Dokument-ID: 972283 | Wolfgang Steinberger |
Muster | Vertragsmuster

Asset Deal Agreement

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This Agreement is made on … by and between

X GmbH, a company incorporated and existing under the laws of
Germany registered with the Commercial Court having its business
address at … (the „Seller”); and

Y GmbH, a company incorporated and existing under the laws of
Austria registered with the Commercial Court Vienna under number …
having its business address at …, Austria (the
„Purchaser”)

(Seller and Purchaser hereinafter also referred to individually
as „Party” and collectively as
„Parties”)

1. Interpretation

In this Agreement unless the context otherwise requires, the
provisions of this Clause 1 apply:

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| 1.1 | Definitions  Defined terms shall have the meaning ascribed or referenced to them in Schedule 1.1. |
| 1.2 | Schedules etc  References to this Agreement shall include reference to any Schedules to it as well as to any agreements entered into or to be entered into, pursuant to this Agreement. References to Clauses and Schedules are to Clauses and Schedules to this Agreement. Statements in Clauses or Schedules shall be deemed to have been made also for the purposes of all other Clauses and Schedules. |

2. Sale and Transfer of Assets

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| 2.1 | Sale and Transfer of Assets  Subject of this contract is the enterprise …, which is transferred to the Purchaser. With economic effect as of … local time at the registered seat of Seller (herein „Effective Date”), Seller hereby sells and transfers or assigns, as the case may be, to Purchaser, and Purchaser hereby purchases and accepts the transfer or the assignment by Seller, as the case may be, of, all of Seller's Rights in, and to, (i) the Transferred Intellectual Property Rights (which transfer is exclusively subject to Clause 5 below), and (ii) any assets other than Intellectual Property Rights to the extent legally or economically exclusively or predominantly relating to the Business on the Effective Date, ((i) and (ii) collectively herein „Assets”), including, but not limited to, Seller's Rights in, and to:   |  |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | 2.1.1 | all Non-Current Assets exclusively or predominantly used in the Business, including but not limited to   |  |  | | --- | --- | | (i) | real estate listed in Schedule 2.1.1 (i): | | (ii) | encumbrances of real estate in favour of Seller listed in Schedule 2.1.1 (ii); | | (iii) | tangible fixed assets, including technical equipment, (e.g. machines, tools, IT hardware, office equipment, vehicles and assets under construction) (the „Tangible Assets“) listed in Schedule 2.1.1 (iii); | | (iv) | participations in other companies listed in Schedule 2.1.1 (iv); | | (v) | securities (excluding participations in other companies referred to in Clause 2.1.1 (iv) above) listed in Schedule 2.1.1 (v), and | | (vi) | use of standard software listed (including number of licenses) in Schedule 2.1.1 (vi) granted by third parties under (group) software license agreements which are not to be transferred under Clause 3.1.1 (viii); | | | 2.1.2 | all Current Assets exclusively or predominantly used in the Business, including but not limited to   |  |  | | --- | --- | | (i) | raw materials, spare parts and work in progress listed in Schedule 2.1.2 (i). | | (ii) | other inventories including finished goods and merchandise listed in Schedule 2.1.2 (ii): | | (iii) | participations in other companies belonging to the X Group not being qualified as Non-Current Asset pursuant to Clauses 2.1.1 (iv) or 2.1.1 (v) above listed in Schedule 2.1.2 (iii): and | | (iv) | participations in other companies not belonging to the X Group and securities to the extent not being qualified as Non-Current Asset pursuant to Clauses 2.1.1 (iv) or 2.1.1 (v) above listed in Schedule 2.1.2 (iv): | | | 2.1.3 | all rights in connection with guarantees, warranties, representations, bonds, or other sureties in respect of goods and/or services supplied to Seller in the course of the Business; | | 2.1.4 | the right to the benefit of all restrictive covenants and confidentiality obligations given by any former employee of the Business or any other person to the extent for the benefit of the Business; | | 2.1.5 | all claims to the extent relating to the Business (including the Transferred Intellectual Property Rights and claims resulting from open customer orders) and not relating to an Excluded Asset or an Excluded Liability existing as at the Effective Date; and | | 2.1.6 | all books of account, income and expenditure records, stock and other invoices, shipping records, databases, information relating to customers, price lists, promotional and advertising literature, supplier list and tax records, correspondence and other documents, records and files, in each case (i) to the extent exclusively or predominantly relating to the Business, (ii) unless constituting, containing, or relating to Intellectual Property Rights, and (iii) as to electronic and/or physical data set out in the Data Segregation and Access Agreement, in the way and to the extent only as set out in the Data Segregation and Access Agreement;  but in any event excluding the following Assets (each an „Excluded Asset” and jointly the „Excluded Assets”; the Assets excluding the Excluded Assets shall be the „Transferred Assets”). | | 2.1.7 | any cash and cash equivalents (including cheques, deposits with and financial receivables against banks and other financial institutions), liquid assets, bank- accounts, intercompany payables and receivables including any amounts owed to Seller under the intragroup financing of X Group based on contracts or arrangements for, in connection with, or relating to, the X Group’s cash management, the intercompany accounts, the cash pooling, term loans or term deposits (in particular the master loan agreements and all individual loan agreements concluded thereunder); | | 2.1.8 | any claims in connection with taxes and social security contributions; | | 2.1.9 | trade accounts receivables towards customers existing as of the Effective Date (the „Customer Accounts Receivables”); | | 2.1.10 | [intentionally left blank] | | 2.1.11 | goods in transit; | | 2.1.12 | participations in other companies other than those listed in Schedule 2.1.1 (iv), Schedule 2.1.2 (iv) and Schedule 2.1.2 (iii); | | 2.1.13 | securities which serve as collateral for partial retirement benefits, pension benefits or similar employee benefits (which transfer is subject to (a) separate agreement(s)); | | 2.1.14 | assets exclusively or predominantly used in the X Business; and | | 2.1.15 | any claims resulting from hedging agreements; and | | 2.1.16 | recourse and regress claims of Seller vis-à-vis third parties resulting from or in connection with the warranty claims not transferred pursuant to Clause 6.1.14. | |
| 2.2 | Consummation of Transfer, Transfer of Risk  The Parties undertake to do all acts, and sign, execute and deliver any documents, to the extent necessary or appropriate to effect the transfer, conveyance and setting-over to Purchaser of the relevant Sellers Rights in, and to, the Transferred Assets. Risk of loss, the benefits of, and the charges or similar costs associated with Sellers Rights in, and to, the Transferred Assets shall pass and transfer from Seller to Purchaser with effect as of the Effective Date. |
| 2.3 | Transfer of Possession  At the Transfer Date or as soon as reasonably practicable thereafter, Seller shall grant to Purchaser and Purchaser shall assume physical possession of physical assets being qualified as Transferred Assets. If the Transferred Assets are in the possession of a third party, the Parties hereby agree to notify such third party to hold the Transferred Assets on behalf of Purchaser. From the Transfer Date until physical possession has been transferred to Purchaser, Seller shall hold the Transferred Assets on behalf of Purchaser. |
| 2.4 | Third Party Consent  Subject always to the terms of any conflicting provisions of this Agreement relating to the obtaining of third party consent to the transfer of specific classes of Transferred Assets, if and to the extent the transfer of any of Sellers Rights in, and to, any of the Transferred Assets is subject to (i) the consent of a third party, (ii) any agreement with a third party, or the waiver of any objection right of, or the lapse of any objection period for, a third party (collectively herein „Third Party Consent”), the relevant transfer shall not take effect until the Third Party Consent has been obtained and Seller and the Purchaser shall each use their respective commercially reasonable efforts (which shall not, for the avoidance of doubt, include the giving of a performance guarantee) to obtain the Third Party Consent as soon as possible after the date of this Agreement, and with respect to licenses in standard software in any event prior to the Effective Date. After the Effective Date, until the Third Party Consent is obtained, Seller shall, to the extent legally permissible, be deemed to hold the respective Transferred Asset for the benefit and burden of Purchaser. Upon a required Third Party Consent being obtained for any Transferred Asset, any contractual arrangements between the Parties due to the fact that a required Third Party Consent for such Transferred Asset had not been obtained at the Effective Date, if any, shall automatically terminate or be discontinued, as the case may be. |
| 2.5 | Additional Software Licenses  Should, within twelve (12) months after the Effective Date, the Purchaser identify that, in addition to the licenses in standard software set out in Schedule 2.1.1 (vi), it requires (i) a higher number of licenses, and/or (ii) licenses in standard software not set out in Schedule 2.1.1 (vi), then the Seller shall, subject to Clause 2.4, transfer such additional licenses to the Purchaser to the extent available at the Seller and not needed by the Seller. For the granting of such licenses, the Purchaser shall pay the Seller (in addition to potenzial fees the third party software vendor may claim under Clause 2.4) the book value of such licenses plus a handling fee of 0.5 % of such book value. |

3. Sale and Transfer of
Contracts

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| 3.1 | Assumed Contracts   |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | 3.1.1 | With economic effect as of the Effective Date, Seller hereby sells and transfers, and Purchaser hereby purchases and accepts the transfer of, all rights and obligations under all contracts, offers, orders, undertakings, arrangements, agreements, expressions of interest or similar institutes, irrespective whether they are legally binding or subject to any dispute, and which are unperformed (wholly or partly, relating to the main obligation, secondary obligations or any other obligation) on or before the Effective Date (collectively herein „Contracts“) to which Seller is a party and to the extent relating exclusively to the Business on the Effective Date, including but not limited to   |  |  | | --- | --- | | (i) | the guarantees and sureties (e.g. bonds, guarantees, letters of comfort or other sureties, including sureties issued in favour of customers, consortium partners, suppliers or other third parties) listed in Schedule 3.1.1 (i); | | (ii) | joint venture agreements or other cooperation agreements listed in Schedule 3.1.1 (ii); | | (iii) | asset lease agreements listed in Schedule 3.1.1 (iii) (the „Transferred Asset Lease Contracts”); | | (iv) | contracts over delivery or service with customers listed in Schedule 3.1.1 (iv); | | (v) | contracts over delivery or service with suppliers listed in Schedule 3.1.1 (v); | | (vi) | agreements with sales representatives listed in Schedule 3.1.1 (vi); | | (vii) | license agreements with respect to Intellectual Property Rights listed in Schedule 3.1.1 (vii); and | | (viii) | license agreements and related software support agreements with respect to standard software listed in Schedule 3.1.1 (viii) (the „Software Licenses”); |   (as amended from time to time collectively referred to herein as „Assumed Contracts”), but in any event excluding the following contracts, rights, and obligations:   |  |  | | --- | --- | | (ix) | guarantees or sureties not listed in Schedule 3.1.1 (i); | | (x) | insurance contracts | | (xi) | contracts relating to employees (e.g. employment contracts) and pensions related contracts which transfer is exclusively subject to Clause 7 below; | | (xii) | lease contracts under which Seller is the tenant which transfer is exclusively subject to Clause 4.1 below; | | (xiii) | shareholder loan agreements and any other financing agreements with any other X Group company; | | (xiv) | agreements on bank accounts or other banking services | | (xv) | asset lease agreements other than those listed in Schedule 3.1.1 (iii); | | (xvi) | contracts over delivery or services with customers other than those listed in Schedule 3.1.1 (iv); | | (xvii) | contracts over delivery or service with suppliers other than those listed in Schedule 3.1.1 (v); | | (xviii) | license agreements with respect to Intellectual Property Rights other than those listed in Schedule 3.1.1 (vii); | | (xix) | license agreements and support agreements with respect to standard software other than those listed in Schedule 3.1.1 (viii); | | (xx) | contracts not documented in written form or by way of electronic data exchange; | | (xxi) | overdraft facilities agreements, deposit agreements with banks or financial institutions; and | | (xxii) | external and internal hedging agreements. | | | 3.1.2 | Subject to Clause 3.2 below, the Purchaser shall from the Effective Date onwards:   |  |  | | --- | --- | | (i) | perform all of the obligations and assume all liabilities, save for warranty claims which are not transferred pursuant to Clause 6.1.14, under, and will be entitled to the benefit (subject to the burden) of, each Assumed Contract (whether to be performed before or after the Effective Date or any transfer or novation of the Assumed Contract to the Purchaser) in accordance with the terms of such Assumed Contract; | | (ii) | be responsible for any liabilities arising from or relating to breaches of or defaults under the Assumed Contracts, save for warranty claims which are not transferred pursuant to Clause 6.1.14; and | | (iii) | be liable for or entitled to (as the case may be) any payment in respect of the price or cost of any product, service or other benefit provided or to be provided under each Assumed Contract. | | |
| 3.2 | Consummation of Transfer, Third Party Consent   |  |  | | --- | --- | | 3.2.1 | If an Assumed Contract cannot be transferred to the Purchaser except by a transfer made with a Third Party Consent or by a novation agreement, the Parties shall each use their commercially reasonable efforts (which shall not, for the avoidance of doubt, include the giving of any performance guarantee) to obtain the Third Party Consent to the transfer, or achieve the novation, of the relevant Assumed Contract or to arrange for the Purchaser to enter into a replacement contract on substantially equivalent terms to replace the relevant Assumed Contract as soon as possible after the date of this Agreement, and with respect to Software Licenses in any event prior to the Effective Date. Any such Assumed Contract shall qualify as „Pending Contract” until a required Third Party Consent has been obtained or novation been achieved. | | 3.2.2 | With respect to each Pending Contract the following shall apply between the Parties from the Effective Date onwards:   |  |  | | --- | --- | | (i) | Purchaser shall obtain full benefit of all contractual rights, benefits and claims arising out of, or in connection with, the Pending Contract, whether arising before, on or after the Effective Date; | | (ii) | Purchaser shall be responsible to the Seller for any liabilities (excluding any Excluded Liabilities) relating to such Assumed Contract and, to the extent legally permissible, carry out, perform and complete all the obligations (including contingent obligations) of Seller under, or in relation to, the Pending Contract; | | (iii) | the Parties shall reasonably cooperate to enforce the rights and, in case it is prohibited by law for Purchaser to fulfil its obligations under Clause 3.2.2 (ii) above, to fulfil the obligations, under, or in relation to, the Pending Contract; | | (iv) | Purchaser shall (i) provide access to Seller to all relevant books, records and other documents and information in relation to each Pending Contract as Seller may reasonably require and (ii) provide Seller upon Sellers request, a report listing obtained and outstanding Third Party Consents as well as novations achieved; | | (v) | Purchaser shall diligently and in due course make all correspondence relating to the Pending Contracts, provided (i) that Purchaser shall neither be entitled (a) to act in the name of Seller nor (b) make any material correspondence relating to the Pending Contracts without the prior consultation of Seller, respectively, and (ii) that Seller shall reasonably support Purchaser; and | | (vi) | each Party shall forward without undue delay to the other Party a copy of all correspondence, notice or any other document or items received, or sent, with respect to the Pending Contract and provide reasonable information about any other communication relating to the Pending Contract. | | | 3.2.3 | If a required Third Party Consent has not been obtained or a novation has not been achieved within six (6) months after the Transfer Date, the Parties shall agree the most appropriate steps to take in relation to a Pending Contract which may, if legally permissible, include the termination of such Pending Contract. | |
| 3.3 | Shared Contracts   |  |  | | --- | --- | | 3.3.1 | In case of a contract to which Seller is a party, in each case, which pertains not exclusively but partially to the Business and would constitute an Assumed Contract, if it was exclusively pertaining to the Business (herein „Shared Contract”), the Parties shall use their commercially reasonable efforts to obtain the consent of the other party or parties to the relevant Shared Contract to the transfer of, or to achieve the novation of, an amendment to or other arrangement in respect of the Shared Contract as soon as possible after the date of this Agreement, and with respect to license agreements and support agreements in standard software in any event prior to the Effective Date, so as to (i) transfer to the Purchaser the benefit of that part of the relevant Shared Contract that relates to the Business and (ii) have assumed by the Purchaser the burden and the Assumed Liabilities with respect to that part of the Shared Contract that relates to the Business. Upon any such consent being obtained or agreement to the novation or other such amendment or arrangement being achieved, the Parties shall enter into any agreement or arrangement necessary to transfer that part of the Shared Contract that relates to the Business. Clause 3.2.3 above shall apply mutatis mutandis with respect to the obtaining of the third party consent referred to in this Clause 3.3.1. | | 3.3.2 | Until consent (express or implied) is obtained or agreement to such novation or other such amendment or arrangement is achieved as referred to in Clause 3.3.1 all contractual rights and obligations relating to the Shared Contract shall legally remain with Seller, however, the Seller and the Purchaser will, between themselves, treat each other as if the Third Party Consent had been obtained or the novation agreement or other such amendment or arrangement had been agreed with effect as of the Effective Date, in particular:   |  |  | | --- | --- | | (i) | Purchaser shall obtain full benefit of all contractual rights, benefits and claims arising out of, or in connection with such part of the Shared Contract that relates to the Business, whether arising before, on or after the Effective Date; | | (ii) | Purchaser shall be responsible to Seller for any liabilities (excluding any Excluded Liabilities) relating to that part of the Shared Contract that relates to the Business and shall, to the extent legally permissible, carry out, perform and complete all obligations (including contingent obligations) relating to that part of the Shared Contract that relates to the Business (the „Performance of Obligations”) and shall bear its own costs and any expenses, as the case may be, for the Performance of Obligations if such costs or expenses are not to be borne by the contractual partner of the relevant Shared Contract; | | (iii) | Purchaser shall indemnify and keep indemnified the Seller in respect of any costs, claims, demands, expenses, proceedings, losses and liabilities arising out of and relating to the period from and including the Transfer Date resulting from a breach of the Performance of Obligations by the Purchaser; and | | (iv) | Seller and Purchaser shall reasonably cooperate to enforce the rights and, in case it is prohibited by law for the Purchaser to fulfil such obligations, to fulfil the obligations relating to that part of the Shared Contract that relates to the Business. | | |
| 3.4 | Handling of Customer Complaints and Returns and of Bonus Payments to Customers   |  |  | | --- | --- | | 3.4.1 | Handling of Customer Complaints and Returns  Schedule 3.4.1 describes the process that shall apply between the Parties with respect to Complaints and Returns (both as defined below) by customers relating to products which were sold and delivered by the Seller prior to the Effective Date.  A „Complaint” in the aforementioned sense means a complaint by a customer relating to a product which is based on (i) defects in a product, (ii) transport damage or loss, and/or (iii) commercial reasons (as specified in Schedule 3.4.1).  A „Return” in the aforementioned sense means the return by a customer of a product that the customer (i) is entitled to return under its contract with a Party and/or (ii) wants to return on a voluntary basis without the product being defective. | | 3.4.2 | Handling of Bonus Payments to Customers  Schedule 3.4.2 describes the treatment between the Parties of open bonus payments payable to customers (the „Bonus Customers”) under existing customer bonus agreements (the „Bonus Agreements”) for sales made under such Bonus Agreements to such Bonus Customers before the Effective Date. | |

4. Leased Premises

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| 4.1 | Transferred Lease Contracts  It is stated, that § 12a MRG (Austrian Rent Act) is not applicable. With the economic effect as of the Effective Date, Seller hereby sells and transfers, and Purchaser hereby purchases and accepts the transfer of all Contracts under which Seller is the tenant with respect to leased premises exclusively or predominantly used for the purpose of the Business and/or listed in Schedule 4.1 (i) (each a „Transferred Lease Contract” and collectively the „Transferred Lease Contracts”) but, in any event, except for the lease Contracts listed in Schedule 4.1 (ii). |
| 4.2 | Consummation of Transfer, Third Party Consent   |  |  | | --- | --- | | 4.2.1 | Clauses 3.2.1 and 3.2.2 above shall apply mutatis mutandis, provided that the Purchaser agrees to enter into such covenants and agreements and provide such additional security as may be necessary to secure the Third Party Consent where reasonably required. | | 4.2.2 | If a required Third Party Consent is not obtained, Seller, with effect as of the Effective Date, shall permit Purchaser to use and occupy the premises leased under the Transferred Lease Contracts (the „Transferred Leased Premises”) for the period from the Effective Date until the date the Third Party Consent is obtained in the same manner it would be permitted to do if the Transferred Lease Contracts thereof had been transferred to the Purchaser (the „Sublease”) subject to the following terms and conditions of this Clause 4.2.2:   |  |  | | --- | --- | | (i) | Purchaser will occupy the Transferred Leased Premises as licensee only of Seller and no tenancy or other interest shall be vested or deemed to be vested in Purchaser in relation to the Transferred Leased Premises; and | | (ii) | Purchaser will observe and perform all the obligations on the part of the tenant under the respective Transferred Lease Contracts for each Transferred Leased Premises (including the payment of all rents and outgoings) and Purchaser shall indemnify and keep indemnified Seller in respect of any costs, claims, demands, expenses, proceedings, losses and liabilities arising and relating to the period from and including the Effective Date resulting from a breach of the Transferred Lease Contracts by the Purchaser. | | | 4.2.3 | The transfer of the Transferred Lease Contracts shall be in such form as is agreed by the parties of the relevant Transferred Lease Contract having due regard to the nature of the Transferred Leased Premises to be transferred and the matters affecting the Transferred Leased Premises. | | 4.2.4 | The Parties agree to execute all such necessary documents required to effect the completion of the transfer of the Transferred Lease Contracts from Seller to Purchaser. | | 4.2.5 | On and after the Effective Date (and until the completion of the transfer of the Transferred Lease Contract to Purchaser) Seller shall act in accordance with the direction of Purchaser in connection with any dealing, management or other matter relating to or concerning the Transferred Leased Premises provided it does not put Seller in breach of its obligations under the terms of any Transferred Lease Contract. | |
| 4.3 | Shared Lease Contracts   |  |  | | --- | --- | | 4.3.1 | In case of a Contract under which Seller is the tenant with respect to leased premises and which neither pertains exclusively nor predominantly but partially to the Business and would constitute a Transferred Lease Contract if it was exclusively or predominantly pertaining to the Business, including but not limited to the lease contracts listed in Schedule 4.3.1 (herein the „Shared Lease Contract”), Seller and Purchaser shall enter into a sublease contract (the „Sublease Contract”) under which Seller subleases to Purchaser such part of the leased premises under the respective Shared Lease Contract which is used by Purchaser (the „Shared Leased Premises”). Clause 3.2.1 shall apply mutatis mutandis. | | 4.3.2 | The terms and conditions of the Sublease Contract shall be substantially the same as the terms and conditions of the Shared Lease Contract and shall further include, with respect to the Shared Leased Premises, that:   |  |  | | --- | --- | | (i) | Purchaser shall be responsible, to Seller for any liabilities (excluding any Excluded Liabilities) and shall, to the extent legally permissible, carry out, perform and complete all obligations (including contingent obligations) and shall bear its own costs and any expenses, as the case may be, with respect thereto if such costs or expenses are not to be borne by the contractual partner of the relevant Shared Lease Contract; | | (ii) | Purchaser shall indemnify and keep indemnified Seller in respect of any costs, claims, demands, expenses, proceedings, losses and liabilities arising out of and relating to the period from and including the Effective Date resulting from a breach of any obligations; and | | (iii) | Seller and Purchaser shall reasonably cooperate to enforce the rights and, in case it is prohibited by law for Purchaser to fulfil such obligations, to fulfil the obligations relating to the Shared Leased Premises. | | | 4.3.3 | With respect to the Shared Leased Premises, Clauses 4.2.2 and 4.2.5 shall apply mutatis mutandis, provided that Clause 4.2.2 shall be applicable until the date on which the respective Sublease Contract is becoming effective. | |

5. Intellectual Property Rights

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| 5.1 | Sale and Assignment of Patents, Registered Design Rights and Domains   |  |  | | --- | --- | | 5.1.1 | With effect as of the Effective Date and always subject to Clause 5.6, Seller hereby sells and assigns to Purchaser, and Purchaser hereby accepts such sale and assignment of, the (i) solely owned and co-owned Patents listed in Schedule 5.1 (i) („Transferred Patents”); to the extent the Transferred Patents are co-owned with third parties and the assignment requires the consent of such co-owner(s) („Transferred Co-Owned Patents”) the assignment, however, is made upon the condition precedent that the respective co-owner(s) consent to the assignment, (ii) registered Design Rights listed in Schedule 5.1 (ii), and (iii) Domains listed in Schedule 5.1 (iii) each including all claims, in particular damage claims, against any third parties (excluding Affiliates of Seller) in relation to an infringement of such Intellectual Property Rights prior to the Effective Date (collectively herein „Transferred Registered IP”). | | 5.1.2 | Seller shall use reasonable efforts to obtain the consent of the other co-owner(s) of the Transferred Co-Owned Patents to the assignment of the respective Transferred Co-Owned Patents to Purchaser in due course after the Effective Date. In case such consent is not granted within six (6) months after the Effective Date, the respective Transferred Co-Owned Patents shall not form part of the Transferred Patents and no transfer of such Transferred Co-Owned Patents shall take place. | |
| 5.2 | Sale and Assignment of Trademarks  With effect as of the Effective Date, Seller hereby sells and assigns to Purchaser, and Purchaser hereby accepts such sale and assignment of, always subject to Clause 5.6.7, the Trademarks listed in Schedule 5.2, including all claims, in particular damage claims, against any third parties (excluding Affiliates of Seller) in relation to an infringement of such Trademarks in the … Business prior to the Effective Date (the „Transferred Trademarks”). |
| 5.3 | Sale and Assignment of Know-how   |  |  | | --- | --- | | 5.3.1 | With effect as of the Effective Date and always subject to Clause 5.6, Seller hereby sells and assigns to Purchaser all information (irrespective as to whether such information is available in the form of documentation, orally or in electronic format and irrespective of whether they are protected by Copyrights or not), including business and trade secrets, and technical and business information, inventions (including inventions made by employee inventors), experience and expertise, all to the extent that such information is not software or covered by Patents or Design Rights (collectively herein „Know-how”) which (i) exclusively pertains to the … Business on the Effective Date, and (ii) Seller wholly or co-owns and is authorized to dispose of on the Effective Date, including all claims, in particular damage claims, against any third parties (excluding Affiliates of Seller) in relation to a misappropriation of such Know-how prior to the Effective Date (herein „Transferred Know-how”). Purchaser hereby accepts the sale and assignment of the Transferred Know-how. The Parties agree that (i) the documentation in which the Transferred Know-how is embodied is already available in the … Business and a separate handover of such documentation is therefore not necessary, and that (ii) the segregation of electronic and/or physical data set out in the Data Segregation and Access Agreement shall exclusively be subject to and be made in accordance with the Data Segregation and Access Agreement. | | 5.3.2 | Seller shall keep the Transferred Know-how confidential and shall only disclose it to Permitted Licensees (as defined below in Clause 5.6.3) or Acquirer of Divested Business (as defined below in Clause 5.6.4), provided that such Permitted Licensee and Acquirer of Divested Business are bound to adequate confidentiality obligations. The aforementioned confidentiality obligations do not apply to the extent such Transferred Know-how (i) is or has become publicly known without Seller (or Permitted Licensees or Acquirer of Divested Business, as the case may be) having violated its confidentiality obligations, and/or (ii) is required to be disclosed by Seller (or Permitted Licensee or Acquirer of Divested Business, as the case may be) to comply with applicable laws or governmental regulations, provided that Seller (or Permitted Licensee or Acquirer of Divested Business, as the case may be) promptly informs Purchaser of such disclosure and uses commercially reasonable efforts to limit the disclosure to the minimum necessary. | |
| 5.4 | Sale and Assignment of Software  With effect as of the Effective Date and always subject to Clause 5.6, Seller hereby sells and assigns to Purchaser all rights of use and exploitation, including all copyrights, in the object code and in the source code of software individually created by or for Seller, including the corresponding documentation, (hereinafter „Software”) (i) which exclusively pertains to the … Business on the Effective Date, and (ii) provided that Seller has ownership rights (subject only to moral rights of the authors) in such Software and Seller is entitled to assign such Software on the Effective Date, including but not limited to the Transferred Software listed in Schedule 5.4, including all claims, in particular damage claims, against any third parties (excluding Affiliates of Seller) in relation to an infringement of the rights in such Software prior to the Effective Date (herein „Transferred Software”). For the avoidance of doubt, Seller does not sell and assign any components or elements comprising part of, or as are otherwise included, in the Transferred Software which are owned by third parties and therefore cannot be sold and assigned by Seller, in particular open source software elements, and Purchaser shall be fully responsible to comply with all requirements resulting from the transfer of the Transferred Software to, and its use by, Purchaser. Purchaser hereby accepts the sale and assignment of rights in the Transferred Software. The Parties agree that data carriers with the Transferred Software and the respective documentation are already available in the … Business and a separate handover of data carriers and documentation is therefore not necessary. |
| 5.5 | Sale and Assignment of other Intellectual Property Rights  With effect as of the Effective Date and always subject to Clause 5.6, Seller hereby sells and assigns to Purchaser all unregistered Design Rights and Copyrights, each to the extent it (i) exclusively pertains to the … Business on the Effective Date, and (ii) is wholly or co-owned by Seller and Seller is authorized to dispose of it on the Effective Date, each including all claims, in particular damage claims, against any third parties (excluding Affiliates of Seller) in relation to an infringement of such Intellectual Property Rights prior to the Effective Date (herein together „Transferred Other Intellectual Property Rights”). Purchaser hereby accepts the sale and assignment of the Transferred Other Intellectual Property Rights. The Parties agree that the documentation in relation to the Transferred Other Intellectual Property Rights is already available in the … Business and a separate handover of such documentation is therefore not necessary. |
| 5.6 | Retained Rights of Seller and Third Party Rights   |  |  | | --- | --- | | 5.6.1 | Except for the Transferred Trademarks (for which Sellers rights are further governed by the Trademark License Agreements) and the Domains listed in Schedule 5.1 (iii), the Transferred Intellectual Property Rights are sold and assigned always subject to a retained non-exclusive, worldwide, irrevocable and perpetual, fully paid-up, unlimited in scope, right of Seller to use the Transferred Intellectual Property Rights, including but not limited to use the Transferred Intellectual Property Rights to develop, have developed, make or have made, purchase, sell, and offer to sell, import and export products and corresponding services. For the avoidance of doubt, the term Transferred Intellectual Property Rights as used in this Clause 5.6 shall include all Patents and other Intellectual Property Rights arising out of the Transferred Intellectual Property Rights after the Effective Date. In relation to the Transferred Trademarks the Seller retains a right to continue to use such Trademarks on business papers, brochures, and in other advertising (including in the internet) already produced or otherwise existing on the Effective Date, for a transitional period of one (1) year after the Effective Date. | | 5.6.2 | In addition to the retained right of Seller to use the Transferred Intellectual Property Rights pursuant to Clause 5.6.1, Purchaser with effect as of the Effective Date grants to Seller a non-exclusive, worldwide, irrevocable and perpetual, fully paid-up license, unlimited in scope, under all Transferred Intellectual Property Rights, except for the Transferred Trademarks (for which a license is partially granted to Seller pursuant to the Trademark License Agreements) and the Domains listed in Schedule 5.1 (iii). The license includes the right to use such Transferred Intellectual Property Rights to develop, have developed, make or have made, purchase, sell, and offer to sell, import and export products and corresponding services. | | 5.6.3 | Seller may grant licenses under the retained rights pursuant to Clause 5.6.1, respectively may grant sublicenses under its license to the Transferred Intellectual Property Rights pursuant to Clause 5.6.2, to (i) any of its Affiliates, which (sub)license may, upon Sellers choice, continue even if such Legal Entity to which the (sub)license has been granted ceases to qualify as an Affiliate of Seller, (ii) purchasers of any of Sellers or Sellers Affiliates products for the use for, or in connection with, such product, irrespective of whether such purchaser is a direct or indirect customer of Seller or Sellers Affiliate, (iii) partners of joint research, development or other technology cooperations, (iv) contractors of Seller or Sellers Affiliates who manufacture any of Sellers or Sellers Affiliates products on their behalf, and (v) any Acquirer of Divested Business (as defined below), which may, upon Sellers choice, include the right of such Acquirer of Divested Business to grant further sublicenses to its Affiliates ((i) to (iv) herein „Permitted Licensees“). | | 5.6.4 | Irrespective of, and in addition to, the right to grant licenses pursuant to Clause 5.6.3, Seller may assign its retained rights pursuant to Clause 5.6.1 (in whole or in part) and the license under any of the Transferred Intellectual Property Rights pursuant to Clause 5.6.2 (in whole or in part) to a third party acquirer of Seller's business or any part of such business (herein „Acquirer of Divested Business”). | | 5.6.5 | With effect as of the Effective Date, Purchaser hereby grants to Seller a usufruct as an in rem right in the Transferred Intellectual Property Rights except for the Transferred Trademarks, and Seller hereby accepts such usufruct. The usufruct shall be in force until the last of such Transferred Intellectual Property Right expires and the last part of the Transferred Know-how becomes publicly known, and shall automatically cease to exist thereafter. No payment of Seller shall be due for the usufruct granted by Purchaser hereunder. As a result of the usufruct, Seller shall without limitation be entitled to use the Transferred Intellectual Property Rights (except for the Transferred Trademarks) and grant licenses thereunder, subject only to the limitations contained in Clause 5.6.3. The usufruct granted hereunder shall not restrict Purchaser's rights to use the Transferred Intellectual Property Rights and to transfer or otherwise dispose of them in accordance with this Agreement. | | 5.6.6 | Seller shall have the right to register the license and the usufruct granted to it and the licenses and sublicenses granted by it to its Permitted Licensees under Clauses 5.6.2, 5.6.3 and 5.6.5 with the respective intellectual property offices. Purchaser shall sign and execute all such documents and conduct all acts as are reasonably necessary for the registration of the license and the usufruct granted to Seller under such Transferred Intellectual Property Rights. Seller shall bear all costs related to the registration of the license and/or the usufruct. | | 5.6.7 | Purchaser agrees and acknowledges that (i) the Transferred Intellectual Property Rights may be subject to Third Party Rights granted by Seller, Purchaser or any of their predecessors or Affiliates to third parties, (ii) such Third Party Rights continue to exist after the Effective Date, (iii) it shall inform any acquirer or transferee of any or all of the Transferred Intellectual Property Rights prior to the transfer that (a) Third Party Rights may exist, and (b) Seller has retained rights and is granted a license and usufruct under such Transferred Intellectual Property Rights, and (iv) shall safeguard that the transferee acknowledges and observes such Third Party Rights and the rights retained by, and the licenses and usufruct granted to, Seller, inter alia by agreeing on provisions substantially similar to the provisions contained in this Clause 5.6.7. | | 5.6.8 | Clauses 5.6.2 to 5.6.7 shall apply mutatis mutandis for the Intellectual Property Rights owned on the Effective Date by any other Legal Entity the shares of which Purchaser acquires from Seller in connection with the Transaction, and Purchaser shall procure such acquired Legal Entity immediately after the Effective Date to (i) grant to Seller the license stipulated in Clause 5.6.2 and the usufruct stipulated in Clause 5.6.5, and (ii) provide Seller with a written confirmation of such entity that such license and usufruct is granted. | |
| 5.7 | Surrender of Documents   |  |  | | --- | --- | | 5.7.1 | Seller shall surrender to Purchaser within sixty (60) days of the Effective Date in electronic or written form at least the material documents in its possession regarding the Transferred Registered IP and the Transferred Trademarks, including application and prosecution documents and registration certificates, to the extent available. Seller shall be entitled to retain copies of such documents. In relation to the Transferred Co-Owned Patents this shall only apply upon the co-owner(s) of the respective Transferred Co-Owned Patent having granted consent to the assignment. | | 5.7.2 | Upon written request of Purchaser and at Purchasers costs, Seller shall use reasonable efforts to provide Purchaser with copies of any missing documents in Seller’s possession relating to Transferred Intellectual Property Rights (including object codes and source codes of any Transferred Software) as specified by Purchaser and as already existing on the Effective Date. The same shall apply mutatis mutandis in relation to copies of any missing documents in Purchasers possession in relation to the Transferred Intellectual Property Rights (including object codes and the source codes of any Transferred Software) requested by Seller from Purchaser. The obligations of the Parties under this Clause 5.7.2 shall cease one (1) year after the Effective Date. | |
| 5.8 | Recordal of Assignment; Maintenance   |  |  | | --- | --- | | 5.8.1 | Purchaser shall use reasonable efforts to record the change of ownership to the registered Transferred Intellectual Property Rights in the respective intellectual property registries not later than within two (2) years after the Effective Date, unless agreed otherwise between the Parties. In relation to the Transferred Co- Owned Patents this shall only apply upon the co-owner(s) of the respective Transferred Co-Owned Patent having granted consent to the assignment. | | 5.8.2 | The Parties shall execute separate short form assignment agreements to the extent necessary or useful to record or effectuate the assignment of the registered Transferred Intellectual Property Rights. Seller shall sign and execute all documents and conduct all acts as are reasonably necessary for the assignment of the Transferred Intellectual Property Rights to Purchaser and the registration of Purchaser as the new owner of the registered Transferred Intellectual Property Rights in the respective public registers. Purchaser shall bear all costs related to the registration of the assignment of the Transferred Intellectual Property Rights from Seller to Purchaser. In relation to the Transferred Co-Owned Patents this shall only apply upon the co-owner(s) of the respective Transferred Co-Owned Patent having granted consent to the assignment. | | 5.8.3 | Seller shall bear all costs of the prosecution, maintenance and defense of the Transferred Intellectual Property Rights arising up and until the Effective Date, and Purchaser shall bear all such costs arising after the Effective Date. In relation to the Transferred Co-Owned Patents Seller shall bear all costs of the prosecution, maintenance and defense of the Transferred Intellectual Property Rights arising up and until the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment, and Purchaser shall bear all such costs arising thereafter. | | 5.8.4 | Seller shall be free to abandon any of the solely owned Transferred Registered IP in the usual course of business up and until the Effective Date, and in relation to the Transferred Co-Owned Patents up and until the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment. | |
| 5.9 | Compensation for Employee Inventors  Seller shall be responsible for all remuneration claims of its existing or former employees relating to the use and other exploitation of any and all employee inventions and corresponding Patents forming part of the Transferred Intellectual Property Rights prior to the Effective Date, and in relation to the Transferred Co-Owned Patents prior to the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment. Purchaser shall be responsible for all remuneration claims of employees (including employees of Seller, employees who already left Seller prior to the Effective Date and employees of Seller who transfer to the Purchaser) relating to the sale, transfer, use and other exploitation of any and all employee inventions and corresponding Patents forming part of the Transferred Intellectual Property Rights on and after the Effective Date (in relation to the Transferred Co-Owned Patents on and after the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment), including lump sum payment obligations towards Sellers existing and former employees resulting from the sale and transfer of such inventions and corresponding Patents or the divestiture of the Purchaser from the X Group. Seller shall indemnify and hold harmless Purchaser against any and all remuneration claims relating to the use or other exploitation of such employee inventions and corresponding Patents forming part of the Transferred Intellectual Property Rights prior to the Effective Date (respectively in relation to the Transferred Co-Owned Patents prior to the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment), and Purchaser shall indemnify and hold harmless Seller against any and all remuneration claims relating to the sale, transfer, use or other exploitation of such employee inventions and corresponding Patents forming part of the Transferred Intellectual Property Rights on the Effective Date and thereafter (respectively in relation to the Transferred Co-Owned Patents on the date the co-owner(s) of the respective Transferred Co-Owned Patent have granted consent to the assignment and thereafter), including lump sum payment obligations towards Sellers existing and former employees resulting from the sale and transfer of such inventions and corresponding Patents or the divestiture of the Purchaser from the X Group. |
| 5.10 | Termination of previous licenses  The Parties agree that all licenses under any of Sellers or its Affiliates own Intellectual Property Rights granted by Seller and its Affiliates to Purchaser and its Affiliates before the Effective Date shall terminate on the Effective Date, except for the licenses explicitly granted under the Trademark License Agreements and the IP License Agreements. Purchaser hereby, on its own behalf and on behalf of its Affiliates, irrevocably waives any and all of its and their rights under such licenses previously granted to it and its Affiliates by Seller and its Affiliates with effect as of the Effective Date, and shall procure that its Affiliates waive any and all of their rights under such previously granted licenses. |

6. Assumption of Liabilities

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| 6.1 | Assumed Liabilities  With economic effect as of the Effective Date, Purchaser hereby assumes all risks, obligations, commitments and liabilities of Seller to the extent arising from or relating to the Business (collectively herein „Liabilities”), and, whether known or unknown, fixed or contingent, including, in each case if exclusively arising from or relating to the Business:   |  |  | | --- | --- | | 6.1.1 | save for Clause 6.1.14, all Liabilities arising out of, or in connection with, the Assumed Contracts, the Transferred Lease Contracts or open customer orders; | | 6.1.2 | save for Clause 6.1.14, all Liabilities for penalty, liquidated damages, reimbursement, indemnification and damages; | | 6.1.3 | all Liabilities arising out of, or in connection with, the Transferred Intellectual Property Rights; | | 6.1.4 | all Liabilities arising out of, or in connection with, the use (including infringement) of third party Intellectual Property Rights; | | 6.1.5 | all bonds, guarantees or other sureties, including sureties issued in favor of customers and suppliers of the Business and for the benefit of third parties listed in Schedule 6.1.5 subject to any relevant customer and supplier agreements which shall prevail; | | 6.1.6 | save for Clause 6.1.14, all Liabilities for damages caused by any product sold or any service rendered; and | | 6.1.7 | all Liabilities arising out of statutory or contractual warranty claims of third parties existing as of the Effective Date due to defective products belonging to the Business, if (i) any such claim amounts to at least EUR 100.000,– (in words: one hundred thousand Euro) in the individual case or (ii) the total amount of a series of such claims all resulting from the same serial damage amounts to at least EUR 100.000,– (in words: one hundred thousand Euro);  but in any event excluding the following Liabilities (each an „Excluded Liability” and jointly the „Excluded Liabilities“; the Liabilities excluding the Excluded Liabilities are the „Assumed Liabilities”). | | 6.1.8 | trade accounts payables towards suppliers existing as of the Effective Date (the „Supplier Accounts Payables”); | | 6.1.9 | all Liabilities vis-à-vis financial institutions existing as of the Effective Date; | | 6.1.10 | all payables due resulting from hedging transactions; | | 6.1.11 | all Liabilities to the extent exclusively relating to an Excluded Asset; | | 6.1.12 | Liabilities towards employees subject to the terms and provisions in Clause 7; and | | 6.1.13 | any Liabilities in connection with taxes and social security contributions, and | | 6.1.14 | Liabilities arising out of any warranty claims other than those transferred pursuant to Clause 6.1.7. | |
| 6.2 | Third Party Claims with respect to Assumed Liabilities  In the event a third party is asserting claims or files a lawsuit or any other proceeding against the Seller due to any of the Assumed Liabilities, the Seller shall promptly notify the Purchaser in writing, giving reasonable details of any such third party claim. Following such notification, the provisions of Clause 8.2 below shall apply mutatis mutandis. |
| 6.3 | Release from Assumed Liabilities, Third Party Consent  The Parties shall use their respective commercially reasonable efforts to procure the release and discharge of Seller from each Assumed Liability. If and to the extent a Third Party Consent is required to effect the assumption of any Assumed Liability, Clause 3.2 above shall apply mutatis mutandis. |
| 6.4 | Shared Liability  In case of a Liability which pertains only partially (and not exclusively) to the Business and would constitute an Assumed Liability if it was exclusively pertaining to the Business, (herein „Shared Liability”) Purchaser shall assume the portion of the Shared Liability pertaining to the Business (herein „Assumed Shared Liability”). Seller shall indemnify and hold harmless Purchaser against all claims with respect to the portion of the Shared Liability not comprising the Assumed Shared Liability. Purchaser shall indemnify and hold harmless Seller against all claims with respect to the portion of the Shared Liability comprising the Assumed Shared Liability. |
| 6.5 | Transfer of Provisions and Accruals  Subject to anything stated to the contrary in this Agreement, in case of provisions or accruals to be shown in Seller’s balance sheet as of the Effective Date, if such balance sheet was drawn up, and exclusively or predominantly relating to the Business, in particular but not limited to the provisions and accruals listed in Schedule 6.5. Purchaser hereby assumes all underlying uncertain liabilities, but in any event save for provisions, accruals and underlying uncertain liabilities relating to tax issues, customer rebates, warranty claims not transferred pursuant to Clause 6.1.14, goods or services received but not invoiced from third parties, the Transferred Litigation or Pending Oppositions and Nullity Actions, and allowances for doubtful accounts on receivables. Clauses 6.2, 6.3 and 6.4 shall apply mutatis mutandis. |

7. Transfer of Employees and Pension
Obligations

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| 7.1 | The Parties acknowledge and agree that the employment relationships with the employees listed in Schedule 7.1 shall be transferred from the Seller to the Purchaser with effect as of the Effective Date. Schedule 7.1 further contains information on job titles. |
| 7.2 | Legal procedure of the Transfer   |  |  | | --- | --- | | 7.2.1 | Situation  The Parties are performing a Carve-Out of the … Business from the Seller to the Purchaser effective as of the Effective Date. | | 7.2.2 | Legal Requirements  The legal procedure of the transfer is based on the statutory principle of sec. 3 of the Austrian Employment Contracts Adjustment Act (Arbeitsvertragsrechtsanpassungsgesetz – AVRAG). Sec 3 AVRAG constitutes the handling of the employee relationships as well as the rights and obligations of the Seller and the Purchaser caused by the transfer. | | 7.2.3 | Transfer of Employees  The Parties acknowledge and agree that the sale and purchase under this Agreement constitutes a transfer of business by operation of law within the meaning of sec. 3 AVRAG. The Parties therefore acknowledge that the employment relationships of the employees listed in Schedule 7.1 will transfer with all rights and obligations pursuant to sec. 3 AVRAG from the Seller to the Purchaser as at the Effective Date. | | 7.2.4 | Notification Obligation  The Seller has informed the works council established at the Seller duly and completely about the transfer pursuant to sec. 108 (2) of the Austrian Employee Participation Act (Arbeitsverfassungsgesetz – ArbVG) on (i) the respective transfer of business, (ii) the planned Effective Date of the transfer, (iii) the reason for the transfer, (iv) the legal, economic and social consequences of the transfer for the employees, and (v) the measures that are being considered with regard to the employees. | | 7.2.5 | Objections  Since the employees transfer with all rights and duties and no changes will occur as stipulated in sec. 3 (4) AVRAG, the Parties assume that no objection rights exist. However, The Parties shall immediately inform each other in writing of any objection by an employee. If such an objection is deemed to be legally grounded (to the best knowledge of the Parties, limited to employees which are works council members), both the Seller and the Purchaser shall inform the respective other Party of such objection. One month after the Effective Date of the transfer and based on the comprehensive lists of all objecting employees under sec. 7.2.5 para. 1 and promptly thereafter, the Seller provides an updated (final) version of Schedule 7.1 which then becomes an integral part of this Agreement. | |
| 7.3 | Handling of the benefits by the Parties  Since the employment relationships of the employees will transfer with all rights and obligations by law (pursuant to sec. 3 AVRAG) from the Seller to the Purchaser, this also relates to any employee benefits. |
| 7.4 | Pension Obligations  A description of the treatment of the applicable pension scheme(s) (including liabilities) is provided in the Transfer Concepts in Schedule 7.4.  The Parties shall immediately take all necessary actions and make all necessary declarations to ensure the transfer of pensions in compliance with the procedures and principles as described in Schedule 7.4.  The Parties acknowledge that there are no other pension schemes (including liabilities) to be transferred besides the Pension Scheme(s) provided in Schedule 7.4. |
| 7.5 | Liabilities   |  |  | | --- | --- | | 7.5.1 | The Seller is jointly and severally liable together with the Purchaser for duties pursuant to sec. 6 (1) AVRAG to the extent that they arose prior to the date of transfer and become due after the Effective Date, within the time limits provided by sec. 6 (2) AVRAG, where applicable. If such duties become due after the Effective Date, the Seller is only liable for the pro-rated amount as determined in sec. 6 (2) AVRAG, where applicable. However, all this applies only in relation to the transferred employees listed in Schedule 7.1 while the internal liabilities between the Parties shall be governed exclusively by the following provisions. | | 7.5.2 | Within the internal relationship of the Parties, the Seller remains only liable with respect to any wages (including any withholding payments) owed to the transferred employees listed in Schedule 7.1 that are outstanding up to the Effective Date as these obligations remain on the balance sheet of the Seller.  In case one Party fulfils or has to fulfil liabilities in relation to third parties under sec. 6 para. 1 AVRAG which were allocated to the other Party under sec. 7.5.2, the other Party shall fully indemnify the first Party. | |
| 7.6 | Tax and Social Security Contributions  The Seller assures that all taxes and social security contributions up to the Effective Date with respect to the transferred employees listed in Schedule 7.1 will be duly and thoroughly paid. |
| 7.7 | Personnel Files  The personnel files of the transferred employees listed in Schedule 7.1 shall be provided by the Seller to the Purchaser electronically or via hard-copy with due respect to the local laws and regulations and where reasonable due to the transfer of the employees. Thereafter, the Purchaser will provide the Seller with any information thereof which the Seller requires to fulfil its obligations under any statutory laws and regulations. |
| 7.8 | Definitions  Definitions that are being made in sec. 7 shall apply exclusively to this section. The definitions shall not bear any implications to other sections and/or provisions of this Agreement. |

8. Transfer of Litigation

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| 8.1 | Transferred Litigation  With economic effect as of the Effective Date, Seller hereby transfers to Purchaser, and Purchaser hereby accepts the transfer of, all of Sellers rights, benefits and obligations in connection with, and arising from, any court or administrative proceedings, litigation and arbitral proceedings, to which the Business is subject, including labor disputes and those listed in Schedule 8.1 Part 1 (collectively herein „Transferred Litigation”). |
| 8.2 | Replacement of Party   |  |  | | --- | --- | | 8.2.1 | The Parties shall make commercially reasonable efforts to achieve (i) a release of Seller from all rights and obligations under such Transferred Litigation and (ii) the assumption of such rights and obligations by Purchaser. In particular, as soon as possible after the Effective Date, the Parties shall use their respective commercially reasonable efforts to effect the replacement of Seller by Purchaser as party in each Transferred Litigation in accordance with applicable law (herein „Replacement of Party”) | | 8.2.2 | For the period from the Effective Date until the date at which the Replacement of Party has taken effect, Clauses 3.2.2 and 3.2.3 above shall apply accordingly for each Transferred Litigation, provided that, in the relevant Transferred Litigation, Seller shall:   |  |  | | --- | --- | | (i) | continue to participate in the Transferred Litigation in its own name; | | (ii) | within a reasonable period of time, give notice to the Purchaser of any developments in relation to the Transferred Litigation and shall consult with the Purchaser with respect to the Transferred Litigation and keep the Purchaser reasonably informed of all developments in relation thereto; | | (iii) | take any action and institute any proceedings, and give any information and assistance, as the Purchaser may reasonably request to:  (a) dispute, resist, appeal, compromise, defend, remedy or mitigate the matter; or  (b) enforce against a person the rights of the Seller in relation to the matter; | | (iv) | if the Purchaser requests, allow the Purchaser the exclusive conduct of the proceedings (including any compromise, settle or abandonment of action); | | (v) | not admit liability in respect of, or compromise or settle, the matter without prior approval of the Purchaser; and | | (vi) | forward to Purchaser any and all benefits received due to the relevant Transferred Litigation, |   but all internal and external costs resulting from such Transferred Litigation including reasonable external attorney’s fees shall be borne by Purchaser. | |
| 8.3 | Oppositions and Nullity Actions  As of the Effective Date, (i) Seller has submitted oppositions or nullity actions against third-party owned Intellectual Property Rights which are or could exclusively or predominantly be applied in the Business and which are still pending as listed in Schedule 8.1 Part 2, and (ii) third parties have submitted oppositions or nullity actions which are still pending against Transferred Intellectual Property Rights as listed in Schedule 8.1 Part 3 (jointly the „Pending Oppositions and Nullity Actions“). With respect to the Pending Oppositions and Nullity Actions Clauses 8.1 and 8.2 shall apply mutatis mutandis. |

9. Exclusion of liability pursuant
to Section 38 Act on Enterprises (Österreichisches
Unternehmensgesetzbuch – öUGB)

Seller and Purchaser herewith agree

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| 9.1 | that all legal relationships to the extent exclusively or predominantly relating to the Business (referred to herein as „Legal Relationships”) shall be transferred to Purchaser under Section 38 of the Act on Enterprises and that Seller shall indemnify and hold Purchaser harmless from any claim having its cause before, and that Purchaser shall indemnify and hold Seller harmless from any claims having its cause after, the Effective Date; |
| 9.2 | that, by way of derogation from Section 38 para 1 of the Act on Enterprises, the legal relationships exclusively or predominantly used in the X Business shall not be transferred to Purchaser and Purchaser shall not be liable for such relationships and Seller shall indemnify and hold Purchaser harmless from and against any claims under such relationships; |
| 9.3 | that the Legal Relationships shall be transferred to Purchaser but, by way of derogation from Section 38 para 1 of the Act on Enterprises, Purchaser shall have no liability for claims already existing as of the Effective Date (referred to herein as „Existing Liabilities“ – Altverbindlichkeiten); |
| 9.4 | that both Purchaser and Seller shall inform by means of a joint written communication forthwith after Signing all natural and legal persons about the transfer under Section 38 of the Act on Enterprises; |
| 9.5 | that in the case of an objection to the transfer of any legal relationship there shall be no claim whatsoever between Seller and Purchaser, in particular any right of rescission of the contract and any purchase price reduction shall be waived. |

10. Permits

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| --- | --- |
| 10.1 | Required Permits  Schedule 10.1 contains a non-exhaustive list of permits, licenses, consents, approvals, certificates, qualifications, specifications, registrations or other authorizations or filings of a notification, reports or assessments as required or requested by any governmental authority with respect to the conduct of the Business prior to the Effective Date (collectively referred to as the „Required Permits”). |
| 10.2 | Transfer of Permits  Seller hereby transfers to Purchaser, and Purchaser accepts the transfer of, all legally transferable Required Permits held by Seller and necessary for the Business as of the Effective Date (the „Transferred Permits”). With respect to Required Permits not being Transferred Permits and save for any services or support provided under any applicable Local Services Agreement(s), Purchaser shall without undue delay seek to obtain on its own behalf and account, and Seller shall use commercially reasonable efforts to assist Purchaser in obtaining, all Required Permits. |

11. Wrong Pocket Assets

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 11.1 | Purchaser Wrong Pocket Assets and Liabilities   |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | 11.1.1 | If, at or after the Transfer Date, any Transferred Asset (but not any Excluded Assets) has not been transferred to, or is not legally and beneficially owned by or vested in Purchaser (a „Purchaser Wrong Pocket Asset“) or any Assumed Liability (but not any Excluded Liabilities) has not been fully assumed by Purchaser (a „Purchaser Wrong Pocket Liability”):   |  |  | | --- | --- | | (i) | Seller shall transfer, or procure the transfer of, such Purchaser Wrong Pocket Asset, together with any benefit or sum paid or accruing since the Effective Date as a result of holding such Purchaser Wrong Pocket Asset, as soon as reasonably practicable, to Purchaser or any other transferee nominated by it for no consideration; | | (ii) | Purchaser shall, or shall procure that any other transferee nominated by it will, assume such Purchaser Wrong Pocket Liability, together with any losses accruing to Seller as a result of holding such Purchaser Wrong Pocket Liability since the Effective Date, as soon as reasonably practicable for no additional consideration or compensation; | | (iii) | Seller shall as soon as practicable (at Sellers expense) execute or do all such documents and things as may be necessary to validly effect the transfer or assumption and to vest the relevant Purchaser Wrong Pocket Asset or Purchaser Wrong Pocket Liability in or by the Purchaser or any other transferee (nominated by Purchaser); and | | (iv) | Purchaser shall (at the sole expense of Seller) provide such assistance to Seller, as the case may be, reasonably required for the purposes of effecting the transfer or assumption of the Purchaser Wrong Pocket Asset or assumption of the Purchaser Wrong Pocket Liability in accordance with this Clause 11.1.1 including making or procuring to be made any payment as may be necessary to ensure the transfer or assumption is lawful. | | | 11.1.2 | This provision shall remain in full force and effect for a period of twelve (12) months following the Effective Date. | |
| 11.2 | Seller Wrong Pocket Assets and Liabilities   |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | 11.2.1 | If, at or after the Transfer Date, any Excluded Asset is owned by or vested in the Purchaser (a „Seller Wrong Pocket Asset”) or any Excluded Liability has been assumed by the Purchaser (a „Seller Wrong Pocket Liability”):   |  |  | | --- | --- | | (i) | Purchaser shall transfer, or procure the transfer of, such Seller Wrong Pocket Asset, together with any benefit or sum paid or accruing as a result of holding such Seller Wrong Pocket Asset, as soon as reasonably practicable, to Seller or any other transferee nominated by it for no consideration. | | (ii) | Seller shall, or shall procure that any other transferee nominated by it will, assume such Seller Wrong Pocket Liability, together with any losses accruing to the Purchaser as a result of holding such Seller Wrong Pocket Liability, as soon as reasonably practicable for no consideration or compensation; | | (iii) | Purchaser shall as soon as practicable (at Sellers expense) execute or do all such documents and things as may be necessary to validly effect the transfer or assumption and to vest the relevant Seller Wrong Pocket Asset or Seller Wrong Pocket Liability in or by the Seller or any other transferee (nominated by Seller); and | | (iv) | Seller, shall (at Sellers expense) provide such assistance to Purchaser as is reasonably required for the purposes of effecting the transfer of the Seller Wrong Pocket Asset or assumption of the Seller Wrong Pocket Liability in accordance with this Clause 11.2.1, including making or procuring to be made any payment as may be necessary to ensure the transfer or assumption is lawful. | | | 11.2.2 | This provision shall remain in full force and effect for a period of twelve (12) months following the Effective Date. | |
| 11.3 | Wrong Pocket Payments  If, at or after the Transfer Date, a Party receives payments (the „Receiving Party”) which are attributed to the respective other Party pursuant to the terms of this Agreement (the „Wrong Pocket Payments”):   |  |  | | --- | --- | | 11.3.1 | For the period ending twelve (12) months following the Effective Date (the „Forwarding Period”), the Receiving Party shall forward to the other Party any Wrong Pocket Payments in the respective currency received from a third party after the Effective Date which are attributed to the respective other Party pursuant to the terms of this Agreement. The payments are to be forwarded at least once a month by wire transfer into the bank accounts denominated by the respective Party. It is understood that Seller and Purchaser shall pay and receive any payments made by or to them under this Clause 11.3.1 for themselves with discharging effect. If a Party is obliged under relevant law to repay payments received from a third party and which have been forwarded to the other Party, the other Party shall promptly, following its receipt of the written demand of the repaying Party, reimburse in full to the repaying Party such repayments and directly related interest, reasonable costs and reasonable expenses. | | 11.3.2 | After the Forwarding Period, each Party will re-transfer payments received from a third party to such third party with an explanation that the relevant payment has been credited to the wrong recipient account. | |

12. Transfer Date

Notwithstanding the Effective Date, any legal title and/or
position in whatsoever form shall only transfer in rem under this
agreement at the date of this Agreement but in any event not
earlier than on the Effective Date (the „Transfer Date”).

13. Consideration, Payment

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| --- | --- | --- | --- | --- | --- |
| 13.1 | Consideration   |  |  | | --- | --- | | 13.1.1 | The preliminary consideration for the sale and transfer of the Business shall be EUR … (in words: … Euro) (the „Consideration”). | | 13.1.2 | The consideration is subject to an adjustment in accordance with the below:  Within a period of 45 (forty-five) days from the Effective Date, Purchaser shall determine the value according to IFRS as applied by the X Group of the net assets actually transferred under this Agreement. If the value of the net assets actually transferred is higher or lower than the value of the net assets on the basis of which the preliminary consideration pursuant to Clause 13.1.1 was calculated, the preliminary consideration pursuant to Clause 13.1.1 shall be adjusted by an amount being equal to such delta. The preliminary consideration pursuant to Clause 13.1.1 was derived from a valuation according to general valuation principles and local requirements and determined on the basis of a net asset value of the assets to be transferred in the amount of EUR … (in words: … Euro).  Purchaser shall notify Seller within five (5) days after the determination pursuant to Clause 13.1.2 (i) of the value of the net assets which have been actually transferred but in any event no later than 50 (fifty) days after the Effective Date about (i) the value of the net assets which have been actually transferred and (ii) the adjustment amount of the preliminary consideration pursuant to Clause 13.1.1. If Seller objects to the value of the net assets or the adjustment amount of the preliminary consideration as notified pursuant to sentence 1 of this Clause 13.1.2 (ii) within a period of five (5) days as from delivery of the notification pursuant to sentence 1 of this Clause 13.1.2 (ii), the preliminary consideration pursuant to Clause 13.1.1 shall be adjusted in accordance with a settlement agreed between the Parties. If they do not reach an agreement on a settlement within a period of 10 (ten) days as from the date on which Sellers objection pursuant to sentence 2 of this Clause 13.1.2 (ii) has been delivered to Purchaser, the preliminary consideration pursuant to Clause 13.1.1 shall become the final consideration under this Agreement.  The adjustment amount according to this Clause 13.1.2 shall become final and binding at the earlier of (i) the lapse of the objection period pursuant to sentence 2 of Clause 13.1.2 (ii) if no notification of objection is delivered by Seller to Purchaser by that date pursuant to said Clause or (ii) the date on which the Parties agree on an adjustment amount pursuant to sentence 3 of Clause 13.1.2 (ii). | |
| 13.2 | Payment   |  |  | | --- | --- | | 13.2.1 | The Consideration shall be due and payable by Purchaser on the Transfer Date, but in any event not earlier than on … | | 13.2.2 | Any adjustment of the preliminary consideration in accordance with Clause 13.1.2 shall be due and payable by Seller or Purchaser, as the case may be, on the date on which the adjustment amount becomes final and binding pursuant to Clause 13.1.2 (iii), but in any event not earlier than on … | |

14. Representations and
Warranties

To the extent legally permissible, the Parties acknowledge and
agree that no representation and warranties are given in this
Agreement by the Seller in relation to the Business or any parts of
it and that all remedies that would otherwise be available to
Purchaser under applicable law or otherwise are hereby excluded and
waived.

15. Local Service Agreement(s)

The Parties intend to enter into (a) separate local service
agreement(s) under the framework agreement between X GROUP and Y
GmbH (the/a „Local Services Agreement(s)”) with
effect as of the Effective Date to cover the provision by a Party
of certain transitional and/or long term services required by the
other Party to continue the operation of its business after the
Effective Date as conducted on the Effective Date.

16. Miscellaneous

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| --- | --- |
| 16.1 | Confidential Information, Announcements  Each Party shall keep confidential, and not disclose to any third party, the contents of this Agreement and any confidential information regarding the other Party disclosed in connection with this Agreement or its implementation, except as expressly agreed upon in writing by the other Party. |
| 16.2 | The confidentiality obligation as per Clause 16.1 above shall not apply (i) to information which the respective Party can demonstrate (a) is available to the public through no breach of this Agreement, (b) was in its possession prior to any confidentiality obligation, (c) is independently developed by the respective Party without using confidential information, or (d) is imposed to be disclosed by law or the rules of any governmental organization provided that in such event the Party which is obliged to disclose shall use its reasonable efforts to consult with the other Party in advance as to its form, content and timing and (ii) vis-à-vis a third party in connection with a partial or complete sale of the Business in whatsoever form (e.g. asset deal, share deal) provided that such third party is subject to a non-disclosure agreement customary for such kind of transactions. |
| 16.3 | VAT, Transfer Taxes, Costs and Expenses   |  |  | | --- | --- | | 16.3.1 | All sums payable by one Party to another Party under or pursuant to this Agreement are exclusive of any applicable VAT. Subject to Clause 16.3.2 below, if any VAT is or becomes mandatorily chargeable on any transaction between the Parties under or pursuant to this Agreement, the recipient shall, subject to the receipt of a valid VAT invoice, pay to the supplier (in addition to any other consideration under or in connection with this Agreement) an amount equal to such VAT, except the reverse charge mechanism applies. | | 16.3.2 | For VAT purposes, the Parties agree the following: Seller and Purchaser intend and will use all reasonable endeavors to ensure that the sale of the Business under this Agreement is treated as a transfer of a going concern under Directive 2006/112/EC and/or the corresponding provisions in the applicable VAT law in the relevant jurisdictions, and will not be treated as a supply of goods nor a supply of services for VAT purposes. | | 16.3.3 | Any transfer taxes, stamp duties and comparable taxes caused by the transfer of the Business or in connection with any of the transactions contemplated by this Agreement shall be borne by the Seller unless only either Seller or Purchaser owe such transfer taxes, stamp duties and comparable taxes, in which case they shall be borne by the relevant debtor. To the extent legally permissible, the Parties shall cooperate to mitigate any such transfer taxes, stamp duties and comparable taxes arising out of, or in connection with, any of the transactions contemplated by this Agreement. | | 16.3.4 | Except as explicitly provided otherwise in this Agreement, Seller shall pay the costs and expenses that may arise in connection with the execution of this Agreement and each document referred to in, or relating to the transactions contemplated by, this Agreement, such as notarization fees, court fees, administration fees or stamp duties. Apart from those costs which are to be borne by Seller as specified by this Clause 16.3.4, each Party shall bear its own costs and taxes and the costs of its advisors connected with, or resulting from, the execution and consummation of this Agreement. | |
| 16.4 | Governing Law  This Agreement (including the arbitration agreement contained in it) and any non-contractual obligations arising out of or in connection with it shall be subject to the laws of Austria excluding any conflict-of-laws rules. The United Nations Convention on Contracts for the International Sale of Goods (CISG) of 11 April 1980 shall not be applicable. |
| 16.5 | Dispute Resolution   |  |  | | --- | --- | | 16.5.1 | If a dispute arises in connection with this Agreement, the responsible representatives of the Parties shall attempt, in fair dealing and good faith, to settle such dispute. Upon request of a Party, a senior management representative of each Party shall participate in the negotiations. Each Party shall be entitled to terminate these negotiations by written notification to the other Party at any time. | | 16.5.2 | To the extent not settled between the Parties pursuant to Clause 16.5.1, any dispute, controversy or claim arising from or in connection with this Agreement including, without limitation, any question regarding its existence, validity, performance, breach, interpretation or termination shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the „ICC”) (the „Rules”). The International Bar Association Rules on the taking of evidence in international arbitrations shall not apply but the rules of §§ 577 ff ZPO (Code of Civil Procedure) shall apply. | | 16.5.3 | The number of arbitrators shall be three (3). The arbitrators shall be appointed in accordance with the Rules. | | 16.5.4 | The seat, or legal place, of arbitration shall be Vienna, Austria. The language of the arbitral proceedings shall be German, provided however, that the Parties shall be entitled to submit written evidence in other languages (in which case a German translation shall be provided by the Party submitting such written evidence). | | 16.5.5 | The Parties shall keep confidential all ICC proceedings (including information received from any other Party during the course of preparation for such proceedings), any decision rendered at any ICC proceeding and any preceding, antecedent and subsequent discussions and correspondence unless the disclosure is required by applicable law or the information is to any tax authorities to the extent such disclosure is reasonably required for the purposes of the tax affairs of any of the Parties. | |
| 16.6 | Notices   |  |  | | --- | --- | | 16.6.1 | A notice or other communication under, or in connection with, this Agreement (herein „Notice”) shall be (i) in writing, (ii) in the German language or with a German language translation, (iii) delivered personally, by courier, sent by registered mail or by fax. | | 16.6.2 | A Notice to Seller shall be sent to such Party at the following address, or such other person or address as Seller may notify the Purchaser from time to time: … | | 16.6.3 | A Notice to Purchaser shall be sent to such Party at the following address, or such other person or address as Purchaser may notify the Seller from time to time: … | |
| 16.7 | Entire Agreement, Amendments. Conflict  This Agreement comprises the entire agreement between the Parties concerning the subject matter hereof and supersedes and replaces all oral and written declarations of intention made by the Parties in connection with the contractual negotiations. Changes and amendments to this Agreement shall be valid only if made in writing and signed by or on behalf of each of the Parties. This shall also apply to any change of this Clause 16.7. |
| 16.8 | Interpretation  In this Agreement, the headings are inserted for convenience only and shall not affect the interpretation of this Agreement. The terms „including“, „include“ and „in particular“ shall always mean „including, without limitation”, „include, without limitation“ and „in particular, without limitation“, respectively. Words such as „hereof, „herein” or „hereunder” refer, unless otherwise required by the context, to this Agreement as a whole and not to a specific provision of this Agreement. |
| 16.9 | References  In this Agreement, a reference to a statutory provision (except where stated otherwise) includes a reference to the statutory provision as applicable as at the date of this Agreement. |
| 16.10 | Partial Invalidity  Should any part or provision of this Agreement be held to be invalid or unenforceable by any competent arbitral tribunal, court, governmental or administrative authority having jurisdiction or should an unintended gap in this Agreement become evident, the other provisions of this Agreement shall nonetheless remain valid. In such case, the Parties hereto agree to recognize and give effect to such valid and enforceable provision or provisions, which correspond as closely as possible with the commercial intent of the Parties. |

Place …, date …