

# HOCHLEITNER

*Rechtsanwälte GmbH*

## MERGER AGREEMENT

pursuant to Art. I UmgrStG (Austrian Reorganisation Tax Act)

concluded between

Acquiring company:

Fabasoft AG, FN 98699x  
Honauerstraße 4, A-4020 Linz

Transferring company:

FB Beteiligungen GmbH, FN 323228k  
Kirchenplatz 8, 4070 Eferding

With the accession of:

Fallmann & Bauernfeind Privatstiftung, FN 181039i  
Honauerstraße 2-4, A-4020 Linz

(also referred to jointly in the following as the “Parties to the contract”)

as follows:

### **Preliminary Remarks**

- R1 The company Fabasoft AG with its registered offices in the political municipality Linz is registered in the company register of regional court Linz as commercial court under the company number FN 98699x (also referred to in the following as the “Acquiring company”). The share capital of the Acquiring company amounts to € 11,000,000.00 and comprises 11,000,000 no-par value shares. Fabasoft AG has been listed on the Frankfurt Stock Exchange since 1999.
- R2 The company FB Beteiligungen GmbH with its registered offices in the political municipality Eferding is registered in the company register of the regional court Wels as commercial court under the company number FN 323228k (also referred to in the following as the “Transferring company”). The share capital of the Transferring

company amounts to € 35,000.00 and is settled in full. The sole shareholder of the Transferring company is Fallmann & Bauernfeind Privatstiftung, FN 181039i, with an assumed and fully paid capital contribution amounting to € 35,000.00, which corresponds to a participation of 100%.

- R3 The Transferring company is a shareholder of the Acquiring company and holds 490,286 no-par value shares in the Acquiring company, which corresponds to a participation of 4.46%. These shares are deposited with the Raiffeisenlandesbank OÖ AG.
- R4 The sole shareholder of the Transferring company, i.e. Fallmann & Bauernfeind Privatstiftung (FN 181039i), is also a direct shareholder of the Acquiring company and holds 4,228,228 no-par value shares, which corresponds to a participation of 38.44%.
- R5 Fallmann & Bauernfeind Privatstiftung therefore holds a 42.90% participation in the Acquiring company - a 4.46% participation held indirectly via the Transferring company and a 38.44% direct participation.
- R6 The Transferring and the Acquiring company have both existed for more than 2 years. Both the Acquiring and the Transferring company have a positive market value on the effective date of the merger as well as on the present day and both have a positive equity book value. In addition a positive market value of the assets to be transferred is given even when the value of the participation of the Transferring company in the Acquiring company and the distribution of profits on 15 July 2021 amounting to € 100,000.00 are not taken into account.
- R7 It is now intended to merge FB Beteiligungen GmbH, FN 323228k, as the Transferring company as at the effective merger date of 31.12.2020, by way of universal succession pursuant to § 231 in conjunction with § 224 (3) AktG on passing on of the shares of the Transferring company to the Acquiring company, as a result of the transfer of its assets in their entirety with all rights and obligations and without recourse to liquidation, downstream with Fabasoft AG, FN 98699x, as the Acquiring company, taking full advantage of the tax benefits provided for in particular under Article I of the Austrian Reorganisation Tax Act (UmgrStG) and to establish a (purely) direct participation of Fallmann & Bauernfeind Privatstiftung in the Acquiring company amounting to 42.90%.

R8 A dividend of EUR 0.85 per dividend-bearing no-par value share for the fiscal year 2020/2021 was resolved by the Annual General Meeting of Fabasoft AG held on 05 July 2021. Payment of the dividend was effected on 14 July 2021, less (any) 27.5% withholding tax on capital in compliance with statutory provisions, by means of a credit by the custodian bank. The dividends for the fiscal year from 01 April 2020 to 31 March 2021 have already been received by the Transferring company and the Parties to the contract intend to transfer the dividends for the fiscal year 2020/2021 to the sole shareholder of the Transferring company in the course of the passing on of the shares. For the purpose of transparency, the dividends already included in the assets of the Transferring company are therefore accounted for clearly.

The Parties to the contract now agree as follow:

## **1. Merger agreement**

1.1 The Transferring company is to be merged with the Acquiring company by way of universal succession as a result of the transfer of its assets in their entirety with all rights and obligations and without recourse to liquidation based on the closing balance sheet as at 31 December 2020 drawn up pursuant to corporate law (**Annex/1**) as well as the interim balance sheet as at 30 June 2021 (**Annex/2**), whereby full advantage of the tax benefits provided for in particular under Article I of the UmgrStG shall be taken for this transaction.

## **2. Merger process**

2.1 This merger process concerns a downstream-merger of the parent company (FB Beteiligungen GmbH) with the subsidiary (Fabasoft AG). In this merger process the shares in the subsidiary in addition to its assets are therefore transferred to the subsidiary as a result of the merger and become its own shares. This is permissible pursuant to § 224 (3) AktG as the shares are used as compensation for the shareholders for the loss of their shares in the Transferring parent company (“passing-through of shares by the subsidiary” / “Durchgangserwerb such die Untergesellschaft”).

A merger-related capital increase in the subsidiary (Acquiring company) shall therefore not take place (§ 224 (3) AktG).

In the course of the passing on of the shares Fallmann & Bauernfeind Privatstiftung shall therefore acquire the participation of the Transferring company in the Acquiring company (490,286 no-par value shares, hence 4.46%) as the sole shareholder of the Transferring company ipso iure and no additional legal act is required. As a consequence Fallmann & Bauernfeind Privatstiftung, FN 181039j, holds a direct participation of 42.90% in the Acquiring company.

The Acquiring company therefore acquires by way of universal successor the shares transferred to itself permissibly as its own shares and must pass (“auskehren”) these on directly to the sole shareholder of the Transferring company.

2.2 In order to ensure that no capital increase is effected in the course of this merger process

- (i) no separate determination of an exchange ratio pursuant to §§ 224 AktG in conjunction with 225a (3) AktG is undertaken and
- (ii) as a consequence of this there is no granting of new shares in the Acquiring company pursuant to §§ 224 AktG in conjunction with 225a (3) AktG and therefore
- (iii) also no determination of the time as of which new shares have an entitlement to profit.

In the absence of the need to grant new shares and any additional cash payment, the appointment of an escrow agent pursuant to § 225a AktG is not necessary.

2.3 No special benefits shall be granted to the members of the managing board or supervisory board, the annual auditor or merger auditor. Neither are any special rights granted to individual shareholders, holders of preferential shares, bonds and profit participation rights.

2.4 This merger process is a simplified merger pursuant to § 231 AktG, as the participation of the Transferring company in the Acquiring company is on the one hand less than 10% of the share capital of the Acquiring company while on the other hand in the case of a downstream merger the shares to be passed on are not counted, as these are acquired directly from the Transferring company (see in this context *Szep* in *Artmann/Karollus*, AktG III<sup>6</sup> § 231 (10)). As the conditions for a simplified merger pursuant to § 231 AktG are objectively satisfied, the managing

board has waived the necessity of the passing of a resolution of the general meeting of the Acquiring company.

- 2.5 In the notification pursuant to § 221a (1) AktG the shareholders are explicitly informed of their right pursuant to § 231 (3) AktG , whereby shareholders that hold over 5% of the shares of the Acquiring company either alone or jointly may, until expiry of one month after the passing of the resolution of the shareholders of the Transferring company, demand the convocation of a general meeting in which a resolution on the approval of the merger is passed. The Articles of Association can link the right to demand the convocation of the annual general meeting to a lower holding of shares in the share capital (this is currently not the case).
- 2.6 With regard to the publication of the documents pursuant to § 221a (1) (2) AktG, that day is decisive for this merger pursuant to § 231 AktG on which the general meeting of the Transferring company is convened. In the absence of a waiver, the publication or provision of the documents (§ 232 (2) AktG) is effected at the Acquiring company. The merger agreement shall also be filed in the company register of the Acquiring company and notification of such must be published in the bulletins of the company (or in compliance with § 221a (1a) AktG). In the event of a significant change in the net assets and earning performance between conclusion of the merger agreement (drawing up of the draft) and the passing of the resolution in favour of the merger in the Transferring company, additional information for the shareholders by means of notification pursuant to § 221a (5) AktG and where appropriate communication pursuant to § 108 Abs. 5 AktG is required. Proof of the publication pursuant to § 221a (1) (or 1a) AktG and of the declaration pursuant to § 221a (1) (or 1a) AktG and with regard to the declaration pursuant to § 231 (3) AktG is to be furnished by the managing board pursuant to § 225 (2) (3) AktG in the course of registration in the company register.
- 2.7 Fallmann & Bauernfeind Privatstiftung hereby undertakes to completely indemnify and hold the Acquiring company harmless for liabilities of the Transferring company not reported in the closing balance sheet of the Transferring company as at 31 December 2020 or that occur at a later date.

### 3.

- 3.1 This merger process is based on the closing balance sheet of the Transferring company as at 31 December 2020 and the interim balance sheet as at 30 June 2021. The continuance of book values is applied to the merger process pursuant to fiscal and corporate law. It is hereby noted that due to a lack of any fiscal balance deviation the tax merger balance as at 31 December 2020 (**Annex/3**) complies with the closing balance sheet and the distribution of profits effected in the retrospective period in compliance with § 2 (4) UmgrStG is disclosed as a liability item.
- 3.2 It is noted that the annual financial statements including notes of the transferring company as at 31 December 2020 have already been submitted to the competent company register.
- 3.3 31 December 2020 has been agreed as the effective date of the merger of the Transferring company in the Acquiring company.
- 3.4 The Acquiring company hereby confirms it has audited adequately and closely the closing balance sheet of the Transferring company as at 31 December 2020 drawn up pursuant to corporate law as well as the interim balance sheet upon which the merger is based. The Acquiring company has informed itself in detail of the operation and company of the Transferring company and gained clarity and knowledge of the assets that constitute the subject of agreement.
- 3.5 In compliance with § 108 (3-5) AktG the following documents are provided by each company involved at the latest during one month before the day for which the general meeting of the Transferring company is convoked:
- (i) the merger agreement or a draft thereof (§ 220 § (1)(2) AktG)
  - (ii) the annual financial statements and the management reports and where applicable the corporate governance reports of the companies involved in the merger for the previous 3 fiscal years as well as the closing balance sheet;
  - (iii) the interim balance sheet;
  - (iv) the merger reports of the managing boards of the companies involved in the merger (§ 220a AktG);
  - (v) the audit reports (§ 220b AktG) and
  - (vi) the supervisory board report (§ 220c AktG)).

**4.**

- 4.1 The Transferring company shall cease to exist with the expiry of the effective date of the merger 31 December 2020 and its assets in their entirety and without recourse to liquidation transferred to the Acquiring company by way of universal succession.

**5.**

- 5.1 The Acquiring company grants no special rights pursuant to § 220 (2) (6) AktG and no such measures are planned.

**6.**

- 6.1 Full advantage will be taken for this merger process of the tax benefits provided for in particular under Article I UmgrStG. The Acquiring company hereby declares that the taxation of hidden reserves in the company for the assets transferred to it is not and will in no way be restricted.
- 6.2 It is hereby noted that the assets of the Transferring company do not include any real property and rights equivalent to real property pursuant to the Real Estate Transfer Tax Act.
- 6.3 Pursuant to the retroactive function in compliance with § 5 UmgrStG the Transferring company is entitled to the net dividends paid out to the Transferring company in compliance with the resolution of the annual general meeting of the Acquiring company held on 05 July 2021 and the Acquiring company hereby undertakes to transfer (forward) the net dividends distributed for the 490,286 no-par value shares to Fallmann & Bauernfeind Privatstiftung within 7 days after the merger becoming legally effective to the bank account to be indicated separately by Fallmann & Bauerfeind Privatstiftung and to transfer the associated legally based recovery claim for withholding tax in due form to Fallmann & Bauernfeind Privatstiftung.
- 6.4 It is hereby noted that the Transferring company has paid a minimum corporate income tax, which passes to the Acquiring company. An asset amounting to [€ 43,577.69] is therefore incurred in the Transferring company, which passes to the Acquiring company in the course of the merger where it is retained as a compensation of expenses.

Fallmann & Bauernfeind Privatstiftung hereby forgoes any compensatory measure in this connection as well as any capital increase.

6.5 This merger agreement is subject to the conditions precedent of (i) timely filing with the company register and (ii) submission of the declaration of the managing board of the Acquiring company that the shareholders of the Acquiring company have waived the exercise of their right pursuant to § 231 (3) AktG or have forgone this right in writing.

## 7.

7.1 In compliance with the hereby agreed obligation of completion of all Parties to the contract, these undertake to submit the declarations needed for completing and implementing this agreement in the prescribed form, that are required, necessary and otherwise useful in this respect. As a precautionary measure and based on their desired and intended universal successor all Parties to the contract grant in particular their explicit consent and agreement

- (i) to the transfer of the existing bank contracts to the Acquiring company in compliance with banking law;
- (ii) to the necessary conveyance of the existing business licences to the Acquiring company stipulated by trade regulations/administrative law;
- (iii) to the transfer of the share portfolio.

7.2 Furthermore, the Parties to the contract are obliged to determine and agree those supplements and amendments to this agreement necessary for the complete and unrestricted achievement of the reorganisation tax objective. The intent of the Parties to the contract is aimed without restriction at achievement of this objective.

7.3 This merger is effected within the Group and this process is not subject to notification under antitrust law.

7.4 The Acquiring company bears sole liability for all costs, taxes, duties and expenses associated with the preparation, fees and implementation of this agreement as well as those incurred as a result of this merger, whereby the above-mentioned compensation of expenses is intended to offset such costs.



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Place/date

[signed by]

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Fabaso AG, FN 98699x

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FB Beteiligungen GmbH, FN 323228k

With accession of:

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Fallmann & Bauernfeind Privatstiftung  
FN 181039i

59/79  
Fabaso/1282 15 July 2021

**Disclaimer:**

*This is a working translation from the German version. In case of discrepancies, the German version shall prevail.*