Paragraph 1 b of the Decision of the Sanctions Commission was annulled, Paragraph 2 and 3 of the Decision of the Sanctions Commission were modified by a decision of the Arbitration Court of SIX Swiss Exchange, dated 22 March 2016

SANKTIONSKOMMISSION   COMMISSION DES SANCTIONS

Decision of the Sanctions Commission of 16th March 2015 re X AG

SaKo 2014 AHP-I/14

Decision

1. X AG has breached its obligations pursuant to art. 54 para. 2 LR in connection with art. 17 para. 2 DAH:
    a. by not reacting to a leak regarding the impending strategy decision with publication of an ad hoc notice at the latest on Monday, 29 October 2012, 7.30 a.m. CET; and
    b. by not reacting to a leak regarding impending fines in LIBOR-related investigations with publication of an ad hoc notice at the latest on Monday, 17 December 2012, 7.30 a.m. CET.
2. A fine of CHF 3 million is imposed on X AG.
3. X AG shall pay the costs of the sanction procedure of CHF (…).
4. This decision having acquired legal force shall be published by SIX Exchange Regulation.
5. X AG may file an appeal with the Court of Arbitration within 20 trading days (…).

Reasons for the decision

A. Notes to the procedure

1. On [date], SIX Exchange Regulation (SER) informed X AG of the opening of a preliminary investigation on the grounds of possible violations of ad hoc publicity rules in connection with the two press releases of X AG dated 30 October 2012 entitled “X AG announces strategic acceleration from a position of strength” and entitled “X AG’s third-quarter 2012 results” referring to the X AG third-quarter 2012 report (“Strategy Change”)
2. With letter dated [date] SER asked X AG follow-up questions with regard to the press releases of 30 October 2012. Furthermore, X AG was informed about the extension of the preliminary investigation to the press release of [date] regarding the settlement of LIBOR-related matters (“LIBOR Settlement”).
3. The preliminary investigation proceeded with follow-up questions to both items between May and July 2013. On [date], SER informed X AG that following the preliminary investigation it was opening an investigation according to section 3.3 para. 2 of the Rules of Procedure (RP). The corresponding media release was published on [date].
4. On [date], SER sent to X AG a proposal for sanction and invited X AG to submit a statement. This statement was sent by X AG to SER on [date]. On [date], SER submitted to the Sanctions Commission the proposal for sanctioning dated [date], the

statement of X AG of [date] and comments to this statement of X AG. On [date] and responding to an invitation by the Sanctions Commission, X AG submitted its comments to SER's comments of [date].

5. As the facts were not disputed, there is no need for further exchanges of statements. A difference of views between SER and X AG exists concerning a conversation note on a telephone call of Monday, 29 October 2012, between a representative of SER and the X AG's contact person in ad hoc publicity affairs. The exact content of this conversation is not decisive for the present decision as it occurred after the period where X AG should have reacted to the leak, as the following considerations will show.

B. The breach of rules governing ad hoc publicity

a) Strategy Change

6. In its weekend issue of 27 / 28 October 2012, the [newspaper S] published an article on its front page entitled "X AG eyes 10,000 job cuts in revamp". The article contained, among others, the following information:
   - X AG will announce a split of its Investment Bank next Tuesday (30 October 2012).
   - X AG will bring large parts of the fixed income trading business into a non-core unit, leaving a reduced Investment Bank supplying equities trading, foreign exchange and advisory services.
   - The non-core unit will be headed by A (the co-head of the Investment Bank at the time) and will be wound down over time. B (the other co-head of the Investment Bank at the time) will head the remaining Investment Bank.
   - The move will result in a loss of up to 10,000 jobs which amounts to almost one-sixth of X AG' workforce of 63,500 employees (number of employees as of the end of June …). The job cuts will come on top of a continuing program announced in (year) to cut 3,500 jobs. The job cuts will not happen at once and the precise number is still unclear.
   - This strategy was hammered out in several executive board meetings in New York in the past week and is set to be announced next Tuesday (30 October 2012).
   - The split of the Investment Bank will lead to another reduction in risk-weighted assets of up to EUR 100 billion.

   The article quoted "two people close to the situation" and "one person familiar with the plan" as its sources.

7. A preview of the article was published in the evening of Friday, 26 October 2012, on [information system]. Various Swiss media followed up with reports on the apparently imminent changes in the Investment Bank and the resulting job cuts: [information system] on 26 and 27 October, [newspaper T] on 29 October, [newspaper R] on 27 October, [newspaper Q] of 27 October.

   On Monday, 29 October 2012, the shares of X AG opened at CHF 12.60 (+3 % compared to the closing price on Friday, 26 October 2012), continued to rise on exceptionally high volume during the course of trading and closed at CHF […], which amounts to an increase of 7.2 % compared to Friday's closing price.

8. It was only on Tuesday, 30 October 2012, that X AG, following an internal scheduled publication date, published an ad hoc notice entitled "X AG announces strategic acceleration from a position of strength" and another one entitled "X AG's third-quarter 2012 results" referring to the X AG third-quarter 2012 report.

9. In its release on strategy, X AG announced, amongst other things, the following:
   - Its Investment Bank will be reshaped significantly.

- X AG will concentrate on its traditional strengths in advisory, research, equities, Foreign Exchange (FX) and precious metals and exit certain business lines, predominantly those in fixed income.
- With immediate effect, A will lead the Investment Bank. B steps down from the Group Executive Board and will lead the management of the exited Investment Bank businesses and positions which will be transferred to, and reported in, X AG's Corporate Center.
- X AG will reduce costs significantly while driving further efficiencies across the group more rapidly. By (year), X AG is likely to have a headcount of around 54,000 (corresponding to a reduction of roughly 10'000 jobs compared to the headcount of 64'000 as of 30 October …).
- Basel 3 risk-weighted assets (RWA) in the Investment Bank of about CHF 300 billion at the time of the press release were targeted to be reduced by about CHF 145 billion, or almost 50 % until (year).

10. In its Third-Quarter 2012 Report, X AG posted a loss attributable to its shareholders of around CHF 2,100 million (around CHF 2,500 million pre-tax loss), compared with a profit of more than CHF 400 million (more than CHF 950 million pre-tax) in the previous quarter. The loss mainly reflected impairment charges of around CHF 3,000 million on goodwill and other non-financial assets in the Investment Bank as well as an own credit loss of around CHF 870 million compared to a gain of around CHF 230 million in the previous quarter. The impairment losses of over CHF 3 billion were a direct result of the strategy change regarding the Investment Bank which was published in the Strategy Release.

11. It is obvious that the information published by [newspaper S] and others between Friday, 26 October, and Monday, 29 October were not only rumors but corresponded to what X AG published itself on 30 October. And it has to be noted that X AG did not dispute that there was a leak. At its meeting of 29 October 2012, the Board of Directors of X AG (BoD) was informed that the project was kept very confidential until two weeks before, but as more people became involved, leaks started to originate.

12. In the investigation procedure, X AG took the position that in the case of the strategy decision there was no disclosable fact in the sense of the LR, as its BoD did not decide on the internally proposed strategic changes before the evening of 29 October 2012. But there is no doubt, and it was not disputed by X AG, that the decision on the strategy change is one that is (potentially) price sensitive once it is published. Indeed, it was stated at the meeting of the Audit Committee of 5 October 2012 that an ad hoc announcement can (only) be postponed as long as X AG is able to maintain its confidentiality.

    In order to be complete, reference is made to N 51 of the Commentary on DAH stating that the potential, i.e. the possibility of a significant change in the price, is sufficient (ex ante view). There is no need for an actual change in the price (rise or fall). An effective change is a fact of circumstantial evidence (see also below).

13. In the interpretation of X AG, a disclosable fact in the sense of the Directive on Ad hoc Publicity (DAH) arises only at the time when the issuer's governing and competent body has adopted a plan or has taken a decision. Before that time, while a proposal for the plan or decision is being developed within the issuer, the issuer may have an "idea" or "intention" but it has not yet formed a "plan or decision". In the absence of such a fact, X AG (until the 29 October 2012) had no obligation to immediately react to press reports potentially originating from a leak.

    For the following reasons, this position is not in accordance with the Listing Rules (LR) and the Directive on Ad hoc Publicity (DAH).

14. Art. 53 para 1 of the LR prescribes that an issuer must inform the market of any price-sensitive facts that have arisen in its sphere of activity by publishing an ad hoc notice. According to art. 3 of the DAH the disclosure requirement of art. 53 LR applies only to

qualified events. In order to be deemed relevant, an event must be significantly price-sensitive and hence capable of affecting the average market participant in its investment decision. With regard to timing, art. 53 para. 2 LR states on the one hand that the issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact. On the other hand, art. 54 LR provides a postponement of the disclosure of a price-sensitive fact, if (i) the fact is based on a plan or decision from the issuer and (ii) its dissemination might prejudice the legitimate interests of the issuer. In this case, the issuer must ensure that the price-relevant fact remains confidential for the entire time that disclosure is postponed. In the event of a leak, the market must be informed immediately, in accordance with the rules on disclosing price-sensitive information.

15. Art. 17 al. 2 DAH states: If a leak occurs, the fact must be disclosed immediately, even if publication was scheduled for later. The Commentary on the DAH explains that, if during the postponement of disclosure, reports appear in the media on facts that largely match the information that is the subject of the postponed disclosure, it must mostly be assumed that this is the result of a leak. This is valid in particular if details are reported that match with until then secret information. Then such is no longer a mere rumor. An ad hoc notice must therefore be published immediately (N 209).

16. The issuer's obligation to react to a leak with an ad hoc notice applies irrespective of a possible negative impact that such ad hoc notice may have on the issuer. The applicable rules do not provide for a weighing of interests once a leak has occurred.

17. In the present case, the question to be answered is not at what time between July 2012 and the evening of 29 October 2012 (the meeting of BoD) the "idea" or "intention" of X AG turned into a "plan or decision" that has to be disclosed. The relevant question is whether the various reports in the [newspaper S] and others between the 26 and 29 October 2012 consisted of details that matched with the final proposal for the strategy change that was discussed at the BoD's meeting of 25 October 2012 and finally decided in the evening of 29 October 2012.

    In summary, the chronological order of the decision making procedure at X AG was as follows.

18. In a meeting of the BoD in July 2012, the board members were informed of the necessity of further steps for the strategy for the Investment Bank. At its meeting of 24 August 2012, the BoD was informed of the planning process and the next steps foreseen. In early September 2012, the Group Executive Board (GEB) discussed four scenarios for the future of the Investment Bank, namely
    - scenario (here called) no. 1: Continued operation of the Investment Bank without fundamental changes to its scope and size beyond the exits decided in November 2011;
    - scenario (here called) no. 2: Significant further downsizing of the Investment Bank by exiting various parts of its operations relating to fixed income, currencies and commodities, although other significant parts thereof would be maintained;
    - scenario (here called) no. 3: This scenario went further in the direction of the 'Fine-tuned IB'-scenario, calling for a complete exit from the fixed income, currencies and commodities operations with few exceptions;
    - scenario (here called) no 4: Exiting the Investment Bank altogether.

    In the further course of September 2012, X AG's management worked on the four scenarios to present them to the BoD for a first reading at its meeting of 27 September 2012.

19. On 27 September 2012, the BoD reviewed the future strategy of the Investment Bank. According to the minutes, C noted an emerging consensus among the BoD and the GEB members on scenario 3. It was noted that the GEB would now drill down on the financial impact of this model with the goal of presenting a clear recommendation to the BoD at the October meeting. C noted that he envisaged the following timeline: The ad-

hoc Strategy Committee would reconvene in mid-October 2012 with the formal proposal by management being submitted for the BoD meeting on 25 October 2012. The final decision by the BoD was scheduled for 29 October 2012, just before X AG's 3Q 2012 results presentation on 30 October 2012. Leading up to that date, developing a sound communication plan will be extremely important.

20. At the meeting of the BoD's ad-hoc Strategy Committee on 17 October 2012, D noted that following the discussion at the last BoD, management has further refined the scenarios discussed, focusing on scenario 3 while discarding scenarios 2 and 4. According to the minutes, all the Committee's members expressed their satisfaction with the recommended scenario and it was noted that it was necessary to tackle a number of important tasks already ahead of a possible October 30 announcement including communication, HR, Risk and operating issues.

21. On 25 October 2012, the BoD convened and was updated on the third quarter 2012 financial results and the final version for the strategy discussion (which included scenario 3). The scenario was explained in detail, including future financial targets resulting from it. According to the minutes, the risk weighted assets (RWA) will be reduced with the Investment Bank and Legacy Businesses exiting RWAs of CHF 120 billion and around 10,000 redundancies will be made over the course of the next three years. The BoD was informed on what had to be done, and by whom, including communication, HR, risk and operating issues. The minutes noted that around 10,000 redundancies over the course of the next three years will be made. According to the minutes, no other scenario was discussed.

22. During the day on 29 October 2012, the materials for the BoD meeting were made available to its members. The two presentations that constituted the key documentation for the BoD meeting were slightly updated versions of the presentations of the aforementioned meeting of 25 October 2012.

23. In the evening of 29 October 2012, the Audit Committee held a 30 minutes telephone conference call meeting which was followed by a BoD meeting by conference call which lasted from 5:30 p.m. to 6:30 p.m. and approved the Three Year Strategic Plan and the Operating Plan 2013 (which included scenario 3). The BoD also approved the Q3 2012 Report and approved A as CEO of the Investment Bank and the stepping down of B from the GEB and his appointment as [ ] Management, effective 1 November 2012.

24. When the information originating from a leak was published in media on Friday, 27 October 2012, it was no longer a simple "idea" or an "intention". What was published by [newspaper S] (and subsequently others) had indeed been carefully prepared and discussed within the various competent bodies of X' internal organisation. Even if it is true that in a formal way, the BoD, as the only body of X AG to take such decisions, did not take the final decision on 25 October 2012, it is also true that the information based on the leak reflects what has been prepared and finally presented to the BoD on 25 October 2012, and these were by far more than mere ideas or intentions.

25. X AG argued that no information was possible before 30 October 2012 as one "crucial" input was only available on Monday 29 October, namely the views of the key regulators. Several senior highest ranking officers had spent a considerable part of the two last working days before the BoD's meeting of 29 October speaking to regulators to obtain their views. This is not disputed but is not an argument against publishing an ad hoc notice after the leaks occurred. It shows on the contrary that it was planned that the BoD on 29 October would decide based on informal information only of the regulators positions (which is – for those familiar with such procedures - the normal way) and that X AG followed its line of action for the 30 October as the planned publication day. This is confirmed by X AG' statement that the authorities were informed that their reactions would be "final" for the decision of the BoD that was scheduled for the evening of 29 October.

26. There is no doubt that X AG was allowed to postpone any publication of its planned new strategy during summer and Autumn 2012, but only as long as it remains fully confidential. The reports in the media of 27ff October 2012 largely matched the planned new strategy at this date and the reported details matched with the information that until then was secret for the public. (In every case of a leak, there is an unequal distribution of information between the general public and those persons who have the leaked information, notwithstanding the number of persons. An ad hoc notice is aimed to remedy this unequal situation.)

27. As described in N 209 of the Commentary DAH, X AG was obligated to react immediately by publishing a clarifying ad hoc notice (with a caveat if X AG would really have deemed it necessary). It has to be remembered that the release of an ad hoc notice after a leak does not require a previous meeting of the BoD. The latest day in the present case for this notice was Monday, 29 October 2012, 7.30 a.m. CET. As the accurate media reports appeared on Friday, 26 October 2012, the weekend offered enough time to prepare the ad hoc note before Monday morning. As it did not do so, X AG committed a breach of the art. 54 para. 2 LR.

<u>b) LIBOR Settlement</u>

28. On 15 November 2012, the [newspaper W] published an article stating that after Y's settlement of rate-rigging allegations with U.S. and U.K. regulators, several other Banks are negotiating similar settlements and mentioned that "Switzerland's X AG currently is positioned to be the next bank to reach a settlement."

29. On Wednesday, 12 December 2012, the [newspaper S] wrote under the title "X AG settlement nears": "X AG, meanwhile, is in advanced settlement negotiations with … (authorities)…The bank's eventual fine, which could come before Christmas, may top Barclay's settlement…"

30. On Thursday, 13 December 2012, the [newspaper P] reported that X AG was "in final negotiations with American, British and Swiss authorities to settle accusations that its employees reported false rates, a deal in which the bank's Japanese unit is expected to plead guilty to a criminal charge, according to people briefed on the matter (…)". According to the report, X AG "could face about $ 1 billion in fines and regulatory sanctions".

31. On Saturday, 15 December 2012, the [newspaper T] reported that X AG would have to pay LIBOR-related fines of nearly CHF 1.5 billion. On Sunday, 16 December 2012, [newspaper U] reported that X's Japan subsidiary was about to plead guilty. The same day, [newspaper V] published an article with the title "Presse/X AG/Höhe von Libor-Strafzahlung bis 1,5 Mrd CHF – Verurteilung möglich". On Monday, 17 December 2012, the [newspaper S] reported that "X AG is close to finalizing a deal with UK, US and Swiss authorities in which the bank will pay close to $ 1.5 billion and its Japanese security subsidiary will plead guilty to a US criminal offence". At a CHF/USD exchange rate of 0.92 as at 17 December 2012, USD 1.5 billion was approximately equal to CHF 1.4 billion.

32. In the morning of Monday, 17 December 2012, SER contacted the responsible person for ad hoc notices of X AG via email with regard to various media reports according to which X AG was facing a fine of up to USD 1.6 billion and asked whether these reports were related to facts or not and asked especially whether X AG considered these facts as potentially price-sensitive. SER expressly pointed to the disclosure obligations in art. 53 LR. In the afternoon, X AG confirmed by email that the settlement discussions with government agencies were still ongoing. Given its disclosure on the LIBOR matter in its most recent and previous quarterly reports, X AG answered that there was "currently no such new price-sensitive fact that requires disclosure because the settlement discussions with various government agencies are still ongoing". X AG announced that as these discussions could come to a conclusion soon, it was preparing to issue an ad hoc release and that the BoD approval of a potential settlement was

currently scheduled for the evening of Tuesday, 17 (*recte 19*) December 2012, subject to changes depending upon the course of the negotiations.

33. In the evening of Monday, 17 December 2012, SER confirmed by email reception of X AG's comments and reminded it that issuers must not always wait to publish an ad hoc notice until every detail of a matter is known, citing the relevant notes of the DAH Commentary. SER reminded X AG that disclosure of a potentially price-sensitive fact in financial statements does not generally substitute timely disclosure.

34. In the morning of 19 December 2012, X AG published an ad hoc notice announcing that its BoD had authorized settlements of LIBOR-related claims with US and UK authorities and that [authority E] would issue an order. X AG announced that it would pay approximately CHF 1.4 billion in fines and disgorgement to settle LIBOR-related investigations. The total amount consists of GBP 160 million in fines payable to the [authority F], USD 700 million in fines payable to the [authority C], USD 500 million in fines payable to the [authority D] and CHF 59 million in disgorgement of estimated profits to [authority E]. As part of the settlement with the [authority D], X AG Japan agreed to enter a plea to one count of wire fraud relating to the manipulation of certain benchmark interest rates, including Yen LIBOR. The BoD has authorized the Company to enter into a Non-Prosecution Agreement with the [authority D] relating to X AG and all its subsidiaries and affiliates, except for X AG Japan.

35. With respect to the general considerations on the occurrence of a price-sensitive fact reference is made to the explanations under the strategy decision section (see N 14 – 16 above); they apply likewise for the assessment of the LIBOR Settlement case.

36. X AG argued in this case that it had no obligation to react to the reports in the media because (i) the settlement terms did not constitute a new price-sensitive fact, (ii) the proposed settlement was subject to significant uncertainties and (iii) due to the necessity of maintaining confidentiality of negotiations and decision process.

37. X AG argued that as to art. 53 para.1 LR, a fact is only price-sensitive if it is capable of triggering a significant change in market prices and that art. 4 para.1 DAH specifies that a significant price change is a price that is considerably greater than the usual price fluctuation. It referred to a legal writing stating that such a considerably greater change may, as a general rule, be assumed if the share price moves by at least 5-10%, but clearly not in case of changes of less than 3% (Peter Böckli, Ad hoc-Publizität: Kursrelevanz als Kernkriterium der Bekanntgabepflicht, SZW 2014 2ff.) This opinion was indeed presented by the author in a public seminary on ad hoc publicity, organized by SER on 11 November 2013.

38. X AG argued that during the years 2011 and 2012, the average daily variance of its share price amounted to almost 3% of the closing price and since 13 December 2012 the share price never moved outside a range of +/- 3% from the closing price on 12 December 2012. According to X AG, a considerably greater price change would "certainly have to amount to at least 5%, if not more". Thus, the absence of any significant share price movements or anomalies in trading volumes around the time of the conclusion of X AG's settlements with authorities evidences that the settlement terms did not constitute a new price-sensitive fact.

39. The fact that the share price of X AG did not show any unusual movement in the time between 13 and 19 December 2012 and neither trading volumes were unusual is not an argument against the assumption that the resulting total of fines in the LIBOR-settlements was, or not potentially, price-sensitive. N 51 of the Commentary DAH states: The potential, i.e. the possibility of a significant change in the price, is sufficient (ex ante view), there is no need for an actual change in the price (rise or fall). The aforementioned legal interpretation is not reflected in the still valid Commentary DAH (N 90): There are no simple, technical criteria, such as the extent of a price fluctuation or transaction volumes, that can be used to assess how likely a fact is to have a substantial influence on the price. And N 92 explains that, if "the price does not change

after the publication of an ad hoc notice, this does not mean that the new facts were not potentially price-sensitive."

40. X AG argued that as part of its quarterly financial reporting, it had disclosed long before December 2012 that it was under investigation from authorities with whom it finally reached settlements. Indeed, X AG had disclosed before the LIBOR Settlement that investigations were ongoing and which government agencies were involved in these investigations. X AG had not provided information on the financial impact of these investigations respectively their settlement. In Note 17 of X's Q3 2012 Report (published on 30 October 2012) - the most recent financial report available in December 2012 – X AG reported provisions for litigation, regulatory and similar matters in the amount of around CHF 900 million as at 30 September 2012, roughly CHF 300 million more than was reported in the previous quarter. No specific indication on provisions relating to a LIBOR-related settlement was given. Inside X AG, the BoD on 29 October 2012 was given an amount of around CHF 180 million (see N 42).

41. X AG rose that there was a public expectation already in November 2012 that further settlements of banks with authorities would be forthcoming and X AG was known to be among them. Developments which are widely expected on the basis of facts already publicly known – because they correspond to the customary course of events – do not have the potential to trigger significant changes in market prices. Moreover, at no time before the evening of 18 December 2012 and even over the weekend of 15/16 December 2012 had the negotiations reached the stage where a settlement would have been probable for respective information to affect an average market participant's decisions. Thus in the view of X AG, it had no obligation to react on the media reports in question.

42. The position of X AG that "facts already publicly known because they correspond to the customary course of events" is not consistent with N 48 of the Commentary DAH: A fact does not qualify as public knowledge just because third parties such as certain media have reported on it. Thus, a fact reported in an article on a potentially price-sensitive fact affecting an issuer does not release the issuer from the obligation to publish an ad hoc notice on the subject. Investors attach more importance to original statements by the company than reports by third parties. The position of X AG that there was a "public expectation already in November 2012 that further settlements … would be forthcoming" and that "it is also a publicly-known fact that settlements … are normally only possible at the cost of substantial penalty payments" is thus not acceptable.

43. Even for an issuer of the financial capacity as X AG, fines of the extent of approximately CHF 1.4 billion are to be considered potentially price-sensitive. The LIBOR settlement impacted X AG's 2012 annual results significantly, especially with regard to the substantially larger amounts compared to the provisions for litigation, regulatory and similar matters that were published in X AG's Q3 2012 Report.

    If X AG's interpretation would be accepted, there would never be the obligation of an ad hoc disclosure on settlement of penalties independently of the amount when there is a public expectation that there would be a settlement. This is obviously not the sense of the disclosure obligation of issuers.

44. Concerning the alleged uncertainties, it is correct that the final formal approvals by the various authorities and the BoD were not decided by 17 December 2012. This would have mattered if the confidentiality would have continued to exist. The fact that media started to report between 13 and 16 December 2012 that X AG is close to finalize the settlements with authorities by paying close to $ 1.5 billion changed the situation. Despite the fact that formal approval had not been decided neither by the BoD nor by the authorities (to be noted that the BoD had to decide before the formal approval of the authorities), the question is whether X AG had to inform on what was really going on despite the fact that no formal decision was reached.

45. DAH Commentary explains in N 36 that development and decision-making processes within a company normally pass through several stages before they come to fruition. As a rule, issuers must not wait to publish an ad hoc notice until they know all the details of a fact. And N 35 explains that this "can, e.g., be the case where the potentially price-sensitive figures are already established and known by the top management, but the formal approval of the report by the responsible body will take place only later due to reasons of timing. In such a situation the decisive facts are already given and known to the company but one waits for the formal approval by the responsible persons."

46. Thus the question has to been answered if X AG on 17 December 2012 had the relevant figures – despite the formal approval - when the leak – where ever it came from – informed the public. The facts were as follows:

47. On 31 October 2012, the [authority F] informed X AG in a letter that its assessment of the appropriate penalty was GBP 200 million. The letter noted the discounts available for early settlement that would be 30% if settled before 28 November and 20% after, in December, corresponding therefore to GBP 160 million.

48. As according to the information given by X AG, the staff of the [authority C] informed X AG orally on 9 November 2012 that they would recommend a penalty to the Commission less than USD 1 billion. X AG stated that this penalty amount was heavily negotiated in the following weeks. On 28 November 2012, the [authority C] staff informed X AG orally that they would seek a USD 700 million fine. According to X AG, additional negotiations both on the amount of the fine and on the terms of the settlement followed over the next two weeks. Although the amount of the fine of USD 700 million remained unchanged, X AG stated that the [authority C] staff would not put the fine in any drafts of the settlement agreement, because it was not certain that the Commission would approve the settlement.

49. According to X AG, [authority D] staff orally informed the X AG on 7 December 2012 of the USD 500 million fine. X AG claims that there was no negotiation on this amount. Material aspects of the plea agreement were however still being negotiated into the evening of 18 December 2012.

50. According to X AG, [authority E] orally informed it on 12 December 2012 that the disgorgement amount was USD 60 million followed by [authority E]'s orally communicated information of 14 December 2012, that the disgorgement amount was CHF 59 million.

51. Added up, X AG until 12 December 2012 had knowledge that the settlement amounts proposed by the [authority C] (USD 700 million), the [authority D] (USD 500 million), the [authority F] (GBP 160 million) and [authority E] (CHF 59 million) amounted to approximately CHF 1.4 billion (calculated at an USD/CHF exchange rate of 0.93 and a GBP/CHF exchange rate of 1.5 as at 12 December 2012). By this day X AG had knowledge of the fines negotiated and proposed by the competent bodies, even if certain details of the settlements were still being negotiated and the final approvals from some Commissions and the BoD were still pending.

52. The position of X AG was that until the evening of 18 December 2012 the settlement remained highly uncertain because neither the decision-makers of the several authorities nor the BoD had not yet approved the terms. This argument against an ad hoc disclosure as reaction to the leak (see N 52 below) was then no longer tenable. The results of the settlement negotiations were by far no longer comparable to an idea or a plan only or what was taken into account in the last quarterly report. Furthermore, it is unreasonable to conclude that neither senior staffs of the authorities nor of X AG seriously prepare settlements that are not sufficiently probable for acceptance by their respective Commissions and the X AG BoD.

53. If no leak had occurred, there is no doubt that X AG could have postponed any information to the public. But several media reported between 13 and 16 December

2012 stating that X AG is close to finalizing a deal with UK, US and Swiss authorities in which the bank will pay close to $ 1.5 billion and its Japanese security subsidiary will plead guilty to a US criminal offence which corresponded to the aforementioned results of the prepared settlements. Furthermore, these media reports were in contrast to X AG's earlier assessment of possible fines resulting from the ongoing investigations that could be drawn from its previous financial reports, namely from the provisions and contingent liabilities sections of these reports.

54. The Commentary to DAH explains in N 209 that, if, during the postponement of disclosure, reports appear in the media that largely match the information that is the subject of the postponed disclosure, it must mostly be assumed that this is the result of a leak. An ad hoc notice must be published immediately, even if the company believes that there is no leak. In the case at hand, it was not disputed that it was a leak. An ad hoc notice must therefore be published immediately.

55. X AG argued that due to the necessity of maintaining confidentiality of negotiations and decision process it was not allowed to react due to an understanding and expectation of confidentiality for it and the authorities involved. Indeed there is no doubt that settlement negotiations have to be confidential. An outside counsel of X AG in the USA stated on 23 July 2013 on behalf of X AG that an early public disclosure of the terms of the agreements would have breached an implied mutual understanding of confidentiality or a legal obligation and would have undermined X AG's position. X AG did not argue that there was a legal obligation of confidentiality towards foreign authorities, but rather the damage that such disclosure would have done to the relationship of trust established with the authorities. This is true as long as confidentiality is a fact and the argument is valid as long as there is no leak with accurate information as in the present case. As the leak occurred between the 15 and 17 December 2012, X AG had to conform to its obligation of art. 55 para. 2 LR and art. 17 DAH.

    As the publications following leaks appeared on the workdays of Thursday and Friday X AG would have been in a position to coordinate its obligations of the LR to prepare an ad hoc notice with the authorities in respect to the until then important confidentiality. X AG did not argue that it did so.

56. Art. 17 para. 2 DAH does not generally provide for the disclosure of all the details of the settlements as prepared at the time of the weekend of 17 December 2012. In cases of doubt what to disclose art. 17 para requires that an interpretation that best serves the purposes of ad hoc publicity – i.e. ensuring the highest level of equal opportunities, transparency and preventing insider trading – must be chosen (N 4 Commentary). As X AG had large knowledge of the total amount of the fines that were reported in the media but not yet approved by the BoD (and the different commissions) X AG had to inform the market that it really was in negotiations with various government agencies regarding the LIBOR-matter and that high fines may result from such negotiations.

57. X AG argued that such a disclosure would hardly have satisfied the standard of art. 15 DHA. This argument is not valid. N 167 of the Commentary states that notices should explain the main facts and background in clear and easily understandable language. Information as mentioned in N 54 above would have been acceptable.

58. The Commentary DAH expressly provide for information in stages (N 169). Even if X AG' senior staff should have thought that the BoD would not approve the prepared settlement, a disclosure as described in N 54 above followed by further disclosures would have fulfilled the condition of art. 15 para. 2 DAH that information must be factual, clear and complete.

59. It has to be noted that X AG or its counsel did not – neither in the preliminary investigation of SER nor in the investigation – allege or submit documents as to having tried to discuss with one or several foreign authorities for reconciling their - understandable – expectations of confidentiality with X's unambiguous obligations of art. 17 para 1 DAH to publish an ad hoc disclosure following the leak.

60. As described in N 209 of the Commentary DAH, X AG was obligated to react immediately by publishing a clarifying ad hoc notice. The time limit for this was at the latest on Monday, 17 December 2012, 7.30 a.m. CET before the trading hours. As the accurate media reports appeared on Friday, 15 December 2012, the weekend offered enough time to prepare the ad hoc disclosure before Monday morning. As it did not do so, X AG committed a breach of the art. 54 para. 2 LR.

C. To the Sanction

61. Art. 60 LR states that one or more of the sanctions listed in Art. 61 LR are imposed if an issuer commits a breach of a rule of the LR. In determining the sanction to be imposed, the Sanctions Commission will take into consideration, in particular, the severity of the breach and the degree of fault. In cases of negligence, a fine of up to CHF 1 million may be imposed, in cases of wrongful intent up to CHF 10 million (Art. 61 para 1 LR). When setting the level of fines, the Commission will also take into account the impact of the sanction on the issuer concerned (Art. 60 para 2 LR). In arriving at its decision, the Commission is not bound by the sanction proposals submitted by the investigative bodies (Art. 40.4 Rules of Procedures - RP).

62. The listed company as such is subject to sanctions and not the persons or any institutional body acting for it. In the case at hand, two different events have to be sanctioned: (i) the omission of an ad hoc notice after the leak concerning the strategy change at the latest on Monday, 29 October 2012, and (ii) the omission of an ad hoc notice after the leak regarding impending fines in LIBOR-related investigations at the latest on Monday, 17 December 2012. In both cases the severity and the question of negligence and intent has to be assessed.

Severity of the breaches

63. In the case of the strategy decision, X AG did not react to information leaks as required although it had knowledge of them for at least two weeks. At the BoD meeting of 29 October 2012, the members were informed that the project has been kept confidential until two weeks ago when leaks started to occur. Indeed, the leak published by [newspaper S] on 27/28 October 2012 was based (as quoted by it) on “two people close to the situation” and “one person familiar with the plan”. It cannot be disputed, and it was not by X AG, that the strategy change was a matter of great importance to X AG. It is obvious that information thereto had to be distributed in a way that all market participants have the same opportunity to become aware of this change. Art. 6 DAH is unambiguous in this obligation of every issuer.

    Listed companies have obligations not only toward their shareholders and employees, but also toward the public at large. The public has the right to be notified in accordance with the rules, i.e. quickly, under the same conditions and at the same time (see N 111 Commentary).

64. In the case at hand, the market had quite accurate reports from media as of 26 October 2012 that were neither confirmed nor denied by X AG until 30 October 2012. Investors attribute more importance to statements by issuers than third parties (such as media) as the issuers have to comply with the rules of DAH that bind them – inter alia – to publish an ad hoc notice in the case of a leak (see N 48 Commentary). The market participants should rely on the correct fulfillment of this obligation. X AG cannot be blamed having unevenly distributed information to the market in an active way. The breach of art. 54 LR consists in leaving the market with not confirmed or denied information on a very price-sensitive fact. The strategy change was so important for X AG (this was not disputed) that even a one-day delay is severe.

65. In the case of the LIBOR-settlements, the same considerations apply. The quite accurate information published by media on 15, 16 and 17 December 2012 was neither confirmed nor denied nor put in an ad hoc notice explaining the process until 19 December 2012. So during two days the market could not rely on what could be price-

sensitive facts. Again, as in the strategy decision, it was not disputed that these settlements as such were potentially price-sensitive facts.

66. X AG argued that neither the share price nor the trading volumes showed any anomalies in the time discussed at hand and therefore the information on the settlements could not be new price-sensitive information. As mentioned, this argument is not valid. But it has to be accepted that the delay of two days is less severe compared to the strategy change case. On the one hand, it can be considered that investors could have to some extent taken into account the information given by X AG in its previous quarterly reports that X AG is under investigation from authorities with whom it reached the settlements. On the other hand it is also publicly-known that a settlement with authorities is normally only possible with substantial payments. But payments of a total of CHF 1.4 billion impacted significantly X AG ‘s 2012 annual results, especially when considering what was reported by X AG in its Q3 2012 Report where provisions for litigation, regulatory and similar matters of only around CHF 900 million were reported. Taking this consideration into account, the severity of the breach in December was at the mid-range of severity.

Degree of fault

67. SER proposed to the Sanctions Commission a sanction corresponding to a fine for wrongful intent as provided in art. 61 para. 1 cif. 2 61 LR going up to CHF 10 million.

    Anyone who knowingly and willfully commits a breach of the relevant rule is deemed to have acted with intent. An issuer is deemed to have acted with conditional intent (dolus eventualis) if it did not directly intend to breach its regulatory duties, but at the very least was alerted to the possibility of a breach occurring, and nonetheless accepted the risk that such a breach may occur.

    In contrast, an issuer is deemed to have acted negligently if, through culpable carelessness, it has failed to consider or take account of the consequences of its actions. The essential condition for a breach of the duty of care to apply is the foreseeability of the outcome.

68. In the case of the strategy change, there was a dispute at length between SER and X AG on the time when the strategy change turned from merely an idea, planning options and intention into a fact in the sense of art. 53 LR. X AG argued that art. 53 f LR have to be read that a disclosable fact arises at the time when the issuer has adopted a plan or taken a decision. That is only the case when the governing body of the issuer competent to take the decision or approve the plan, has done so. Before that time, the issuers may, in the words of DAH Commentary, have an “idea” or an “intention”, but it has not yet formed a “plan or decision”.

69. X AG held the view that it was acting in compliance with the SIX’s disclosure rules and this view was the result of a careful analysis by qualified specialists within X AG and, in the case of the strategy decision, a specialist external legal counsel. Both SER and X AG forwarded arguments on how LR and DAH should be interpreted of what is a disclosable fact. If – in the view of X AG – SIX would adopt an overly far-reaching concept of a “fact” in the pre-decision phase, under which decisions wholly within the issuer’s control would become already disclosable (even in principle) when they are only likely to occur or when the decisions become foreseeable, would be untenable and undermine the authority of board of directors and other corporate decision-making bodies of Swiss listed companies. X AG goes further and stated that such an interpretation would often present a huge competitive disadvantage for SIX listed companies.

70. This rather theoretical dispute about the methods for interpretations of the LR, the DAH and its Commentary and when in the course of a decision making procedure in a listed company is not relevant to assess the present case.

71. Even if SER's consideration could be read otherwise, at the end SER reproached X AG, for not having issued at the latest an ad hoc notice on 29 December 2012 for the strategy change and on 17 December 2012 for the LIBOR-Settlement, in both cases after a leak has occurred. In the present case, it has not to be decided (not even in principle) if and what X AG should have done before these two dates. Therefore in the present X-case, the Sanctions Commission has not to decide on a "new" standard, as X AG claimed. The Sanctions Commission has to decide whether in both cases X AG acted, be it due to negligence or due to conditional intent, or of intent by not immediately reacting to the leaks.

72. X AG stated that its view of the disclosure rules were the result of qualified specialists and of the advice of an external legal counsel. There is no dispute about that, but it has to be noted that X AG did not specify whether this advice was given before the leak or after. So it can be assumed that the responsible persons within X AG had the concrete knowledge of the whole DAH and all the content of its Commentary. The DAH and the Commentary are well structured. Art. 17 give the rules for the event of a leak. Para.1 defines the leaks: Information leaks are situations in which, against the issuer's wishes, the confidentiality of a potentially price-sensitive fact can no longer be assured. This applies not only to situations of postponed disclosure. Para. 2 states unambiguously that, if a leak occurs, the fact must be disclosed immediately, even if publication was scheduled for later. What were the facts on 25 October 2012?

73. A fact was that the BoD convened and was updated on the third quarter 2012 financial results and the final version for the strategy discussion (which included scenario 3). The scenario was explained in detail, including future financial targets resulting from it. No other scenario was discussed as could be seen in the minutes of the Meeting and the documents distributed.

74. Another fact is that also the 3rd Quarter 2012 results presented to the Audit Committee on 24 October 2012 would show all the changes that the strategy change affects in the report. As it was noted in the minutes of the Audit Committee of the BoD of 29 October 2012, the latest changes to the IB's business plan did not alter the earlier conclusion under the "specialized IB" scenario. As X AG stated, the changes associated with the strategic proposal were entered into the report for the BoD on the evening of 25 October 2012. However, the Q3 2012 shows that the impairment charges to goodwill and other items are reflected as of 30 September 2012 which implies that the triggering event for the impairment charges had already occurred prior to 30 September 2012. If it would have really been uncertain that the BoD would not approve the proposal as prepared, and, X AG would have presented the financial results without the financial impact of the strategy change. Especially as X AG stated itself that it had drafts without it. If the triggering event for the accounting consequences was a decision after 30 September 2012 then N 22 of IAS 10 ("Events after the Reporting Period") would have been applicable. This gives examples of non-adjusting events after the reporting period and N 22b gives the example of a plan to discontinue an operation. If this scenario would have been a mere idea or plan, the accounting impacts of the decision of final BoD resolution on 29 October 2012 would not have been included in the Q3 financial results but have been reported as an event subsequent to the 30 September 2012 balance sheet date with the financial statements only reflecting the exceptional charges in Q4.

75. And another fact is that at least several persons of X AG including the GEB had knowledge of leaks that occurred two weeks before the 29 October 2012.

76. Even following the arguments of X AG concerning the time when an idea turned into a fact, this argument is in any case no more valid on 25 October and afterwards. N 209 of the Commentary states: If, during the postponement of disclosure (in the present case until the BoD meeting of 25 October 2012), reports appear in the media on facts that largely match the information that is the subject of the postponed disclosure, it must mostly be assumed that this is the result of a leak. X AG had not to assume, the leak was known. And it was not even argued that nobody in X AG had knowledge of the

details reported in the media that match with the internal scenario and which therefore could no longer be described as secret information.

77. The regulatory duties of an issuer in the case of leak are unambiguously described in the DAH and its Commentary (see N 213): “Issuers must take precautions to ensure that they can release information immediately when a leak occurs. It is advisable in the case of legitimate postponement of disclosure to keep a regularly updated notice on hand so that the obligation to disclose the potentially price sensitive facts can be met as quickly as possible. Issuers that make no preparations for immediately publishing an ad hoc notice when delaying disclosure are as a rule unable to publish the notice immediately as required.”

78. X AG knew for several days already before 25 October 2012 that there were leaks. Despite this and the fact, that the BoD was told that a number of tasks already ahead of a possible announcement on 30 October 2012, including communication, needed to be tackled, there is no indication in the files that X AG had prepared a stand-by notice to react on a leak (and X AG did not mention they had prepared one). In critical situations as the one at hand, it is part of the basic precautions to prepare and update an ad hoc stand-by notice for the case of a leak. It is difficult to understand that X AG did not do so. Even if one would fully agree to its position that an ad hoc notice on the strategy change was solely necessary once the BoD had formally made its very final decision, this position is untenable after the leak. This is even more so as X AG was aware of the greater number of persons with knowledge of the fine tuning of the strategy change. N 211 of the DAH Commentary says unambiguously that the greater the number of people who have knowledge of a potentially price-sensitive fact and the longer the postponement, the greater is the danger of a leak.

79. There is no doubt that all these rules were well known to X AG. Nonetheless, X AG followed its own plan with solely an ad hoc notice on 30 October 2012. It cannot be assumed that the responsible persons did directly intend to breach these clear and known duties on ad hoc publicity after the 25 October, but at the very least they were alerted to the possibility of a breach occurring, and nonetheless accepted the risk that such a breach may occur. So X AG is deemed to have acted with conditional intent (dolus eventualis).

80. The same considerations apply for the omission of an ad hoc notice after the leak concerning the LIBOR settlement on 13 resp. 15 December 2012. The duties what to do were known, but X AG continued nevertheless with its communication plans for the 19 December 2012. It decided to adhere to its schedule and not to react to the leak. A significant aggravating circumstance is that as of 14 December 2012, X AG was already in an investigation procedure for having violated the rules on ad hoc publicity and again, during the investigation, did not react to the new matter. In doing so, X AG breached its disclosure obligations with conditional intent twice.

<u>Impact of the sanction</u>

81. When determining a sanction and as mentioned before, consideration must be given inter alia to the listed company’s financial resources. The same fine is likely to impact more heavily companies with more limited economic resources than those with greater financial capacity. The range of fines is the same for all listed companies. Also for the greatest issuers the maximum of CHF 10 million applies even if CHF 10 million would not be material at all for their financial results. To be complete it has to be noted that an issuer cannot claim extenuating circumstances because it is in an industry that has a special risk of loss of reputation as for instance a bank.

82. In an earlier decision (SaKo 2012-AHP-II/11), the Sanctions Commission stated that the impact of the sanction (art. 61 para. 2 LR) is only to be considered high in cases where the fine could cause financial difficulties for the issuer in question. In this case, the issuer’s assets amounted to CHF 2.3 billion and its equity to CHF 1.3 billion. The Sanctions Commission issued a fine of CHF 2 million for a breach of the provisions on

ad hoc publicity that was considered severe and committed with intent. The Sanctions Commission took account that the issuer concerned could have done even worse than it did or in the case of a repeated offence and thus did not fix the penalty in the upper range. But even for the most severe cases that cannot be adequately sanctioned with a suspension or delisting, the LR limits a fine to CHF 10 million Accordingly, some issuers – for example those with high profits or large capital – regularly would suffer by large fines less than the highest possible amount. This effect is exactly the intended result of the authorized rule maker, the SIX Swiss Exchange. Another result could have only been achieved through introducing a determination of fines by fixing the amount in relation to certain financial ratios.

83. There is no need for further explanations that X AG ranks among the biggest listed companies on the SIX Swiss Exchange and thus, it is one of the issuers that are least sensitive to a sanction, even with a maximum fine of CHF 10 million and especially compared with penalties in foreign jurisdictions as the settlement amounts in the LIBOR case show.

84. Following an established practice, if an issuer commits several breaches, the Sanctions Commission issues one sanction that considers them in the aggregate.

85. Considering - in accordance with Art. 61 para 2 LR – (i) the very low impact of any fine up to CHF 10 million on X AG's financial situation, (ii) both the severity of the breach and the degree of fault are reasons not to set the fine at the lower limit of the scale. The fact that the second breach was committed within an already opened (preliminary) investigation against X AG for the breach of the same rules on ad hoc publicity is an aggravating factor in the determination of the sanction.

86. In favor of X, it has to be taken into consideration that it contributed well in the investigation and gave all necessary information. In addition and in favor of it, it has to be mentioned that no sanction had been imposed on it in the last three years.

    Art. 2.6 states RP unambiguously states that a register entry (in the register of sanctions) will not be taken into account in the assessment of any subsequent sanctions if three years have elapsed since the previous sanction acquired legal force. The corresponding entries must be deleted once this period has expired. X AG claimed correctly that in the case at hand, this rule applies and it has to be noted that no sanction has been imposed to X AG in this period.

87. Considering all the circumstances for determining the sanction, a fine of CHF 3 million is appropriate.

88. According to the Rules of procedure, the costs of the procedure of CHF […] (CHF […] for SER, CHF […] for the Commission) are imposed on X.

89. The opening of the investigation has been published by SER. Consequently and in accordance with the provision of Art. 6.3 para 1 RP, the decision of the Sanctions Commission has to be published.