

SIX Exchange Regulation AG

Listing & Enforcement

SB-MP-I/20

**Sanction Notice  
dated 15 September 2020  
concerning**

Issuer

**X.**\_\_\_\_  
[address]  
[place]

In connection with

**Violation of Regular Reporting Obligations and the Listing Rules**

## A. Procedural History

- 1 The proceedings against X.\_\_\_\_ (hereinafter: "X.\_\_\_\_", "Issuer") concern multiple violations of the Directive on Regular Reporting Obligations (hereinafter: "DRRO") and the Listing Rules (hereinafter: "LR").
- 2 With letter dated 24 [month +1] [year], SIX Exchange Regulation AG (hereinafter: "SER") initiated a preliminary investigation in the sense of Ciph. 3.2 Rules of Procedure (hereinafter: "RP") in connection with possible violations of regular reporting obligations concerning X.\_\_\_\_'s annual general meeting of 29 [month] [year] (hereinafter: "AGM [year]").
- 3 On 10 [month +2] [year], X.\_\_\_\_ answered to SER's letter and the questions raised therein timely.
- 4 After having established that there were sufficient indications for a violation of the DRRO, SER, with letter dated [date], communicated to X.\_\_\_\_ the opening of an investigation.
- 5 On [date +2], following discussions with X.\_\_\_\_, SER published a press release communicating the opening of an investigation.
- 6 With letter dated 11 [month +1] [year +1], SER expanded the initial investigation (inter alia) to additional possible violations of the DRRO and the LR.
- 7 X.\_\_\_\_ answered timely to the above letter on 9 [month +2] [year +1].
- 8 On 16 [month +3] [year +1], SER informed X.\_\_\_\_ that it refrains from performing further investigative actions as SER considered that the facts have been sufficiently established. SER set an additional deadline (16 [month+4] [year +1]) to X.\_\_\_\_, granting the possibility to comment again on the allegations raised.
- 9 X.\_\_\_\_'s deadline to submit its comments expired on 16 [month+4] [year +1]. X.\_\_\_\_ did not submit additional comments.

## B. Considerations

### I. Formal Considerations

- 10 X.\_\_\_\_ is a company incorporated under [...] with its registered seat in [place]. X.\_\_\_\_'s [securities] are listed on SIX Swiss Exchange AG. X.\_\_\_\_ signed the declaration of approval of SIX Swiss Exchange AG thereby accepting to be bound by the stock exchange regulations, especially by the LR, the Additional Rules, their implementing provisions and the RP.
- 11 In case of a negligent violation, SER is the competent authority to issue a sanction notice, thereby having the competence to sanction the issuer with a reprimand or a fine of up to CHF 100'000 (Ciph. 3.5 para. 2 RP in accordance with Art. 59 LR).

## II. Material Considerations

### 1. The Facts

- 12 In establishing the relevant facts for this sanction notice, SER considered both the exculpatory and inculpatory facts with equal care. All objects and information that serve to determine the facts of the case are subject to free evaluation and are deemed to be evidence (Ciph. 3.1 para. 1-2 RP).
- 13 In rendering this sanction notice SER evaluated all facts presented by X.\_\_\_\_ even if not explicitly referred to in this sanction notice.

#### 1.1 Regular Reporting Obligations in Connection with the AGM [year]

- 14 In [year] X.\_\_\_\_ held its AGM [year] on 29 [month] [year]. The date of the AGM was fixed by the Board of Directors (hereinafter: "BoD") between 25 and 26 [month -2] [year]. The invitation was sent (via Computershare) to all shareholders and published in the Swiss Official Gazette of Commerce and on X.\_\_\_\_'s website. Further on 8 [month] [year], a press release was distributed in connection with the AGM [year] in accordance with the rules of the ad hoc publicity. However, the date of the AGM [year] was not communicated via CONNEXOR Reporting (hereinafter: "Connexor"). Same holds true for the invitation to the AGM which was also not reported via Connexor. These facts are undisputed.
- 15 In connection with the AGM [year], the share register of X.\_\_\_\_ was closed ten days before the AGM [year]. This was communicated with the distribution of the invitation as set out above. However, it was never communicated via Connexor. This fact is undisputed.
- 16 On 2 [month +1] [year], X.\_\_\_\_ published the results of the AGM [year] which was held on 29 [month] [year]. The resolutions however were not reported via Connexor. This fact is undisputed.
- 17 In connection with the above referred facts, X.\_\_\_\_ assured that these shortcomings were not intentional and that the management is engaged to ensure compliance with the reporting obligations in the future. In order to avoid similar shortcomings in the future X.\_\_\_\_ prepared an internal checklist. However, as will be set out below, the use of a checklist was not capable of hindering future shortcomings (see below para. 19 et seq.).

#### 1.2 Regular Reporting Obligations in Connection with the Announcement of the Publication Date of the Annual Report [year]

- 18 On 17 [month -5] [year+1], SER contacted X.\_\_\_\_ as it appeared that X.\_\_\_\_ omitted to indicate the date of publication of the annual report [year] in its corporate calendar. Following a second reminder, X.\_\_\_\_ updated its corporate calendar on 24 [month -5] [year+1], now indicating the date (30 [month -2] [year+1]) for the publication of the annual report [year], and informed SER accordingly. The annual report [year] was finally published on 30 [month -2] [year+1].

### 1.3 Regular Reporting Obligations in Connection with the AGM [year+1]

- 19 On 1 [month -1] [year+1], X.\_\_\_\_ fixed the date for the AGM [year+1] (14 [month] [year+1]). According to X.\_\_\_\_, the person responsible for reporting that date via Connexor was convinced to have done so. However this was not the case. This is why, upon having received the notification concerning the date of closure of the share register, SER contacted X.\_\_\_\_ on 27 [month -1] [year+1]. SER reminded X.\_\_\_\_ that the date of the next AGM still had to be reported via Connexor. The same day, X.\_\_\_\_ reported the date for the AGM [year+1] via Connexor.
- 20 On 28 [month -1] [year+1], SER again reached out to X.\_\_\_\_ informing that the invitation to the AGM [year+1], which was scheduled to take place on 14 [month] [year+1], had to be filed via Connexor 20 days ahead of the AGM [year+1]. X.\_\_\_\_ shared the invitation via Connexor on 29 [month -1] [year+1].

### 1.4 Regular Reporting Obligations in Connection with Newly Created Securities out of Conditional Capital

- 21 On 5 [month] [year+1], X.\_\_\_\_ created new securities out of its conditional capital and registered those shares in the commercial register. On 13 [month] [year+1], SER contacted X.\_\_\_\_ asking why the newly created securities had not been reported via Connexor within five days following the registration in the commercial register (i.e. within 12 [month] [year+1]). X.\_\_\_\_ filed the necessary report following SER's admonition the same day on 13 [month] [year+1].

## 2. Legal Consideration

- 22 In general it shall be noted that it is the Issuer's duty to know and to comply with the applicable stock exchange regulations at all times. Arguments seeking exculpation of a violation because of major changes to the staff, inexperience of the staff with the applicable regulations or genuine shortcomings have no standing and therefore have to be disregarded.
- 23 The applicable Regular Reporting Regulations are those in force at the date of the violation. In connection with the above mentioned violations X.\_\_\_\_ violated the following versions of the DRRO:
- DRRO dated 1 December 2016 and entered into force on 1 July 2017 (repealed on 30 April 2018) applies to the facts described in para. 14
  - DRRO dated 20 March 2018 and entered into force on 1 May 2018 (repealed on 30 June 2018) applies to the facts as described in para. 15
  - DRRO dated 20 March 2018 and entered into force on 1 July 2018 (repealed on 1 May 2019) applies to the facts as described in para. 16, 17 and 19
  - DRRO dated 7 December 2018 and entered into force on 2 May 2019 (repealed on 31 December 2019) applies to the facts as described in para. 20 and 21.
- 24 That said, it has to be noticed that all the above versions of the DRRO are identical with regard to the violations concerned i.e. Art. 9 Point 3 and Point 5 and the concerning paras. of Annex 1 DRRO.

25 With regard to the facts as described in para. 18 the applicable LR are dated 4 April 2018 and entered into force on 25 May 2018 (repealed on 1 May 2019).

## 2.1 Applicable Regulations in Connection with the AGM [year]

26 According to Art. 9 Point 3.01 DRRO in connection with Point 3.01 Annex 1 DRRO, the issuer has to report via Connexor the date, venue and time of the planned AGM as soon as determined.

27 X.\_\_\_\_'s BoD decided on 25 and 26 [month -2] [year] that the AGM [year] will be held on 29 [month] [year]. No notification via Connexor was made on 25 and 26 [month -2] [year] (see also above para. 14).

28 According to Art. 9 Point 3.03 DRRO in connection with Point 3.03 Annex 1 DRRO, the issuer has to report via Connexor the invitation to its AGM no later than 20 calendar days prior to the AGM.

29 X.\_\_\_\_ shared the invitation to the AGM [year] via various channels on 8 [month] [year], but did not submit it via Connexor, let alone 20 days ahead of the AGM [year] which took place on 29 [month] [year] (see also above para. 14).

30 According to Art. 9 Point 3.02 DRRO in connection with Point 3.02 Annex 1 DRRO, the issuer has to report via Connexor the date of closure of the share register as soon as determined.

31 In connection with the AGM [year], the share register was closed ten days before the date of the AGM [year]. The closure of the share register in connection with the AGM [year] was never reported via Connexor (see also above para. 15).

32 According to Art. 9 Point 3.04 DRRO in connection with Point 3.04 Annex 1 DRRO, the issuer has to report via Connexor the resolutions of the AGM no later than one trading day following the AGM.

33 X.\_\_\_\_'s AGM [year] was held on 29 [month] [year] and the results thereof were published on 2 [month +1] [year]. However, X.\_\_\_\_ failed to submit the resolutions via Connexor (see also above para. 16).

34 Therefore, X.\_\_\_\_, in connection with the AGM [year], failed to comply with Art. 9 Point 3.01, Point 3.02, Point 3.03, Point 3.04 DRRO in connection with Point 3.01, Point 3.02, Point 3.03, Point 3.04 Annex 1 DRRO.

## 2.2 Applicable Regulations in Connection with the Disclosure of the Publication Date of the Annual Report

35 According to Art. 52 LR it is the issuer's duty to produce a corporate calendar disclosing information on the dates of major importance to investors, namely the dates of the AGM and the publication dates of the annual and interim financial statements and the corresponding reports. The guideline to the DRRO specifies that the publication dates of financial statements must be set out explicitly in the corporate calendar at least six months in advance of the planned publication.

36 X.\_\_\_\_'s annual report [year] was published on 30 [month -2] [year+1]. The date of publication was only disclosed (upon being requested twice) on 24 [month -5] [year+1] (only approximately three months in advance) (see above para. 18) .

- 37 X.\_\_\_\_ therefore failed to comply with Art. 52 LR as specified by the guideline to the DRRO by not disclosing the date of publication of the annual report [year] at least six months in advance.

### 2.3 Applicable Regulations in Connection with the AGM [year+1]

- 38 As already set out above (see above para. 26 et seqq.), Art. 9 Point 3.01 and Point 3.03 DRRO in connection with Point 3.01 and Point 3.03 Annex 1 DRRO require the issuer to disclose a) the date of the planned AGM as soon as determined and b) the invitation to the AGM no later than 20 calendar days prior to the AGM.
- 39 X.\_\_\_\_'s BoD decided on the date for the AGM [year+1] on 1 [month -1] [year+1]. No report thereof was shared via Connexor. The needed Connexor report was shared upon request by SER on 27 [month -1] 2020, i.e. 26 days too late (see above para. 19).
- 40 The AGM [year+1] took place on 14 [month] [year+1]. X.\_\_\_\_ therefore should have filed the invitation to the AGM [year+1] via Connexor by 25 [month -1] [year+1] at the latest. The invitation was shared via Connexor upon request by SER on 29 [month -1] [year+1], i.e. four days too late.
- 41 The fact that X.\_\_\_\_ previously failed to comply with these reporting obligations in connection with the AGM [year] and that it has been made aware of its failure during the preliminary investigation, indicates that, contrary to its assertion, the implementation of an internal checklist was not able to prevent future shortcomings (see above para. 17 and paras. 26 et seqq.).
- 42 Because of the above, X.\_\_\_\_ again failed to comply with Art. 9 Point 3.01 and Point 3.03 DRRO in connection with Point 3.01 and Point 3.03 Annex 1 DRRO.

### 2.4 Applicable Regulations in Connection with the Reporting of Newly Created Shares

- 43 According to Art. 9 Point 5.01 DRRO in connection with Point 5.01 Annex 1 DRRO, the issuer has to report via Connexor changes in connection with its capital structure including the creation of new conditional capital within 15 trading days following the AGM or at the latest five trading days following the entry in the commercial register.
- 44 On 5 [month] [year+1], the newly created securities out of conditional capital were registered in the commercial register. It was only upon SERs request and after the expiration of the deadline of five trading days (i.e. 12 [month] [year+1]) that X.\_\_\_\_ filed a report via Connexor on 13 [month] [year+1].
- 45 X.\_\_\_\_ therefore violated Art. 9 Point 5.01 in connection with Point 5.01 Annex 1 DRRO.

## 3. Sanction

- 46 If a breach of the LR, the Additional Rules or their implementing provisions occurred, the sanctions listed in Art. 61 LR may be imposed on the issuer (Art. 60 LR).

- 47 In case of a negligent violation, SER is the competent authority to issue a sanction notice, thereby having the competence to sanction the issuer with a reprimand or a fine of up to CHF 100'000 (Ciph.3.5 para. 2 RP in accordance with Art. 59 LR).
- 48 Art. 61 para. 2 LR provides that in determining the sanction to be imposed, the competent body will consider the severity of the breach and the degree of fault. When setting the level of fines, the impact of the sanction on the party concerned will also be taken into consideration.

### 3.1 Severity of Breach

- 49 Complying with regular reporting obligations is one of the conditions for maintaining the listing. However, given the administrative nature of the obligation, a failure to comply with these obligations is regarded as being not that severe. Same holds true for the violation of Art. 52 LR as specified in the guideline to the DRRO. Nevertheless, given the frequency of the violations and the fact that the same provisions have been breached repeatedly, namely Art. 9 Point 3.01 and 3.03 DRRO, a fine is to be regarded as an appropriate sanction.
- 50 Overall X.\_\_\_\_'s behaviour is to be qualified as a slight violation of the applicable regulations.

### 3.2 Degree of Fault

#### 3.2.1 Degree of Fault of the Violation

- 51 In the case at hand, the person sanctioned is a legal entity and the degree of fault has to be assessed according to objective standards. Thereby it is standing practice to attribute the conduct of a natural person or body acting on behalf of an issuer to the issuer (see decisions of the Sanction Commissions of 14 April 2015 [SaKo 2015-AhP-I/15], number 19; of 30 July 2010 [SaKo 2010-CG-11/10/SaKo 2010-MP-I/10], number 13; sanction notice of SIX Exchange Regulation AG of 12 August 2013 [SER-KTR-FOR-1/13], number 28; of 4 February 2013 [SER-MT 11/12/SER-AHP I/12/SER-Listing I/12], number 103).
- 52 The LR require issuers to ensure compliance with the LR, Additional Rules and implementing provisions at all times. An issuer will be sanctioned if it has not taken all necessary and reasonable organizational precautions to prevent a breach of the obligations entered into under the LR or the DRRO. It is therefore assumed that every issuer complies with the above requirements and that every issuer is aware of the applicable regulations and standards. (see decisions of the Sanction Commissions of 14 April 2015 [SaKo 2015-AhP-I/15], number 19; of 30 July 2010 [SaKo 2010-CG-11/10/SaKo 2010-MP-I/10], number 13; sanction notice of SIX Exchange Regulation AG of 12 August 2013 [SER-KTR-FOR-1/13], number 28; of 4 February 2013 [SER-MT 11/12/SER-AHP I/12/SER-Listing I/12], number 103). In the assessment of the degree of fault, the constant practice is to expect from listed companies compliance with stock exchange regulations without further ado. The responsible employee must be familiar with the relevant regulations. (see decisions of the Sanction Commission of 14 April 2015 [SaKo 2015-AHP-I/15], number 26; of 13 August 2013 [SaKo 2013-AHP-I/12], number 37). Because of the

issuers duty of care, every issuer is expected to be familiar with the applicable stock exchange rules, commentaries and practice of the judicial bodies. Any breach of the rules and regulations must raise a presumption of negligence of the issuer in failing to discharge its duty of care (see sanction notice of SIX Exchange Regulation of 11. October 2013 [SER-AHP-1/13], number 49; of 4. February 2013 [SER-MT 11/12/SER-AHP 1/12/SER-Listing 1/12], number 104).

- 53 X.\_\_\_\_ is expected to be aware of the applicable regulations. Therefore, the violations of the above mentioned obligations (see above section 2.3), have to be qualified as either negligent or intentional. A person acts negligently when it fails to use the care that a normally careful person would use in a given situation (see decisions of the Sanctions Commission of 13 August 2013 [SaKo 2013-AHP-I/12], number 36; sanction notice of SIX Exchange Regulation AG of 21 August 2014 [SER-MP-I/14], number 22; of 11 October 2013 [SER-AHP-I/13], number 48; of 12 August 2013 [SB-KTR-FOR-1/13], number 27; of 4 February 2013 [SER-MT 11/12/SER-AHP 1/12/SER-Listing 1/12], number 102).
- 54 SER has no reason to assume that the violations set out in section II above have been caused intentionally. However, the violations (see above section 2.3) are rooted in X.\_\_\_\_'s negligent handling of the respective situation. Would X.\_\_\_\_ have adopted the caution and care one could expect from a listed company, the violations would not have occurred.
- 55 X.\_\_\_\_'s behaviour is therefore qualified as negligent.

### 3.2.2 Behaviour After the Violation

- 56 The behaviour of the Issuer after the violation is regarded as neutral. It is therefore not taken into account for the determination of the sanction to be imposed.

### 3.2.3 Register of Sanction

- 57 In accordance with Ciph.2.6 RP, SER keeps a register of all sanctions that have become legally enforceable. An entry in this register will be taken into account in the assessment of any subsequent sanctions if less than three years elapsed between the previous sanction acquiring legal force and the time of the latest violation of the regulations.
- 58 In favour of the Issuer, it shall be noted that there is no entry for the relevant period which has to be taken into account for the assessment of the sanction which will be imposed in the current matter.

### 3.3 Sensitivity to Fine and Sanction

- 59 When quantifying the sanction amount the sensitivity to sanctions has to be taken into account. In order to assess the sensitivity to sanctions, the economic performance of the issuer is considered. An issuer with a lower economic performance will tend to be hit harder by the same fine than a company with a

comparatively higher economic performance. For the determination of these fines, economic key figures can be taken into consideration, e.g. EBIT, net income, operating cash flow, cash and cash equivalents or equity (See decisions of the Sanctions Commission of 28 June 2012 [SaKo 2012-AHP-11/11], number 63 et seq. and of 8 December 2011 [SaKo 2011-AHP-J/11, SaKo 2011-CG-I/11]. number 37).

60 According to the latest financial statements, the Annual Report [year+1] dated 30 [month -2] 2020, X.\_\_\_\_'s EBITDA amounted to [amount], its operational result to [amount]. In view of the above economic ratios the sensitivity to sanctions of X.\_\_\_\_ is qualified as high.

61 Negligent violations of the LR, Additional Rules and implementing provisions may be sanctioned with a sanction notice provided that the awarded sanction is a reprimand or a fine of up to CHF 100'000 (Ciph. 3.5 para. 2 RP).

62 Given that X.\_\_\_\_ violated negligently Art. 52 LR and various provisions of the DRRO, that these violations are qualified as slight and considering X.\_\_\_\_'s high sensitivity to sanctions, a fine of CHF 12'000 is appropriate.

#### 4. Conclusion of Investigation and Publication thereof

63 By rendering this sanction notice, the investigation against X.\_\_\_\_ is concluded (Ciph. 3.4 para. 1 RP). This sanction notice will be notified to X.\_\_\_\_ and the Sanctions Commission (Ciph. 3.4 para. 3 RP).

64 SER will inform the public of the conclusion of this investigation as soon as this sanction notice acquires legal force (Ciph. 6.2 para. 4 RP). Further, SER will publish the legally binding sanction notice in anonymous form on its website (Ciph. 6.2 para. 6 RP).

#### 5. Costs

65 In case of sanction proceedings charges are determined based on the expenditure incurred, thereby applying a hourly rate of CHF 300 per person (Ciph.3.7 in connection with Ciph. 4.1 of the List of Charges RegBod).

66 In the present case, charges amount to CHF [...] and shall be borne by X.\_\_\_\_.

## C. Sanction Notice

### SIX Exchange Regulation AG determines the following:

1. It is determined that X.\_\_\_\_:
  - a. violated Art. 52 LR by failing to disclose timely the date of the publication of the annual report [year+1];
  - b. failed to comply with Art. 9 Point 3.01, Point 3.02, Point 3.03, Point 3.04 DRRO in connection with Point 3.01, Point 3.02, Point 3.03, Point 3.04 Annex 1 DRRO, as it failed to timely submit to SIX Exchange Regulation AG the date of the planned AGM [year], the invitation to the AGM [year], the date of closure of the share register and the resolutions of the AGM [year];
  - c. failed to comply with Art. 9 Point 3.01 and Point 3.03 DRRO in connection with Point 3.01 and Point 3.03 Annex 1 DRRO, as it failed to timely submit to SIX Exchange Regulation AG the date of the planned AGM [year+1] and the invitation to the AGM [year+1]; and
  - d. failed to comply with Art. 9 Point 5.01 in connection with Point 5.01 Annex 1 DRRO, as it failed report timely to SIX Exchange Regulation AG the newly created securities out of conditional capital.
2. X.\_\_\_\_ is sanctioned with a fine of CHF 12'000.
3. X.\_\_\_\_ shall bear the costs of these proceedings amounting to CHF [...].
4. Upon acquiring legal force, this sanction notice will be published on the website of SIX Exchange Regulation AG in anonymous form.
5. This sanction notice will be notified (A-Post Plus) to:  
  
[...]

SIX Exchange Regulation AG

[Sig.]  
Head Listing & Enforcement

[Sig.]  
Head Listing