts entered into with the Seller only with the Seller's prior written consent.

Section 3 · Price

1. The applicable price for a purchase contract entered into shall be established by means of the Seller's latest price list at the relevant time, which the buyer has had notice of. Earlier price lists shall become void as soon as the application of new price lists is made known to the buyer. The introduction of new price lists shall not affect or cause any changes to be made to the purchase contracts already entered into.
2. The price items contained in the price list have been framed for seed distributors. The prices are set out on its net value. Any applicable VAT will be additionally imposed. As far as this is not otherwise agreed upon in these General Terms and/or in the individual purchase agreement entered into, the prices are also set out exclusive of any packaging, shipment and other related/additional costs, which may have to be imposed.

Section 4 · Delivery and Transfer of Risk

1. A fixed delivery charge amounting to 7,50 € will be imposed for all purchase orders having a maximum value of 200 € and which are to be delivered within the Federal Republic of Germany. Delivery charges will be waived for all purchase orders having a value exceeding 200 €. A fixed delivery charge of 25 € will be imposed for all purchase orders having a maximum value of 500 € and which are to be delivered outside of the Federal Republic of Germany but within the European Union. A fixed delivery charge of 35 € will be imposed for all purchase orders having a value of between 500 € and 1.000 € and which are to be delivered outside of the Federal Republic of Germany but within the European Union. A fixed delivery charge of 50 € will be imposed for all purchase orders having a value of or exceeding 1.000 € and which are to be delivered outside of the Federal Republic of Germany but within the European Union.
2. The minimum volume/number of goods, which have to be ordered shall be set out in the currently applicable price list. The minimum order value is 100 €. All orders will be filled in bulk and/or predetermined packet sizes:
 - 250 seeds / pellets
 - 500 seeds / pellets
 - 1,000 seeds / pellets
 - 2,000 seeds / pellets
 - 5,000 seeds / pellets
 - 10,000 seeds / pellets
 - 25,000 seeds / pellets

If predetermined packet sizes as mentioned above are requested, a packaging fee of € 0.60 per packet will apply. If special packaging is requested, different than above, a packaging fee of € 1.10 per packet will apply and additional time may be required to complete the order. Please contact customer service for additional details. Any additional costs, which may arise from special requests or applicable regulations with regards to transportation shall be additionally charged to the buyer. Any additional costs, which may arise from special requests or applicable regulations with regards to transportation shall be additionally charged to the buyer.

3. In the event that the buyer instructs the Seller to transport the purchased goods to a place other than the place of performance of the purchase agreement, the risk of accidental loss and accidental deterioration shall be transferred to the buyer at the point in time when the Seller hands the goods over to the transporter, freight forwarder or other person entrusted with the transportation. This shall also apply in the event that the seller assumes the costs of transportation or transports the goods on its own. In the event that the goods are made available for collection, risk in the goods shall be transferred to the buyer at the point in time that the buyer is notified that the goods are ready for collection.
4. All deliveries made outside of the Federal Republic of Germany shall be duly insured. This insurance shall cover all insurable transport risks. The costs arising in such insurance shall be borne by the buyer. Deliveries made within the Federal Republic of Germany shall only be insured in the event that the buyer expressly requests for such insurance and agrees to make payments of the costs arising due to the same. The scope of insurance shall only come into effect when the buyer fulfils all obligations arising from the insurance agreement, which are made known to him.
5. The Buyer shall be obliged to dispose of all packaging.

6. Delivery times and deadlines shall only be deemed to be fixed when the Seller expressly agrees to the same. In the event that the Seller does not comply with the delivery times or deadlines, the buyer would only be able to exercise its rights arising from non-compliance after the Seller is granted a reasonable notice period, which shall consist of at least 15 working days. Despite the aforesaid, the buyer would not be obliged to furnish the Seller with the said reasonable notice period if the law provides that this notice period is dispensable.
7. If the Seller is prevented from performing its obligations due to the occurrence of a force majeure event, the delivery period will be postponed for the duration of the force majeure. The right of the Seller to rescind the contract remains unaffected.
8. The Seller is entitled to make partial deliveries insofar as this does not inappropriately disadvantage the buyer.
9. In the event that the Seller continues to be in delay of delivery upon the expiry of the reasonable notice period granted, the buyer shall be entitled to claim compensation for damages suffered due to this delay.
10. The Seller shall be liable to compensate the buyer 0,5% of the value of the purchase order for each week of delay upon the expiry of the reasonable notice period granted. The total amount of compensation shall not exceed 10% of the value of the purchase order. The buyer's right to claim a higher amount of damages upon proof of such damages is not affected.

Section 5 · Payment

1. A separate bill will be issued for each individual delivery on the date of delivery. The aforesaid will also apply for partial deliveries agreed upon.
2. All invoices shall be duly paid within 60 days from the date of issue. In the event that an invoice is paid and in the event that no other previous invoice is due and payable, within 30 days, the Seller shall extend a 1% discount to the buyer.
3. Payment by means of a bill of exchange can only be made in the event that the buyer executes an undertaking to pay and receives the prior approval of the Seller. Unless otherwise agreed, all bank discounts, note charges as well as costs shall be borne by the buyer.
4. In the event that the creditworthiness of the buyer significantly deteriorates subsequent to the execution of a purchase agreement with the Seller or in the event that such a significant deterioration comes to the Seller's notice after the execution of such a purchase agreement, the Seller shall be entitled to demand payment for the purchased goods in advance of delivery. The issue of a purchase order shall be deemed to be a warranty made on the part of the buyer that it is able to make payment of the purchase price.
5. In the event that subsequent to the execution of the purchase contract, the buyer is in delay of payment, that interest payments are due by reason of late payment, that cheques or bills of exchange have been dishonoured or that the buyer's financial situation has significantly deteriorated, the Seller shall be entitled to demand that payments be made in advance of delivery, to deem all outstanding payments to become immediately due and payable and to return all bills of exchange and undertakings to pay in exchange for cash payments or security. In the event that the buyer does not comply with such demands made by the Seller within five days, the Seller shall be entitled to rescind the relevant or all contracts entered into with the buyer. Upon the Seller's demand, the buyer shall be obliged to return the delivered goods within three days. Interest for late payment shall be calculated pursuant to § 288 of the German Civil Code.
6. The Seller shall be entitled to impose a fixed fee amounting to 5 € for the second and every subsequent reminder and demand for payment issued to the buyer. The buyer shall bear all costs incurred in any litigation proceedings commenced to recover payment.
7. The buyer shall only be entitled to set off undisputed claims or claims that have been reduced to a final judgment.

Section 6 · Quality of the Goods, Liability for Defects

1. The goods delivered to the buyer shall comply with the following terms:
 - the agreed upon quantity,
 - the agreed upon weight,
 - the purity and genuineness of the species or variety,
 - compliance with other agreed upon standards,
 - the given germination ability of the seed, within the scope of customary ranges, in conformity with the International 'Union for the Protection of New Varieties of Plants' (UPOV) Guidelines.

Plant variety descriptions and illustrations found in catalogues or on packaging serve the purposes of merely assisting the buyer in this purchase choice and shall not constitute any warranty of any particular quality. Deviations from the descriptions in brochures or similar items or in the described product condition (form and colour) contained in the sale offers shall be deemed to be contractually acceptable insofar as these deviations arise from natural irregularities contained in the materials used. Any warranty for the development of plants from the delivered seeds is excluded due to the fact that such development is dependant on external factors, which cannot be subsequently verified. Any liability for infection of the seeds and the consequent transmission of disease and damage is excluded. Any other warranty, in particular with regards to the specific intended use on the part of the buyer is excluded. In the event of an inappropriate handling or treatment of the goods, (such as storage, processing, and treatment of the goods) and in the event that the goods are mixed with other goods, all warranties issued shall be extinguished.

2. The buyer shall be obliged to inspect the goods upon receipt of the same without delay. Any complaints with regards to the discrepancies relating to the number of packages delivered or damage caused to the packaging shall be made to the relevant freight forwarder directly. Any defects relating to apparent defects in goods and weight discrepancies shall be notified to the Seller within 5 working days. Defects in germination ability of the goods shall be notified to the Seller within 3 weeks of receipt of the goods. Such notification shall contain an exact description of the claimed defect in writing. Hidden or latent defects shall be notified to the Seller upon detection of the same in writing and without delay and in any case, within 6 months of delivery of the goods.
3. In the event that the goods contained or carried the relevant defect at the point in time of the transfer of risk, the Seller shall be obliged to remedy the defect by means of a substitute delivery. In the event that the Seller is not able to deliver defect-free goods within 2 weeks, the buyer shall be entitled to seek a reduction in the purchase price or to rescind the relevant purchase contract.
4. The Seller shall not be obliged to accept the return of clearly defective goods in the event that the packaging, in which the goods were delivered, was damaged at the point where the packaging was sealed or in the event that the package had been opened.
5. In the event of a justified complaint regarding defective goods, the buyer shall be entitled to temporarily retain a corresponding part of the purchase price proportionate to the portion of goods complained of.
6. In the event of a dispute, the buyer shall be entitled to call for an inspection by NAKTuinbouw, Roelofarendsveen, NL or with any other independent and internationally recognized expert surveyor upon notifying the Seller of the same in advance. The findings made by this expert shall be binding on both parties. In the event that the expert confirms the existence of a defect, the Seller shall bear the costs arising from the appointment of the expert. For the establishment of a defect for the purposes of making a claim for damages suffered, the parties agree on the following procedure: A certified sampler shall be appointed to draw four samples from the goods in question. The remaining goods shall be closed and resealed. The buyer shall either store the remaining goods in a place and manner, which prevents germination, whether on its own or by means of appointing a third party to effect the same. The Seller shall receive two samples together with the complaint, the third sample is to be sent for official inspection to NAKTuinbouw Roelofarendsveen, NL or to any other independent and internationally recognized expert surveyor, and the fourth sample is to remain with the buyer. If the delivery consists of consecutive original packaging made on the part of the Seller, the same proceeding is to be followed.

7. Warranty claims are subject to the statutory periods of limitation.

8. In the case of unjustified claims made by the buyer, whether for the reason that there is no defect or that the defect does not involve any warranties made by the Seller, the buyer shall be obliged to reimburse the Seller for all costs arising from the wrongful complaint made.

Section 7 · Retention of Title

1. The Seller shall retain title in the delivered goods until such time that the full purchase price and all other incidental claims, which may arise, are fully paid. In the case of payments by means of a bill of exchange, the Seller shall retain title in the goods until such time that the bill is honoured

2. In the case of rescission of contract by the Seller (in particular due to delay in payment of the purchase price after a reasonable deadline for payment is granted), the Seller shall be entitled to re-take possession of the goods subject to a retention of title. The Seller is entitled to enter the buyer's business premises during ordinary business times in order to exercise this right of re-possession. Upon the demand on the part of the Seller for the return of goods, the purchase contract shall be deemed to be rescinded.

3. The buyer shall refrain from pledging the goods subject to retention of title or transfer them as security. In the event that any third party attempts to seize the goods subject to retention of title, the buyer shall be obliged to inform the Seller of the same in writing without delay.

The buyer is obliged to furnish the Seller with all documents necessary for the protection of the Seller's ownership rights, including in particular a copy of the documentary proof of the lien. The buyer is liable to the Seller for all damages that arise from any seizures undertaken by third parties, including in particular all judicial and out-of-court costs of an enforcement proceeding, insofar as the third party cannot pay these costs.

4. The buyer shall be obliged to store the purchased goods separate from its own goods and in a manner such that the goods can be easily identified. The same applies for new goods, which arise from the processing or utilization of the purchased goods. The buyer shall be obliged to store the goods with the due care exercised by a prudent businessman as well as to insure the same against damages caused by fire, water or hail. The buyer hereby assigns his rights relating to all claims, which he may have in relation to the insurance coverage of the goods, to the Seller.

5. The buyer shall be entitled to utilize the goods subject to retention of title within his ordinary course of business and to join, mix or process the same with other goods. In the case of such joining, mixing or processing, the Seller shall obtain the right of retention of the newly mixed or produced goods. In particular, the Seller shall obtain the right of retention with regards to plants arising from sowings. The Seller's right of ownership in this regard shall extend to such extent that is proportionate to the value of the original goods subject to the right of retention.

6. The buyer shall be entitled to sell the goods subject to retention of title within his ordinary course of business to third parties. In the event of such a sale, the buyer hereby assigns all claims, which he may have against the third party purchaser (including VAT). In the event of a sale of bound or newly manufactured goods, the Seller shall receive a portion of the total claim against the third party purchase, which would be proportionate to the value of the original goods subject to the retention of title. The buyer hereby guarantees the Seller that such a claim against a third party purchaser has not already been assigned for the benefit of another third party.

7. The buyer shall be authorized to act as a trustee for the Seller in the enforcement of such claims against third parties. The Seller shall retain the right to act on its own behalf for the enforcement of such rights. Nevertheless, the Seller agrees not to exercise this right so long as the buyer fulfills its obligations and in particular, so long as the buyer is not in default of payment.

8. In the event that the buyer is in breach of the purchase contract, in particular due to failure of making timely payment, the right to enforce claims against third parties on behalf of the Seller shall automatically extinguish. Upon breach of the purchase agreement, the buyer shall be obliged to give notice of the assignment of the rights against his purchasers and to hand over all necessary documentation. Upon request of the Seller, the buyer shall be obliged to provide the Seller with a list setting out the name and address of its purchaser. In the event that the buyer becomes unable to make any further payment, the Seller may, as provided for in the relevant insolvency laws, have the right to require for its goods or replacement goods to be separated from the buyer's general pool of remaining assets. These separated goods shall remain inaccessible to the buyer, shall be made available to the Seller within one week and cannot be sold without the Seller's approval. Such goods shall be sold at a price between 65% of the specialized wholesale trade price for the highest quantity of the relevant item and 65% of the price imposed by the Seller at the time of delivery. The Seller shall retain the right to claim the difference between the price obtained by means of such sale and the actual amount due and owing to the Seller shall, together with interest and costs, as compensation for damages suffered. This right of claim shall only be extinguished when the buyer is able to prove that the Seller suffered minimal or no damage.

9. The aforesaid section 7 number 8 shall apply in the same extent for claims collected from the buyer.

10. The buyer's right to sell or utilize the goods subject to retention of title together with the right to enforce claims on behalf of the Seller shall automatically extinguish at the point in time that bankruptcy, or an application for bankruptcy or proceedings for bankruptcy commences.

These rights also extinguish in the event that a cheque or bill of exchange is dishonoured.

Section 8 · Liability and Force Majeure

1. In the event of a breach of its contractual or non-contractual obligations owned by the Seller, the Seller shall be liable to the Buyer for instances of intentional action and gross negligence. This liability shall extend to acts undertaken by the Seller's statutory agents, employees or fiduciaries. This liability is however limited to such damages, which are normal and foreseeable in such contracts as the purchase contract entered into with the buyer. The right to claim any other damages, regardless of the legal basis for such claims and in particular claims for such damages which have not been caused by the delivered goods themselves, are expressly excluded. The buyer shall retain the right to rescind the purchase contract on the basis of the breach made by the Seller.

2. The limitation of liability contained in section 8 number 1 hereinabove shall not apply in cases in which the Seller breaches (regardless of gravity of negligence) one of the main or significant obligations contained in the purchase agreement such that the aggrieved party would not be able to achieve the aim intended upon the execution of the purchase agreement. The limitation of liability would also not be applicable in the event that and to the extent that the Seller had assumed a procurement risk or a guarantee for quality. A guarantee for quality would be only relevant when the guarantee had been undertaken for the purposes that the Buyer would not bear any risk arising outside of the goods, such as in the case of fraudulent concealment of a defect and the initial frustration.

3. In the event of mere negligence due to defective goods, the Seller shall be liable for damages caused to the extent of its product liability insurance, both for the basis of the claim as well as for the amount, which shall not exceed 1.000.000 €. The aforesaid limitation shall not apply to any bodily injury, death, or damage to health. In the event that the defective products results in the buyer having to call-back such goods, the Seller shall be liable for damages caused to the extent of its product liability insurance, both for the basis of the claim as well as for the amount. In addition, the buyer shall only be entitled to reimbursement in the event that the call-back measures were notified to the Seller and the buyer granted the Seller an appropriate time and opportunity to cooperate with the buyer in the call-back.

4. In the case of any other obligations, the Seller shall not be liable for acts of mere negligence, except in cases of death, damage to health or bodily injury.

5. The Seller is not liable for breaches of contract or damages due to force majeure. The contracting parties recognize in particular interruptions in transportation, official measures, weather events, non-availability of raw materials, labor disputes, interruptions in one's own production process, interruptions in the production process of transport companies and suppliers (insofar as a substitute procurement is not reasonable) as force majeure.

Section 9 - Intellectual Property and industrial property rights of Ernst Benary Samenzucht GmbH

1. All seed shall be supplied for the sole purpose of raising plants intended for use as ornamental plants. Using the seed to produce seed (copying of seed) is explicitly not permitted. Any resale of seed shall be subject to the same full terms and conditions as those set out in the present paragraph. The buyer undertakes not to copy, or have anyone else copy, any varieties from the Seller's product range and not to distribute any such copied seed. In the case of wrongful and intentional action, the buyer shall be obliged to make payment of a penalty amounting to 100.000 € to the Seller for each instance copied variety. The Seller shall retain the right to claim compensation for damages suffered.
2. The buyer shall be obliged to offer the Seller's seed under the same product name (brand or other designation) the Seller uses to offer the seed. The buyer shall offer any seeds and seedlings obtained from the Seller's seed exclusively under the Seller's product name of such seed. The buyer shall not be permitted to use the Seller's product names in its corporate name. Any obligations existing under the Plant Variety Protection and Seed Distribution Act to label the seed with the variety name as well as any other legal labelling requirements shall remain unaffected hereof.
3. The Seller shall produce digital photographs and films - either jointly or individually referred to as „Image Material“ - of flower seeds, flower varieties, flowers and ornamental seeds - either jointly or individually referred to as „Product“. The Seller is entitled to all rights to the photographic material. The Seller shall provide the Buyer with photographic material for the purpose of distributing the Products, which the Buyer may use in his own business for decoration purposes, for illustration in his catalogue or individually for the sale of the Products to end customers offline or online on his own website or in his own online shop as follows:
 - 3.1 The Seller grants the Buyer the simple, non-exclusive, non-sublicensable and non-transferable right, which may be revoked at any time, to sell the Seller's products by adding the name of the respective variety under which the photographic material was supplied to the Buyer, to reproduce and distribute them in their own company for decoration purposes or in the print catalogue as well as to store them on the Buyer's website to illustrate offers of the respective type, to make them available to the public in whole or in part and to have the photographic material reproduced on request by visitors to the website. The granting of rights with regard to the Buyer's website exclusively includes the Buyer's own website as well as their online shop, if and to the extent that the Buyer operates such a website and offers products of the Seller on it.
 - 3.2 The Buyer shall make a reference to the Seller's copyright on the photographic material.
 - 3.3 The Buyer shall not be entitled to edit, revise or otherwise alter the photographic material or to use it in connection with works of other rights holders or in extracts or to add to it.
 - 3.4 The distribution of physical or digital work-pieces of the photographic material in a form other than that described in this clause or in forms of exploitation other than those specified in this clause is not permitted, nor is the use outside the Buyer's own business, for other types than the Seller's products or on bags. This requires a separate granting of rights by the Seller.
 - 3.5 A contractual penalty of € 100,000.00 shall be due for each case of culpable infringement of one of the above provisions of Sections 3.1 to 3.4. Any further claims for damages remain unaffected.
 - 3.6 The Benary Flower Seed Catalogue may only be used for the resale of Benary seeds. If and insofar as the Buyer uses the photographic material for printing, they shall be obliged to send the Seller a specimen copy.

Section 10 - Place of Performance and Jurisdiction

1. Place of performance for payment of the purchase price as well as for the other obligations of the buyer is the registered place of business of the Seller. Performance place for the obligations of the Seller is the registered place of business of the Seller.
2. Insofar as the buyer is a merchant within the meaning of the German Commercial Code or a legal entity under public law or public special assets, it is agreed that the place of performance and the exclusive forum for claims not exceeding 5.000 € shall be Hann. Münden. For claims exceeding 5.000 €, the district courts in Hannover shall have the exclusive jurisdiction to hear all disputes arising from purchase contracts entered into between the buyer and the Seller. The Seller is entitled at its option to also commence legal proceedings at the place where the buyer has its normal judicial forum.

Section 11 - Foreign Business Transactions

In case the buyer is domiciled in a foreign country, the following conditions shall additionally apply:

1. All transactions, including bills of exchange and check transactions, are governed by German civil and commercial law including UN Convention for the International Sale of Goods.
2. All invoices for transactions entered into outside of Germany shall be made in €. The payment of such invoices may be made in foreign currency as long as such currency can be converted in Germany. The conversion rates applicable shall be the current daily exchange rates applicable on the day of receipt of payment. The buyer shall bear the costs of exchange.
3. The buyer guarantees the Seller that it possesses all necessary import and payment approvals and permits.
4. In the event that the purchase agreement is entered into in various languages, the German version of the agreement shall be authoritative.
5. The buyer shall bear all customs, fees, duties and taxes, which may arise from the performance of the purchase agreements entered into with the Seller as well as deliveries made in relation to the same. Notwithstanding the aforesaid, the Buyer shall make payment of all taxes imposed in its domicile.
6. The Seller is entitled to commence legal proceedings against the buyer in its own domicile. In the event that the relevant foreign court declines to recognize the application of German law, the contractual relationship between parties shall be governed by the UN Convention for the International Sale of Goods to such extent that such application is permissible, applied and considered together with the agreements entered into between parties in these General Terms.
7. The Seller is further entitled to commence arbitration proceedings against the buyer in DIS arbitration proceedings with the exclusion of normal court proceedings. The place for arbitration shall be Göttingen and the language to be utilized in the course of arbitration shall be German.

Section 12 - Validating Clauses

1. Should present or future provisions of this contract be entirely or partly invalid or unenforceable or later lose their validity or enforceability, the validity of the remaining provisions of the contract shall not be disturbed. The same applies if this contract should have gaps.
2. In place of the invalid or ineffective provision or to fill a gap, that fitting rule will apply that the parties would have used, had they considered it at the point of concluding the contract. This also applies when the invalidity of a provision rests on a denominated measure of performance or time (period of time or due date); in such cases that legally permissible measure of performance or time (period of time or due date) that comes closest to that intended shall replace that in the contract.
3. Should the validity of a provision in the above-described sense be attainable only by way of agreement under adhesion to particular requirements of form, the parties are obligated to do the required acts and give the required declarations.