

Decision

in the procedure SaKo-KTR-I/20

SIX Exchange Regulation AG
(Listing & Enforcement)
Hardturmstrasse 201
8021 Zürich

vs.

X. ____
[address][place]

The Sanctions Commission – [...], chairman, [...], [...], [...], secretary – has rendered a decision as follows:

1. X. ____ has breached negligently Art. 42 Listing Rules (LR) in connection with Art. 3 para. 1 No. 5 and Art. 4 paras 1 and 5 Directive on Procedures for Equity Securities (DPES) as well as Art. 21 para. 1 and Art. 23 LR.
2. X. ____ is ordered to pay a fine of CHF 40'000.
3. X. ____ is ordered to bear the cost of the present proceedings in the amount of CHF [amount] and the additional charges incurred by the Sanctions Commission of CHF [amount] (total costs CHF [amount]).
4. The Sanctions Commission's decision is to be published in anonymised form on the website of SIX Exchange Regulation AG upon becoming legally binding (Ciph. 6 para 8 Rules of Procedure RP).

[...]

Reasons for the Decision

1. On [date], X. ____ (hereinafter referred to as “X. ____”, the “**Issuer**” or the “**Company**”) decided at its extraordinary general meeting to convert its listed [amount] A-shares into [amount] B-shares with a nominal value of [currency] [amount] each.
2. On [date], the conversion of shares was entered into the daily register of the Commercial Register of the canton of [place]. Subsequently, the conversion of shares was published in the Swiss Official Gazette of Commerce on [date]. Since SER did not receive a listing application for the conversion of shares from A- into B-shares, the trading of the A-shares was suspended on [date] and the Company informed accordingly.
3. On request of SIX Exchange Regulation AG (hereinafter referred to as **SER**), the Company submitted a correct listing application and after a suspension of more than [timeframe], the trading of the [amount] B-shares of the Company commenced under a new Swiss Security Number.

1. Procedure

1.1. Overview of the proceeding

4. By letter dated [date], **SER** initiated a preliminary investigation within the meaning of Clause 3.3 para. 1 of the Rules of Procedure (RP) regarding the conversion of the Company's A-shares into B-shares. The Issuer answered timely with a statement dated [date] and acknowledged the basic facts. The Company explained that the mandate of the Recognised Representative had been terminated after the successful listing of the A-shares "not at least for cost reasons" and with the intention to reactivate the mandate as soon as it seems necessary.
5. By letter dated [date], SER informed the Issuer of the opening of an investigation in accordance with Clause 3.3 para. 2 RP. The letter also mentioned that the results of the investigation might lead to a proposal for a sanction, a sanction notice, an agreement or the stay of the investigation and that the public would be informed of the opening of the investigation on [date].
6. The Issuer has not opposed against English as the language of the proceedings. Accordingly, English has been chosen by SER as the language of the proceedings (Clause 2.2 para. 1 RP).
7. Before submitting the sanctions proposal (dated [date]) to the Sanctions Commission (hereinafter **SaKo**), SER presented the sanction proposal to the Issuer to state its position on the matter. The sanctions proposal and the comments made by the Issuer hereto have been submitted to SaKo on [date].
8. The Company accepted the facts and the principle of a sanction but requested that the the proposed fine should be lowered from CHF [amount] to CHF [amount] as the Issuer "acted highly cooperative during the preliminary investigation, the violation was only negligent and very moderate, no damage was caused and the Issuer had not been sanctioned in the last three years".
9. SER alerted SaKo that the Company handed the response to the Swiss postal service on [date] only instead of [date] as per the deadline granted. Nevertheless, SER would not exclude X. ____ response from evidence. SaKo included the response in the file and in its considerations without reservation.

10. The Sanctions Commission informed the Company of the composition of the Delegation for the decision. No request to abstain nor to complement the response to the sanction proposal was submitted within the deadline set.

1.2. Applicable rules and jurisdiction

11. X. ____ is a limited share company, incorporated under the laws of [country] with its registered office in [place], [country]. The Company's shares are listed on SIX Swiss Exchange according to the [listing segment]. The Issuer has last acknowledged the validity of the currently valid version of the Listing Rules (LR), the provisions implementing the LR and the RP by signing the Declaration of Consent on [date]. Accordingly, X. ____ is subject to stock exchange regulations.
12. Pursuant to Art. 59 LR in connection with Clause 1.2 RP, the Listing & Enforcement department of SER is the competent body for investigating violations of the LR, the Additional Rules and the related implementing provisions, as well as further rules and regulations concerning admission to trading.
13. Before securities may be listed on SIX Swiss Exchange, an application must be submitted (Art. 42 LR). For capital transactions such as the exchange of securities (e.g. conversion of A- into B-shares) involving securities of an already listed company, a listing application must be submitted no later than 10 trading days before the planned listing date (Art. 3 para. 1 No. 5 of the Directive on Procedures for Equity Securities [DPES] in connection with Art. 4 paras 1 and 5 DPES).
14. In connection with an ordinary or authorized capital increase, the listing of the new equity securities must take place immediately following the corresponding entry in the Commercial Register (Art. 4 para. 2 DPES). This provision is also applied *mutatis mutandis* to share splits and exchanges of securities in order to ensure an uninterrupted trading in the shares (cf. [...]).

2. Facts

2.1. General Comments

15. Regarding the establishment of the relevant facts, the exculpatory and the inculpatory aspects shall be considered with equal care; all evidence shall be subject to free evaluation (Clause 3.1 paras 1 and 2 RP).

2.2. Description of the case

In casu, the following facts of the matter were ascertained:

16. On [date], the Company decided at its extraordinary general meeting to convert its listed [amount] A-shares into [amount] B-shares with a nominal value of [currency] [amount] each. Its articles of association were amended accordingly.
17. On [date], the conversion of shares was entered into the daily register of the Commercial Register of the canton of [place]. Subsequently, the conversion of shares was published in the Swiss Official Gazette of Commerce on [date].
18. Since SER did not receive a listing application for the conversion of shares from A- into B-shares, the trading of the A-shares (Swiss Security Number [number]) was suspended on [date] and the Company informed accordingly.
19. On the same day, once the Company had been informed of the latter, the Issuer mandated [attorney-at-law] in her capacity as competent specialist of the recognised

representation “[law firm]” (hereinafter referred to as “**Recognised Representation**”) in order to file a listing application and initiated the necessary measures in order to ensure proper trading as well as to ensure the clearing and settlement in respect of the B-shares (such as ordering of the Swiss Security Number and International Securities Identification Number (ISIN), the registration of the B-shares in the SECOM (the main system operated by SIX SIS Ltd.) by the paying agent, the signing of a deposit agreement with SIX SIS Ltd. and the signing of a mandate agreement with the share register provider).

20. On [date], the Recognised Representation filed a listing application regarding the conversion of A-shares into B-shares with SER on behalf of the Company.
21. Subsequently, on [date], SER issued a first decision approving the listing application subject to certain conditions, *i.a.* the delivery of an official notice regarding the listing. The first trading day was set for a yet to be determined date. Following notification of the specific first trading day by the Recognised Representation on [date], SER issued a second decision setting the first trading day on [date] as requested.
22. On [date], after a suspension of more than [timeframe], the trading of the [amount] B-shares of the Company commenced under the new Swiss Security Number [number].
23. The Issuer states that it was not aware of the obligation to submit the listing application before the conversion from A-shares into B-shares in the commercial registry. But according to its statement it learnt from this incident; the Issuer promised that henceforth it will always obtain professional advice in advance, in particular before decisions are taken (by the board of its directors or the general meeting).

3. Considerations

24. Strict observance of the Listing Rules and the relevant procedures is a precondition for the proper functioning of the stock exchange market. Therefore, listing procedures are core to the regulatory framework. SIX is requested by law to fully enforce the respective rules and to sanction violations (Art. 35 Financial Market Infrastructure Act FMIA). Such rules include, among others, any changes in the capital structure of an issuer and changes in the rights of the shares traded. The Listing Rules and the Directive on Procedures for Equity Securities (DPES) govern in detail the listing procedure for equity securities and are intended to give instructions in the planning and execution of the procedure as well as in the compilation of the required documents (Art. 1 DPES).
25. The conversion from A-shares into B-shares undeniable affects the capital structure and the rights of shareholders even if the economic value should remain. It is a transaction that requires formal application (Art. 3 DPES, notably para. 1 No.5). The transaction by X. ___ undeniably falls under these rules.
26. The conversion of the Issuer’s shares from A- into B-shares was approved by the Company’s extraordinary general meeting of [date]. The conversion was entered in the daily register of the Commercial Register of the canton of [place] on [date] and published in the Swiss Official Gazette on [date]. In accordance with the practice, the first day of trading for the new B-shares should have been set on [date] and the respective listing application thus filed by [date] at the latest.
27. By failing to submit the application for the conversion of A- into B-shares by no later than 10 trading days prior to the registration in the Commercial Register of the canton of [place], the Issuer violated Art. 42 LR in connection with Art. 3 para. 1 No. 5 and Art. 4 paras 1 and 5 DPES.
28. Furthermore, the issuer must ensure proper trading of securities on the stock exchange at any time; the issuer must also ensure that transactions can be cleared and settled via the settlement systems that are permitted by SIX Swiss Exchange (Art. 21 para. 1 as well

as Art. 23 LR, see also Trading Rules of SIX Swiss Exchange regarding the specific provisions). These listing requirements must continue to be fulfilled for the entire duration of the listing (Art. 26 LR). The requirements must therefore also be fulfilled in the course of a share conversion.

29. Since the necessary measures regarding the technical aspects of the conversion – such as the ordering of the Swiss Security Number and ISIN, the registration of the B-shares in the SECOM by the paying agent, the signing of a deposit agreement with SIX SIS Ltd. and the signing of a mandate agreement with the share register provider – were only initiated on or after [date], the above mentioned listing requirements were not met. Thus, the Issuer also violated Art. 21 para. 1 and Art. 23 LR.
30. In summary, it can be stated that X. ____ violated Art. 42 LR in connection with Art. 3 para. 1 No. 5 and Art. 4 paras 1 and 5 DPES by failing to submit the application for the conversion of A- into B-shares no later than 10 trading days prior to registration in the Commercial Register. X. ____ also violated Art. 21 para. 1 and Art. 23 LR by failing to timely initiate the necessary measures in order to ensure the proper trading of securities on the stock exchange as well as by failing to ensure that transactions can be cleared and settled via the settlement systems that are permitted by SIX Swiss Exchange.

4. Sanction

31. If an issuer commits a breach of the LR, the Additional Rules or their implementing provisions, a sanction specified in Art. 61 LR may be imposed (Art. 60 LR).
32. In particular, the severity of the breach and the degree of fault must be taken into consideration when determining the sanction (Art. 61 para. 2 sentence 1 LR). Furthermore, any previous sanction in the last three years preceding the breach of the regulations must also be taken into account in the assessment of the sanction (Clause 2.6 para. 4 RP). When setting the level of fines, the impact of the sanction on the issuer shall be taken into account (Art. 61 para. 2 sentence 2 LR).

4.1. Severity of Breach

33. Listing regulations aim *i.a.* to ensure the proper functioning and transparency of securities, as well as to ensure the protection of financial market participants. The purpose of the LR is to provide issuers with access to exchange trading that is as free and equal as possible, and to ensure transparency for investors with regard to issuer quality and the characteristics of individual securities (Art. 1 LR).
34. Since no application was filed for the conversion from A- into B-shares and no measures were taken in order to ensure proper trading as well as to ensure the clearing and settlement in respect of the B-shares, trading of the Company's shares had to be suspended from [date] until [date].
35. Accordingly, shareholders of the Company and/or potential investors were not able to buy or sell B-shares in the Company during a continuous period of [amount] trading days, i.e. more than [timeframe].
36. There is no evidence of additional damage caused or need to clear pending stock exchange transactions.
37. It is acknowledged that the Issuer strived to correct quickly the missing administrative steps to resume the trading of shares as quickly as possible.
38. Missing the deadline for the conversion of shares respectively not initiating the necessary measures for the proper trading, clearing and settlement of the B-shares can be classified as a **moderately severe breach** of the listing regulations and its implementing provisions.

4.2. Degree of Fault

39. In accordance with the LR, the Issuer is obliged to ensure that it always complies with its obligations under the LR, the Additional Rules and the related implementing provisions.
40. Sanctions are imposed on issuers and not on natural persons. The company shall be sanctioned if it can be accused of not having taken all necessary and reasonable organizational precautions to prevent a breach of the obligations entered pursuant to the LR. The assessment of fault is, therefore, carried out to a large extent according to objective standards. The behaviour of the natural persons or governing bodies acting on behalf of the company shall be attributed to the company (cf. decisions of the Sanctions Commission dated 14 April 2015 [SaKo/AhP/I/15], No. 19; dated 30 July 2010 [SaKo 2010-CG-II/10/SaKo 2010-MP-I/10], No. 13; sanction notices of SER dated 12 August 2013 [SER-KTR-FOR-I/13], No. 28; dated 4 February 2013 [SER-MT II/12/SER-AHP-I/12/SER-Listing I/12], No. 103).
41. Anyone who knowingly and wilfully commits a breach of the relevant rule is deemed to have acted with intent. An issuer is deemed to have acted with conditional intent if it did not directly intend to breach its regulatory duties, but at the very least is alerted to the possibility of a breach occurring, and accepts the risk that such a breach may occur (cf. decision of the Sanctions Commission dated 28 June 2012 [SaKo 2012-AHP-II/11], No. 46; sanction notices of SER dated 11 October 2013 [SER-AHP-I/13], No. 48; dated 12 August 2013 [SER-KTR-FOR-I/13], No. 26; dated 4 February 2013 [SER-MT II/12/SER-AHP-I/12/SER-Listing I/12], No. 101).
42. An issuer is generally deemed to have acted negligently if, through culpable carelessness, it has failed to consider or take into account the consequences of its actions. The essential condition for a breach of the duty of care to be considered is the foreseeability of the outcome. The main elements of the sequence of events leading to the outcome must be foreseeable (cf. decision of the Sanctions Commission of 13 August 2013 [SaKo 2013-AHP-I/12], No. 36; sanction notices of SER dated 21 August 2014 [SER-MP-I/14], No. 22; dated 11 October 2013 [SER-AHP-I/13], No. 48); dated 12 August 2013 [SER-KTR-FOR-I/13], No. 26; dated 4 February 2013 [SER-MT-II/12/SER-AHP-I/12/SER-Listing I/12], No. 102).
43. In assessing the fault of issuers, constant practice presupposes compliance with stock exchange regulations. The responsible employee is expected to familiarise him/herself with stock exchange rules, any relevant commentaries, the established practices of the judicial bodies and SER and to act in accordance with such rules, commentaries and practices (cf. decisions of the Sanctions Commission dated 14 April 2015 [SaKo 2015-AHP-1/15], No. 26; dated 13 August 2013 [SaKo 2013-AHP-1/12], No. 37). Any breach of the rules and regulations must normally raise a presumption of negligence on part of the issuer failing to discharge its duty (cf. decision of the Sanctions Commission dated 28 June 2012 [SaKo 2012-AHP-II/11], No. 40; sanction notices of SER dated 11 October 2013 [SER-AHP-I/13], No. 49; dated 4 February 2013 [SER-MT II/12/SER-AHP-I/12/SER-Listing I/12], No. 104); dated 10 November 2011 [SER-MP-II/11/SER-CG-I/11], No. 53].
44. At hand, there is no evidence to suggest that the Issuer breached the listing regulations with intent or conditional intent.
45. The Issuer states that it was not aware of the obligation to submit the listing application before the conversion from A-shares into B-shares in the commercial registry. A simple reading of the DPES would have been sufficient to know the obligations of the issuer during such a transaction. X. ____ has thus failed to consider the foreseeable consequences of its inactions – not filing a timely application for the conversion of its

listed [amount] A-shares into [amount] B-shares as well as not to timely initiate the necessary steps in order to ensure the proper trading of securities on the stock exchange and to ensure that transactions can be cleared and settled via the settlement systems that are permitted by SIX Swiss Exchange which led to the suspension of trading – through culpable carelessness. The carelessness is culpable as the Issuer has not shown the necessary care to which it was obliged under the specific and personal circumstances.

46. X. ____ was apparently neither sufficiently familiar with the relevant stock exchange rules nor with the established practice nor did it involve professional advisors in the matter: The Company would have had sufficient time to involve professional advisors – even after the extraordinary general meeting – such as the Recognised Representation – in order to timely file the application for the conversion of A-shares into B-shares and to timely initiate the necessary measures in order to ensure a proper trading as well as the clearing and settlement in respect of the B-shares. In fact, the Issuer failed to establish the necessary structure and procedures that are required for any listed company. There is no room to lower these conditions for smaller or newly listed issuers.
47. When determining the sanction, it shall be considered in favour of the Issuer that according to its statement it learnt from this incident, acknowledging its fault; the Issuer promised that henceforth it will always obtain professional advice in advance, in particular before decisions are taken (by the board of its directors or the general meeting).
48. During the preliminary investigation, X. ____ explained in its statement of [date] all steps taken after SER suspended the trading due to the missing listing application. X. ____ confirmed the willingness to cooperate and to act expeditiously. All these efforts and actions are duly recognized by SaKo. These efforts underline that the Company had not the intention to violate the rules. However, this cannot be seen as "acting in good faith" in the process of the transformation of A- to B-shares as the Company expresses in its statement. Merely, it is a sign of carelessness in implementing the structures, organization and procedures necessary for any listed company. The commitment "in the future always obtain professional additional advice in advance" does not mitigate the fault but is just the necessary level of professionalism any company must apply when accessing the stock exchange. There is no room to lower this requirement.
49. Accordingly, the breach of Art. 42 LR in connection with Art. 3 para. 1 No. 5 and Art. 4 paras 1 and 5 DPES respectively Art. 21 para. 1 and Art. 23 LR was committed with **severe negligence**.

4.3. Behavior in the Previous Three Years

50. In imposing the sanction, any prior sanctions in the last three years must also be considered (Clause 2.6 para. 4 RP). This would normally lead to an increase of the sanctions but there is no discount for not having been sanctioned in the previous years.
51. At hand, no sanctions were imposed against the Company during this period. Therefore, the sanction does not have to be increased in the current case.

4.4. Sensitivity to Sanctions

52. In determining the sanction, the impact of the sanction on the Issuer is considered (Art. 61 para. 2 sentence 1 LR). The same fine is likely to have more impact on companies with limited economic resources than on those with greater financial capacity. Financial ratios may be used to determine financial capacity, e.g. EBIT, net earnings, cash flow generated from operations, cash and cash equivalents or shareholders' equity (cf. decisions of the Sanctions Commission dated 28 June 2012 [SaKo 2012-AHP-II/11],

No. 63 et seqq. and dated 8 December 2011 [SaKo 2011-AHP-I/11, SaKo 2011-CG-I/11], No. 37 et seq.).

53. In the financial year [year], X. ____ reported (on a consolidated basis) a net loss of [currency] [amount] and shareholders' equity of [currency] [amount]. In the financial year [year+1], X. ____ reported (on a consolidated basis) a net profit of [currency] [amount] and shareholders' equity of [currency] [amount].
54. In view of these economic figures, the Issuer is **to a certain degree more sensitive to sanctions** than an average company listed at the Swiss Stock Exchange.

5. Conclusions

55. SIX is obliged by law to enforce the rules including sanctions (Art. 35 Financial Market Infrastructure Act FMIA). Sanctions shall have a preventive effect as well.
56. When considering the exact amount of the sanction, SaKo not only refers to the sanction proposal of SER but compares to sanctions imposed in other cases as well, although this is not a simple mechanical step. *In casu*, the negligence of X. ____ could be compared with a case in 2015: a sanction of CHF 200'000 was imposed on a company that first omitted to notify management transactions and corrected this within short time. The sanction was considered "in the lower range due to light to middle negligence and a light severity of breach".
57. Therefore, the sanction proposed by SER should be increased, at least moderately, in order to reflect comparable sanctions and the necessary preventive effect.
58. Considering all the factors presented above, a **fine of CHF 40,000** is appropriate.
59. The legally binding decision will be made available in anonymised form on the website of SIX Exchange Regulation AG (Clause 6.3 para. 3 RP).
60. Fees are levied for sanction proceedings in accordance with the List of Charges Regulatory Bodies (LocRB) (Art. 63 para. 1 LR). In case of sanction proceedings, the charges are determined on the expenditure incurred by the plaintiff (SER), adopting an hourly rate of CHF 300 per person (Clause 3.7 in connection with Clause 4.1 LocRB). In the present case, costs of SER amount to CHF [amount].
61. The costs of the Sanctions Commission amount to CHF [amount]
62. All costs in the total amount of CHF [amount] shall be borne by X. ____.

[Place], 20 November 2020

The Chairman:

The Secretary:

[sig.] Chairman

[sig.] Secretary