Decision

in the procedure SaKo

SIX Exchange Regulation AG

Hardturmstrasse 201

8021 Zurich

vs.

X.___
[address]
[city] / Switzerland

represented by attorney-at-law [...],
[address], [city] / Switzerland

On 12 April 2023, the Sanctions Commission (**SaKo**) – [...] (Chairman), [...], [...], [...] (Secretary) - decided as follows:

Decision

1) SaKo has determined that X.___ negligently violated the applicable rules regarding financial reporting and thereby its obligations pursuant to Art. 51 LR in combination with Art. 6 DCF by booking provisions that do not meet the requirements of IAS 37 for the recognition of such provisions.

2) SaKo has determined that X.___ did not violate the applicable rules regarding financial reporting and thereby its obligations pursuant to Art. 51 LR in combination with Art. 6 DFR by issuing a respective restatement.

3) X.___ is ordered to pay a fine in the amount of CHF 150'000.

4) X.___ is ordered to bear the costs of the present proceedings incurred by SER in the (reduced) amount of CHF [...] and additional charges incurred by the Sanctions Commission in the amount of CHF [...]. The total costs to be borne by X.___ amount to CHF [...].

5) Once the sanction decision has become legally binding, it will be made available in anonymized form on the website of SIX Exchange Regulation Ltd. Furthermore, the conclusion of the proceedings will be communicated in a coordinated manner with the case SER IV/2023 to the public in a single media release, with the names of the parties mentioned.

Reasons for the decision

1. Introduction and Proceedings Overview

1) In accordance with Art. 51 Listing Rules (LR) in conjunction with Art. 6 of the Directive on Financial Reporting (DFR), SIX Exchange Regulation (SER) reviews the compliance of the issuers' financial statements with the applicable accounting standard.

2) After reviewing the [20X2] IFRS annual financial statements of X.___ (X.___, Company or Issuer), SER initiated a preliminary inquiry in accordance with the Rules of Procedure (**RP**) concerning a possible violation of the applicable accounting standard. X.___ responded timely to the preliminary inquiry letter of [date] [20X3] with its letter dated [date] [20X3].

3) After considering all the evidence, SER concluded that there were indications of a potential violation of the obligations set out by the applicable accounting standard (**IFRS**) in connection with X.___'s [20X0] and [20X1] IFRS annual financial statements. Therefore, on [date] [20X3], SER initiated an investigation submitting additional questions and informing X.___ that an investigation generally concludes with the closure of the proceedings or upon an agreement, the issue of a sanction notice or the submission of a proposal for sanctions with the Sanctions Commission (Ciph. 3.4 para. 1 RP). X.___ timely responded on [date] [20X3].

4) On [date] [20X4], SER submitted to SaKo a Sanction Proposal dated [date] [20X4] including the response of the Company dated [date] [20X4]. This response included a procedural request to combine the present procedure with another procedure against X.___ and relating to ad-hoc publicity obligations.

5) SaKo confirmed receipt of the file on [date] [20X4] and granted both parties the opportunity to complement their position, notably concerning the procedural request.

6) SER responded to the procedural request on [date] [20X4] and X.___ reacted to this response on [date] [20X4].

7) The Chairman decided on the procedural request on [date] [20X4] by a separate interim decision, including the composition of the delegation and determining the languages to be used. No request for recusal was filed.

8) In summary, the Chairman declined in the interim decision to combine the two procedures but stated that each delegation shall be documented with the file for the other procedure as well and that both decisions shall be communicated in a combined media release. This shall ensure that both procedures shall be decided in a coordinated and fully informed manner.

9) The delegation deliberated on the current Sanction Proposal and made its decision on [date] [20X4].

2. Findings

2.1. Formal Findings

10) X.___ is a company incorporated under the laws of Switzerland with its registered office in [city], Switzerland. The company's registered shares are listed in the International Reporting Standard of SIX Swiss Exchange AG. Most recently i.e. on [date] [20X0], X.___ signed a declaration and accepted to be bound by the stock exchange regulations, the LR, the additional rules, implementing provisions and the RP in their latest version.

11) The violation of the LR, any additional regulations thereto or any implementing provisions thereof, may be sanctioned with one or more of sanctions listed in Art. 61 LR (Art. 60 LR). Competent to decide upon sanction proposals submitted by SER is the Sanctions Commission (Ciph. 3.4 and Ciph. 4 RP).

2.2. Material Findings

2.2.1. Facts of the Matter

12) In establishing the relevant facts for this sanction decision, SaKo declares to have considered both the exculpatory and inculpatory facts with equal care. All information that serves 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) SER states that it is an undisputed fact that the originally published [20X1] financial statements on [date] [20X2] contained errors and can in retrospect no longer be considered a faithful presentation of the relevant economic situation with respect to the IFRS Conceptual Framework.

2.3. Rules Regarding Financial Reporting

2.3.1.1. Misstatements of the [20X1] financial statements and restatement thereof contained in the [20X2] financial statements

14) On [date] [20X2], X.___'s [20X1] annual report was published (SER act. 4). On [date] and [date] [20X0], two employees of A.___, [city], [country 1] (a wholly owned subsidiary of X.___) filed whistle-blower reports in accordance with X.___'s company policies and procedures. The whistle-blowers claimed the violation of IFRS rules in connection with provision bookings of X.___'s [country 1] operations as well as topside adjustments (i.e. entries not recorded in the books of a subsidiary).

15) Upon consultation with the CEO and X.___'s external auditor [...], the Chairman of the Audit Committee engaged an independent external counsel, B.___ (**B.___**), to serve as investigative counsel and C.___ (**C.___**) as accounting and forensic expert. The mandate was to investigate into the allegations raised by the whistle-blowers for the accounting periods from [20X0] to [month] [20X2]. C.___, as an accounting and forensic expert, supported B.___ and was under the leadership of B.___.

16) Because of the errors in the [20X1] consolidated financial statements identified by B.___, X.___ decided to make a restatement in the [20X2] consolidated financial statements published on [date] [20X3] of the provisions in the [20X1] comparative period amounting to CHF [...] million. According to B.___, errors of CHF [...] million constituted intentional misstatements.

17) In the [20X2] consolidated financial statements, X.___ made a correction of errors relating to provisions for the [20X1] comparative period with respect to the opening balance sheet in the amount of CHF […] million for errors resulting from prior years and CHF […] million for errors that occurred during the [20X1] reporting period. The latter correction includes personnel provisions of CHF […] million, restructuring provisions of CHF […] million and other provision of CHF […] million in connection with the disposal of business activities.

18) The corrections increased [20X1] EBITDA by CHF […] million in total, thereof CHF […] million relating to continuing operations. Overall, after taxes, these errors resulted in an increase of net income by CHF […] million, thereof CHF […] million in continuing operations and CHF […] million in discontinuing operations.

19) According to X.___'s response on [date] [20X3], the EBITDA margin only increased from [low two-digit number]% to [low two-digit number]% due to the restatement of the [20X1] reporting period.

20) Following preliminary internal clarifications of the whistle-blower reports, a formal internal investigation was initiated on [date] [20X2]. The final investigation report was presented to X.___ on [date] [20X3]. The final report by B.___ qualified CHF […] million as an "intentional misstatement" with the purpose of "probable earnings management". [Auditor] (**[auditor]**) also concluded that CHF […] million of provisions were intentionally misstated.

2.3.1.1.1. Whistle-blower reports on [date] and [date] [month] [20X2]

21) According to the first whistle-blower report, filed by an employee of the X.___ [regional financial department] on [date] [20X2], the Regional Head of [financial department], had asked him to book two separate accounting provisions which, in the whistle-blower's view, were not in compliance with IFRS standards. After having reviewed both the specific and interpretative IFRS guidance, the disagreement could not be resolved. Furthermore, the Regional Head of [financial department] refused to solicit the view of [accounting department] or the external auditor […].

22) According to the whistle-blower, the Regional Head of [financial department] stated that as the head of the department, he was the one making the final decisions and the subordinated employees would have to abide by it. A written confirmation from him on his interpretation of the guidance and booking entries on his behalf would be "good enough" to make the controversial accounting entries. About a week later, a colleague working in the same department scheduled a meeting to persuade the whistle-blower to change his view. After several days of deliberation, the whistle-blower decided not to book the accounting provisions, because in his view, it would be breaching X.___'s code of conduct, the IFRS accounting standards and the ethical standards upheld by the Certified Public Accountants (**CPA**). According to the whistle-blower, the ethical standards of [country 1] CPAs refer to such bookings as a "red flag" in respect of financial reporting fraud.

23) The first whistle-blower continued to state that the Regional Head of [financial department] had indicated that senior management exerted pressure to find more expenses to "steer" the financial results and smooth the results over the quarters because large swings would raise questions and needed to be explained.

24) The second whistle-blower report was filed by an employee working in the [regional tax department] on [date] [20X2]. Shortly after joining X.___, the employee identified a potential issue with tax provisions, but was told by the Head of [accounting department and Head of tax department] not to pursue this matter, because it had grown historically, and no reserves would be recorded for the current year.

25) The whistle-blower stated that on [date] [20X2], the Regional Head of [financial department], the Head of [tax department] and two employees working in the [tax department] including the whistle-blower had a call. The Head of [tax department] was asked to find between [currency] [...] million to [currency] [...] million of expenses by recording provisions for sales tax on outstanding exemption certificates[1] despite the fact that those provisions did not meet the criteria under IAS 37 since the amount could not be reasonably determined or estimated. The employee filing the whistle-blower report expressed concerns that those bookings were not ethical and would "put the CPA license on the line".

26) The following day after a lengthy discussion, the Regional Head of [financial department] explained to the second whistle-blower that the purpose of the provision for tax exemption certificates was to smooth out the EBITDA over time.

27) According to the second whistle-blower report, the Regional Head of [financial department] agreed that under the [country 1] law the Company is not allowed to record a theoretical risk that cannot be reasonably estimated. On the other hand, the Regional Head of [financial department] argued the case by stating that X.___ is a Swiss company and different rules might apply in Switzerland (i.e. "*the line that you draw in Switzerland is thicker than in [country 1]*"). He further stated that Swiss auditors are very well educated and professional and sometimes they express a strong contrary opinion. However, they are a service provider to X.___ and do not want to jeopardize their mandate.

28) On [date] [20X2], a second call was arranged to discuss the provisions for missing tax exemption certificates for [country 1] sales tax. In this context, the provisions for the exemption certificates ranging from [currency] [...] million to [currency] [...] million were revisited. Additional information in follow-up calls and e-mails were requested by the Regional Head of [financial department] and were discussed with the Head of [tax department] and Head of [accounting department], which were in turn provided to [auditor] to determine the amount to be recorded. It was indicated that no provisions would be recorded locally, but on the group level. Further information was provided by an employee working in the [tax department] with the reservation that the purpose of the information provided were for internal analysis and calculation and would not meet the requirements of IAS 37.

29) On [date] [20X2], X.___ formally informed [auditor] that it had received the whistle-blower allegations and would conduct an internal investigation. The Issuer states that, "*X.___ took the whistle-blower reports very seriously and conducted a comprehensive and elaborate internal and*

[1] A sales tax exemption certificate is needed to enable a purchaser to make tax-free purchases that would normally be subject to sales tax. The purchaser needs to provide to the seller the completed form within a certain time frame after the sales, stating the reason for the tax exemption. The seller needs to keep the exemption certificate on record or could be held liable for the sales tax not collected in case of a tax audit. ([...])

external investigation regarding the allegations that had been raised by the whistle-blowers. For the external investigation, X.___ engaged external counsel B.___ to serve as investigative counsel and C.___ as accounting and forensic expert. […], X.___'s external auditor ([…]), was informed on the whistle-blower reports and the allegations and kept up to date at all times with respect to all findings of the investigation. All steps of the investigation were coordinated with [auditor] in order to allow [auditor] to conduct its review for purposes of its audit and its own investigation. This was confirmed by [auditor] in its detailed report dated [date], [20X3], to the Audit Committee (AC) and to the Board of Directors (BoD) of X.___ for the year ended 31 December [date] [20X2]. During the investigation, measures were taken to ensure a proper and unhindered process of the investigation, compliance of future entries and bookings with applicable accounting rules, and that X.___ would be in a position to give assurance with respect to the financial statements to be audited by [auditor] and published."

30) The Issuer continues "X.___ informed market participants transparently, comprehensively and immediately after having obtained knowledge of the relevant price-sensitive facts in their main points on the basis of respective interim findings of the investigation. As is correctly stated in the Sanctions Proposal, X.___ was informed of such facts by B.___'s interim report to the AC of [date] [20X3]. While continuing its work and exchange with B.___ and with [auditor] on remaining open positions, X.___ immediately convened an extraordinary BoD meeting for Sunday, [date] [20X3], to present the situation and allow the BoD to form its view and take the necessary actions. On [date] [20X3], the BoD resolved to postpone the publication of the [20X2] X.___ Integrated Report and consequently of X.___'s [20X3] annual general meeting. In line with the listing rules of SER, X.___ informed market participants by ad hoc release on [date] [20X3], before the start of trading at SIX Swiss Exchange."

2.3.1.1.2. Project Lime

31) After the CEO and the Chairman of the Audit Committee had been informed about the allegations, the Audit Committee launched an internal investigation which was coded as "Project Lime" (**investigation**).

2.3.1.1.3. [Country 1] and [Country 2] Workstream as of [date] [20X2]

32) As the allegations focused on X.___'s [country 1] and Corporate Headquarters, B.___ set up two investigation workstreams, one focused on [country 1] personnel and accounting records and another one focused on Corporate Headquarters personnel and accounting records. On [date] [20X2], the first preliminary results were presented to the Chairman of the Audit Committee and [auditor].

33) During the period from [date] to [date] [20X2], C.___ undertook an initial site visit and process walkthroughs at X.___'s [regional department] site and at X.___'s headquarters in Switzerland, respectively, to gain an initial conceptual understanding of the financial and accounting processes and procedures. The general focus was on responsible employees for authorizing journal entries and identifying at which level journal entries are performed. Interviews were conducted with the two whistle-blowers individuals at [regional department] and with individuals with Corporate functions based in [country 2] and [country 3], respectively.

34) C.___ and B.___ conducted **an expedited forensic e-data review** of preserved data of several individuals for the years [20X1] and [20X2]. Those individuals included employees at [regional department] and employees with Corporate Functions.

35) The allegations raised included:

- requesting [country 1]-related provision bookings in the areas of maintenance & services as well as indirect sales tax which were in violation of IFRS guidance;

- general concerns that X.___'s upper management used judgmental provision bookings that constitute a violation of applicable accounting rules and standards, also raising internal control concerns, including upper management's tone-from-the-top and integrity; and

- potential issues that, taken together, and if the allegations were true, could have an impact on the accuracy and closing of the [20X1] and [20X2] financial records of the affected [country 1] entities and the X.___ Group as a whole.

36) The investigation conducted an analysis of the tool used by [controlling department] for the monthly calculation of certain provision top-side entries (**forecasting and calculation tool, FaCT**), which is also referred to as "Milchbüechli". The tool consists of temporary working files in an Excel format which are updated several times between the period of the preliminary and the final Monthly Financial Reports (**MFR**).

37) The research showed that for reporting periods extended over a period of several months, the internal communication of provision effects did not always sufficiently refer to strict IFRS requirements. Instead, provisions were connected and discussed with respect to estimated and expected results.

38) When confronted with those findings, it was conceded by members of [controlling department], that the application of the short-term calculation tool created the impression that factors other than IFRS requirements play a role in provision building and assessment.

39) A restructuring provision for the [restructuring program] amounted to CHF [...] million of which CHF [...] million was allocated to the business units and CHF [...] million was held as a "contingency" in the [20X1] annual financial statements. The whole provision was recorded as a topside adjustment (i.e. in the consolidated accounts only rather than in the local accounts). During the period of the [restructuring program] the provision was pushed down into the business units (i.e. recorded in the accounting records of the subsidiaries). 16 months after the initial recognition of the restructuring provisions for the [restructuring program], respective plans for some of the areas of the program had not been initiated and no detailed calculation for the contingency was provided. B.___ concluded that contingency provisions in principle are not in line with IAS 37.

40) In addition, there remained a considerable amount of restructuring provisions already recognized in the [20X1] financial year for employees with no exit date because it was based on old information. An e-mail written in [month] [20X2] with the subject "Q2 [20X2] Steering" states

the following: "*We help Corp by not releasing much of [restructuring] provision in Q2 [20X2]. However, we have a risk here: majority of [restructuring] are not executed (29 FTE with no exit dates or FTE scope change), remaining provision [...] mio CHF*".

41) B.___ also set up one workstream focusing on [country 1] personnel and books. E-Mails written prove that there was a considerable effort to steer the Company's EBITDA during multiple quarters in the years [20X1] and [20X2]. Some quotes of e-mails regarding [country 1] provisions are listed below:

- "We have huge profits and need very likely sales tax provisions in a big amount. We were able to shelter Q2, but would need this for Q3. I will inform you after your/my holidays and we will elaborate a plan to get there – just you and me first";
- "I could be creative over here and find some bookings on exceptionals";
- "Any news? Do you need provisions now for Q3? I need your answer asap otherwise it is too late to design anything";
- "We need to know from you, if we have to further analyze and calculate this urgently for Q3 [20X2]? If not, do you need the provision for Q4? Or you just want to keep this open for a while?";
- "No provision required for Q3. For Q4 probably also no big amounts required, but it is recommended that we book the reasonable amount of provisions so that there is no surprise in the next year";
- "Let us know how much you would like us to book here in [country 1]";
- "They are looking for expenses in SG&A.... I am afraid if they have not enough, Corp again will contact region for additional SG&A expenses. I will start review for just in case";
- "A provision is just booked and amount is flexible (you tell me how much you want). Since the new Regional Head of [controlling department] took over and the Regional Controlling Manager [...] arrived, [regional controlling department] has access to Accounting and we can book whatever we want (fully in line with IFRS of course, but please still no need to tell the Head of [accounting department])";
- "I am aware that topic is very sensitive especially in [country 1], where they are threatened losing their licenses for doing things like this";
- "Finance needs the updated file to reconcile if we have sufficient provisions. In case if this is not sufficient then I will need to align with [controlling department] to check if Corporate has enough provision globally if not then we will need to increase this provision in the region".

42) Regarding sales tax exemption certificates there were conflicting views on the appropriateness of tax provisions under IFRS. In this dispute [tax department] had identified a potential risk of up to CHF [...] million caused by allegedly missing tax exemption certificates for [country 1] Sales Tax. However, upon push-back from an employee (the second whistle-blower) in local accounting, [auditor] was consulted and advised that no provision could be booked. Because of the intervention of the second whistle-blower, no provision was booked for the sales tax exemption certificates.

43) There was a considerable dispute over provisions regarding plant maintenance shutdowns. Senior Regional Accounting Manager [...], Regional Head of [accounting department] and corporate accounting in [country 2] took the stand that costs that need to be incurred to operate the business in the future are not present obligations of a company arising from past events. Since the shutdown is not a past event, a provision cannot be recognized. Provisions are not recognized for future operating losses if the entity can avoid the future expenditure by its future actions. Therefore, according to the opinion of the Senior Regional Accounting Manager [department], there is no present obligation. Because the disagreement could not be resolved, a written confirmation by the Regional Head of [accounting department] was requested to state that the postings will be booked on behalf of the Regional Head of [financial department] who takes a different view on the interpretation of the IAS 37.

44) In [20X2], a six-years-old provision of CHF [...] million for an environmental risk related to the [...] acquisition was released due to very low settlement amounts. The investigation found it to be very questionable whether this provision was still justifiable as of 31 December [20X1].

45) As a result of the forensic e-data review and the forensic accounting review covering the timeframe of [20X1]-[20X2] the following findings have been identified:

- [controlling department] has initiated bookings that have been oriented and adjusted with a focus on EBITDA margin expectations, namely the timing of certain provisions was (probably) rather driven by EBITDA considerations than by the underlying reasons for the provisions becoming apparent at the relevant point when the provision was made;

- [accounting department] did not analyze the accounting entries in detail but rather relied on the information provided by [controlling department] and [tax department];

- members of [controlling department] or [financial department] discussed that Corporate Accounting should be kept out of certain issues that were perceived as being potentially non-compliant bookings under IFRS;

- members of [tax department], [accounting department] and [financial department] were involved in expelling an inappropriate tone and approach regarding integrity and compliance topics.

2.3.1.1.4. Extended Work Plan as of [date] [20X3]

46) After the initial review, an **Extended Work Plan** was approved by the Chairman of the Audit Committee, which prioritized the impact on the publication of X.___'s [20X2] integrated report and local financial reports of X.___'s [country 1] subsidiaries. Specifically, accounting entries requiring management judgement at local and corporate level were scrutinized in the following areas: (i) restructuring programs, (ii) inventory revaluation, (iii) VAT risk and (iv) bonus provisions in nine different countries.

47) The **key findings and observations of the extended work plan as of [date] [20X3]** relate to the FaCT ("Milchbüechli") used by the [controlling department] to facilitate the provision calculation process for each quarter. The main functionality of this tool appeared to be to forecast the EBITDA impact of judgmental items and compare this forecast EBITDA with EBITDA targets for the relevant financial quarter.

48) Based on the documents and communication analysed the following findings have been identified:

    - Following the preliminary EBITDA calculation in the FaCT, suggestions were made to adapt provisions to meet EBITDA targets using a backward-logical chain to derive provision amounts from EBITDA targets;

    - There is indication that certain judgmental topside provision bookings and the EBITDA target were not wholly independent variables in the past;

    - Corporate Accounting makes accounting entries based on booking vouchers provided by [controlling department] and [tax department] with limited review by senior [accounting department] staff as they are relying on their accuracy ensured by the respective provider of the booking voucher.

49) These findings by B.___ led to the conclusion that potential EBITDA targets influenced internal provision calculations. Other judgmental provisions prepared or influenced by [controlling department] might have been the basis for booking vouchers and could have resulted in accounting entries that would constitute misstatements.

50) The Head of the [controlling department] has created the FaCT and used the tool likely without knowledge of the Head of [accounting department] and the CFO to adapt the timing and amount of certain judgmental provisions to meet quarterly EBITDA targets.

51) Through the investigation, it was identified that the Head of [tax department] in coordination with the [controlling department] may have identified certain VAT risks in several countries to submit booking vouchers containing potentially non-IFRS compliant provisions for VAT tax risks.

52) It was also identified that the Head of Global [financial department] has been aware of the attempt by [controlling department] and [tax department] to create or release quarterly topsides entries that may have resulted in non-IFRS compliant provisions requiring management judgment in the respective focus countries.

2.3.1.1.5. Updated Extended Work Plan as of [date] [20X3]

53) By the end of [month] [20X3], the work plan was further expanded, and the results were presented to the Audit Committee and [auditor] in the **Updated Extended Work Plan** on [date] [20X3].

54) The findings were as follows:

- The investigation identified a series of communications suggesting that non-IFRS compliant bookings have been made to meet certain EBITDA expectations (referred to as **Relevant Communication**);

- C.___'s Forensic Accounting Review identified several transactions during its Corporate Headquarter review, for which it <u>cannot</u> confirm:

  i) that they have been recorded in accordance with IFRS; or

  ii) that there is sufficient documentation available to C.___ to make an affirmative statement that such transactions are fully compliant with IFRS;

  iii) Those transactions are referred to as **Unconfirmed Transactions**.

- With the goal to assess whether the Unconfirmed Transactions and other transactions recorded in the financial years [20X1] and [20X2] constitute misstatements, C.___ was seeking to map the relevant communication with the Unconfirmed Transactions and was conducting additional testing of selected transactions;

- B.___ undertook a targeted review of key employees considering their role, specific knowledge of or visibility into certain transactions, communication style and/or conduct. They assigned each key employee a certain risk category with the following consequences:

  - Head of Regional [financial department] was suspended.

  - Head of [controlling department], Regional Head of [controlling department], Head of [tax department], Head of Global [financial department] and Head of [financial department] are not recommended as assurance providers anymore.

  - The two outstanding assessments of the Group CFO and the Head of [accounting department] will be submitted to the Chairman of the Audit Committee by [date] [20X3].

2.3.1.1.6. Updated Extended Work Plan as of [date] [20X3]

55) Based on the findings and observations regarding the Unconfirmed Transactions in the Updated Extended Work Plan from [date] [20X3], B.___ and C.___ further investigated whether or not these

transactions constitute intentional misstatement suggesting fraud. The updated presentation of key results was presented on [date] [20X3].

56) For this purpose, the Unconfirmed Transactions were allocated into the following three subcategories:

a. Unconfirmed Transactions for which the material identified by the Investigation suggest that it is more likely than not that such transactions were recorded as part of the effort to steer EBITDA (“**Non IFRS Compliant Transactions – EBITDA Steering**”).

   For the [20X1] financial year, a restructuring provision for the [restructuring program] of CHF […] million, restructuring provisions for […] [20X2] of CHF […] million and an adjustment related to a bonus release of CHF […] million were identified.

b. Unconfirmed Transactions for which the material identified by the Investigation received as of [date] [20X3] was not sufficient for B.___ and C.___ to make an affirmative assessment that such transactions had been recorded in full compliance with IFRS, but for which there was no suggestion that these transactions were recorded as a result of an intentional misstatement ("**Non IFRS Compliant Transactions**").

   For the [20X1] financial year a local restructuring in the amount of CHF […] million in [country 4], [country 5] and [country 1] as well as the […] litigation in [country 1] of CHF […] million was allocated into the same subcategory (total of CHF […] million).

c. Unconfirmed Transactions for which B.___ and C.___, due to the limited time available for a comprehensive review and understanding of these transactions, would require more time to come to an affirmative assessment that such transaction has been recorded in full compliance with IFRS, but for which the evidence on record did not suggest that these transactions were recorded as a result of an intentional misstatement ("**Possibly Non IFRS Compliant Transactions**").

   There were 12 transactions for the [20X1] financial year that were still under investigation and were categorized into the last category.

2.3.1.1.6.1 Additional Assurance Memorandum – CFO and Head of [accounting department]

57) Further to the above investigation concerning the [20X0], [20X1] and [20X2] financial years and because of the above findings, a nuanced assessment of the Group CFO and the Head of [accounting department] and their ability to provide assurance to the Chairman of the Audit Committee and /or the external auditor in the context of the submission of the [20X2] X.___ Group annual financial statements has been performed by B.___ and C.___.

58) B.___ and the C.___ Forensic Accounting Team conducted interviews with the CFO between [date] [20X2] and [date] [20X3]. B.___ and the C.___ Forensic Accounting Team concluded that:

   – the CFO was actively involved in communication suggesting a steering of EBITDA numbers, sometimes even suggesting further provisions with an EBITDA impact. When confronted with such documents, the CFO stated he had not intended to provide any directions to the recipients. Looking at the overall communication (on most of which he was not included), the issue appeared not to be limited to individual issues. However, the CFO maintained that he did not engage in any form of target steering through inappropriate accounting entries.

- the CFO's statements cannot be brought into line with the communication he received, and in parts was actively involved in. Specifically, in an e-mail written on [date] [20X1], the CFO states that they had "*[...] million hidden reserves which they could rebook in Q3 or Q4*". It was discussed if this should be done after H1 or Q2 [20X1]. Conversations held in [month] [20X1] showed that the CFO "*would like to show to the BoD not higher than [low two-digit number]%*". The figures were adjusted accordingly. A conversation on [date] [20X1] between the CFO and the Head of [controlling department] revealed that there was an excess of provision in the amount of CHF [...] million relating to the [restructuring program] and was being reversed. According to B.___ and C.___ this is problematic with regard to its IFRS compliance due to the lack of documentation of the increased risks known from past experience. Another CHF [...] million of contingent provisions were maintained for reasons of EBITDA steering. Additionally, a "[...] Disposal Provisions" of CHF [...] million should have been released as per instructions of [auditor]. X.___ did not follow these instructions and ended up taking it to the summary of uncorrected misstatements (**SUM**). Similar conversations took place for the [20X2] financial year proving that senior management did put in a considerable effort to steer EBITDA margins.

- The CFO claimed he had neither heard of the term "Milchbüechli" before nor had he ever seen this sort of Excel file. However, the documentation shows that he was at least sent snippets from the "Milchbüechli" (without reference to this term). In one case, the snippet included the term "target" and he provided input to these snippets.

- The CFO asserted that he spoke several times in [20X1] and [20X2] with the Head of [controlling department] to correct his communication style, and that he reminded the Head of [controlling department] verbally that provisions must be made in compliance with accounting rules. The Investigation did not identify such communication of the CFO. He further stated that he had undertaken significant efforts to increase the maturity level of X.___'s control processes and communication culture that may have led to the issues at stake when he took over from his predecessor. The CFO pointed to COVID-induced travel restrictions which made it particularly difficult for him to meet many Regional Country Heads of [...] in person to introduce and communicate a new management style.

59) Consequently, B.___ and the C.___ Forensic Accounting Team affirmed that the Group CFO was not recommended to act as an assurance provider for the representation letter to the auditor, because he had considerable visibility on the EBITDA target-driven efforts of [controlling department] and seemed to have been actively involved in these efforts. Accordingly, the CFO

did not sign the representation letter for the [20X2] financial statements where the [20X1] comparative figures were restated.

60) With the representation letters X.___ confirmed to [auditor] that, to the best of its knowledge and belief, the financial statements had been prepared in accordance with the IFRS standards and Swiss law and are free from material misstatements. The representation letters also state that the Company had informed [auditor] of all facts and circumstances that were relevant to the financial statements.

61) The representation letter for the [20X1] IFRS financial statements was signed by the Chairman of the Board of Directors and the CFO, whereas the representation letter for the [20X2] IFRS financial statements was signed by the newly appointed Chairman of the Board of Directors, the Chairman of the Audit Committee and the Head of [accounting department].

62) Through the review of relevant documents and the interviews conducted with the Head of [accounting department], B.___ and the C.___ Forensic Accounting Team summarized the key findings as follows:

- The Head of [accounting department] stated that the Corporate Accounting department did not analyze the documentation and information provided by [controlling department] and [tax department] for booking provisions in detail – but due to lack of resources - rather relied on such information to be correct.

- The Investigation has identified some communication involving members of Corporate Accounting showing an inappropriate tone regarding (accounting) integrity and transparency; in one individual case, the Head of [accounting department] was actively involved.

- The Investigation, however, has identified several communications where members of [controlling department] or of [financial department] discussed that [accounting department] should be kept out of certain issues that were perceived as potentially IFRS-problematic, indicating that they regarded Accounting as an obstacle to their rather cavalier approach.

- The Head of [accounting department] was not involved in discussions about the forecast and calculation tool ("Milchbüechli") used by [controlling department].

- In his opinion, the topics presented to him during the interview mostly constituted "bagatelles." He further claimed that all bookings were transparent and was confident that they all were in line with IFRS.

63) As a result, the Head of [accounting department] was still considered to be an acceptable assurance provider with additional assurance processes and steps recommended. This was because the Head of [accounting department] was not found to be actively involved in the conduct related to the allegations raised by the whistle-blowers nor was he engaged in any efforts to pressure others to book provisions or accruals that were not in line with IFRS.

2.3.1.1.6.2 Audit Committee Meeting on [date] [20X3] and conference call of Board of Directors on [date] [20X3]

64) The information presented at the Audit Committee Meeting on [date] [20X3], indicated that the communicated date of publication of the [20X2] financial statements could not be met and that previously published financial information needed to be restated. Based on the evaluation of the information presented in this meeting, it was concluded that the financial results will not be published as planned. This conclusion urged an extraordinary conference call of the Board of Directors on [date] [20X3], which was immediately arranged.

65) On [date] [20X3], the recently received reports from B.___ were discussed and [auditor] stated it is still in the process of evaluating the report's findings and its implications for the audit of X.___'s [20X2] consolidated financial statements. Due to certain findings identified during the investigation the risk of fraud was increased and [auditor] had to perform additional review steps to obtain reasonable assurance that the financial statements were free from fraud or error. The investigation needed to be completed before [auditor] could finalize the audit and issue its opinion.

66) During the conference call on [date] [20X3], some members of the Board of Directors stated that they do not understand why [auditor] refuses to sign off the [20X2] financial statements. A representative of the [auditor] Forensic Services argued that information was withheld in [20X1] and therefore [auditor] needed to seek a sufficient level of trust before signing off the [20X2] financial statements. Reference was made to various e-mail communication regarding different provisions leading to material uncertainty. [Auditor] Forensic Services explained that [auditor] does not only confirm with its signature that the financial statements are correct but also that the Company is adhering to laws and regulations with is now subject of the ongoing investigation.

67) In the conference call on [date] [20X3], the Board of Directors concluded that all outstanding investigative actions must first be completed to be able to give a correct and complete picture of the course of business in the integrated report and the [20X2] annual financial statements. As this could no longer be realized in due time, the Board of Directors decided to postpone the publication of the fourth quarter and the [20X2] full year financial results originally scheduled for [date] [20X3], and the Annual General Meeting.

68) In the conference call on [...] [20X3], the General Counsel concluded the meeting by stating that the publication of the [20X2] full year results needed to be postponed and consequently the Annual General Meeting as well. X.___ published an ad hoc announcement on [date] [20X3] to notify the public about the delayed publication of its fourth quarter and [20X2] full year financial results originally scheduled for [date] [20X3] and about a possible restatement.

69) Upon receipt of additional information from a X.___ employee on [date] [20X3] suggesting, in particular, that intentional misstatements may also have occurred as part of the financial years prior to [20X1] (i.e. [20X0 – 6 years] through [20X0]), additional review steps were conducted. The additional review steps included a forensic accounting review of specific transactions of these financial years, dedicated interviews, as well as an extended e-data review. The additional steps

were focused on the question as to whether transactions could be identified that would have a material impact on the integrity of the [20X1] Opening Balance Sheet.

2.3.1.1.7. Final Work Plan as of [date] [20X3]

70) Additional key review steps were identified in a further extended investigation work plan of [date] [20X3] to provide additional assurance to the Audit Committee for its review and approval of the [20X2] annual financial statements, and any necessary changes in the opening balance sheet of [20X1].

71) Altogether 38 transactions were identified by the investigators that were deemed "not compliant with IFRS", covering the periods [20X0], [20X1] and [20X2]. X.___ only consented to the adjustment of 29 of these, while 9 were not or only partially agreed. The identified transactions comprised restructuring provisions, both at Group level and at the level of subsidiary companies, the reversal of provisions for bonuses and disposal related provisions (which were mostly rejected by X.___).

72) For the [20X1] financial year alone, the following was identified:

   - 22 transactions for the [20X1] period with an aggregate volume of CHF […] million categorized as "Non IFRS Compliant transactions":

   - thereof: 6 transactions with an aggregate value of CHF […] million categorized as "None IFRS Compliant transactions (Intentional Misstatements)":

     [Table]

73) Of the remaining 16 transactions relating to [20X1], 4 transactions were not corrected and 2 only partially. The final correction affecting [20X1] EBITDA was CHF […] million (rather than the CHF […] million identified by B.___), including CHF […] million classified as intentional misstatements.

2.3.1.1.8. Extension of the publication of financial results

74) On [date] [20X3], X.___ requested an extension of the deadline of [date] [20X3] for the publication of the [20X2] annual financial statements. On [date] [20X3], SER granted X.___ the requested extension for the publication of the [20X2] full year financial results and the [20X2] integrated report until [date] [20X3]. The extension allowed X.___ to implement and finalize all required restatement corrections for the [20X1] financial statements in the [20X2] financial statements.

75) On [date] [20X3], the [20X2] financial statements were published, including the restatement of the [20X1] comparative period.

2.3.1.1.9. Audit Reporting to Audit Committee and Board of Directors

76) [Auditor] reported in the detailed report to the Audit Committee and the Board of Directors on the audit procedures and findings related to the restatement under the heading of Project Lime.

77) Given that the allegations implicated senior management in potential misstatements, the audit team re-evaluated the assessment of the risks of material misstatement due to fraud and its

resulting impact on the nature, timing and extent of audit procedures to respond to the assessed risks. In this context, additional audit procedures at certain components as well as on Group level were performed and specialized individuals from [auditor] Forensic Services were assigned to the audit.

78) [Auditor] noted that CHF […] million of the CHF […] million (impact on EBITDA) restated errors were intentionally misstated and concluded that the [20X2] consolidated financial statements (*after* the [20X1] restatement) are free from material misstatements. After the restatement, the remediation measurements implemented and the audit evidence gathered, the audit team has identified no further evidence of pervasive fraud.

79) [Auditor] noted that the investigation found that members of senior management exploited weaknesses in the internal control system to achieve a pre-determined EBITDA outcome through provision-related accounting entries and that as a result, provisions were not recorded in line with the respective IFRS rules. [Auditor] also noted that the risk of fraud through management override of controls has been amplified due the findings of the investigation.

2.3.1.1.10. Remediation of Deficiencies Identified by the Investigation

80) To ensure that the risks identified during the Investigation are addressed in a timely manner, an extensive program of remediation measures was initiated to ensure the integrity of the process taken to prepare X.___'s year-end financial statements. These include, inter alia, a greenlighting process whereby booking vouchers were reviewed before entries were booked.

81) B.___ recommends that the measures must be monitored by the Audit Committee and managed on the level of executive management led by the CEO and the CFO. Measures should cover all aspects of the financial reporting activities, namely the tone at the top, governance, policies and training, monitoring and controls of processes, reporting and people/disciplinary measures. B.___ recommend that the remediation plan must be established in the very near future and be completed by the end of the year.

2.3.1.2. Disclosure of the error correction

82) According to the note […] in the [20X2] financial statements, X.___ discloses that as a result of the information received internally, the Company undertook an investigation which focused on the recognition and measurement of certain provisions and accruals, reviewing whether these were incorrectly recognized and/or measured with the potential aim of steering the Company's results to meet internal and external targets.

83) As a result of the internal investigation, X.___ restated previously published financial statements, including the annual financial statements for the financial year ended 31 December [20X1], the unaudited half-year financial statements for the periods ended 30 June [20X1] and 30 June [20X2] as well as the unaudited quarterly reporting during those years. Errors which related back to periods before 1 January [20X1] have been corrected in the opening balance sheet of the [20X1] annual financial statements.

84) The disclosed correction of errors resulted in an increase of net income of CHF […] million (thereof CHF […] million in continuing operations) and was performed in accordance with IAS 8.

The identified deviations from previously reported figures were described as mainly due to over- or understated provisions and accruals. These corrections also resulted in consequential corrections to deferred tax assets and liabilities as well as corresponding increases/decreases of costs of goods sold and operating expenses in the income statement. Specifically, the nature and impact of these adjustments relate to the overstatement of restructuring provisions, provisions for variable salaries, provision in connection with an investigation by the EU, provisions set up in connection with the disposal of business activities, provisions and accruals for expenses of various types (e.g. legal obligations, plant maintenance). There was no impact of the restatement on the sales and cash and cash equivalent figures reported in [20X1].

2.3.2. Rules regarding Financial Reporting

2.3.2.1. Misstatement of the [20X1] annual financial statements

2.3.2.1.1. Applicable Accounting and Auditing Requirements

85) IAS 37.10 defines a provision as a liability of uncertain timing or amount. Moreover, IAS 37.14 requires that a provision should be recognized when an entity has a present obligation (legal or constructive) because of a past event, when it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation and a reliable estimate can be made of the amount of the obligation. No provision should be recognized unless all these conditions are cumulatively met (IAS 37.14).

86) IAS 37.19 clarifies that only those obligations arising from past events existing independently of an entity's future actions (i.e., the future conduct of its business) are recognized as provisions. If the entity can avoid the future expenditure by its future actions, for example by changing its method of operation, it has no present obligation for that future expenditure and no provision is recognized.

87) According to IAS 37.63 provisions shall not be recognized for future operating losses. The illustrative example 11 (repairs and maintenance) in IAS 37 explains that some assets require, in addition to routine maintenance, substantial expenditure every few years for major refits or refurbishment and the replacement of major components. IAS 16 (Property, Plant and Equipment) gives guidance on allocation of expenditures on an asset to its component parts where these components have different useful lives or provide benefits in a different pattern. The illustrative example 11 B (refurbishment costs) refers to an airline that is required by law to overhaul its aircraft once every three years. The costs of overhauling aircraft are not recognized as a provision because there is no present obligation. Even a legal requirement to overhaul does not make the cost of overhaul a liability because no obligation exists to overhaul the aircraft independently of the entity's future actions. The entity could avoid the future expenditure by its future actions, for example by selling the aircraft. Instead of a provision being recognized, the depreciation of the aircraft takes account of the future incidence of maintenance cost, i.e., an amount equivalent to the expected maintenance costs is depreciated over the three years.

88) The amount to be recognized as a provision must be the best estimate of the expenditure required to settle the present obligation at the end of the reporting period (IAS 37.36). IAS 37.42 further states that risks and uncertainties that inevitably surround many events and circumstances shall be considered in reaching the best estimate of a provision. IAS 37.59 requires

that provisions must be reviewed at the end of each reporting period and adjusted to reflect the current best estimate. If it is no longer probable that an outflow of resources embodying economic benefits will be required to settle the obligation, the provision should be reversed.

89) IAS 37.72 states that a constructive obligation to restructure arises only when an entity:

a) Has a detailed formal plan for the restructuring identifying at least:

(i) the business or part of a business concerned;

(ii) the principal locations affected;

(iii) the location, function, and approximate number of employees who will be compensated for terminating their services;

(iv) the expenditures that will be undertaken; and

(v) when the plan will be implemented.

b) Has raised a valid expectation in those affected that it would carry out the restructuring by stating to implement that plan or announcing its main features to those affected by it.

90) According to the IFRS conceptual framework (**CF**) 2.5, faithful representation is a fundamental qualitative characteristic of useful financial information. To be useful, financial information must faithfully represent the substance of the phenomena that it purports to represent (CF 2.12). A perfectly faithful representation is complete, neutral, and free from error (CF 2.13). Although neutrality is supported by the exercise of prudence, the overstatement of liabilities or expenses is not allowed. Such misstatements can lead to the understatement of expenses in future periods (CF 2.16).

91) A neutral depiction is without bias in the selection or presentation of financial information and not slanted, weighted, emphasized, de-emphasized, or otherwise manipulated to increase the probability that financial information will be received favourably or unfavourably by users (CF 2.15).

92) According to IAS 8.5 prior period errors are misstatements in the entity's financial statements for one or more prior periods arising from a failure to use, or from misuse of reliable information that was available when financial statements for those periods were authorized for issue and could reasonably be expected to have been considered in the preparation and presentation of those financial statements. Such errors include the effects of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud.

93) IAS 8.41 states that errors can arise in respect of the recognition, measurement, presentation, or disclosure of elements of financial statements. It further describes that financial statements do not comply with IFRS if they contain errors that are material or immaterial but are made intentionally to achieve a particular presentation of an entity's financial position, financial performance, or cash flows.

94) International Standard on Auditing (**ISA**) 240 clarifies the auditor's responsibility to consider fraud in an audit of financial statements. The standard distinguishes fraud from error and describes the two types of fraud that are relevant to the auditor, that is, misstatements resulting from misappropriation of assets and misstatements resulting from fraudulent financial reporting. The term "fraud" refers to an intentional act by one or more individuals among management, those charged with governance, employees, or third parties, involving the use of deception to obtain an unjust or illegal advantage.

95) According to ISA 240 two types of intentional misstatements are relevant to the auditor, that is, misstatements resulting from fraudulent financial reporting and misstatements resulting from misappropriation of assets.

96) Fraudulent financial reporting involves intentional misstatements including omissions of amounts or disclosures in financial statements to deceive financial statement users.

97) Fraudulent financial reporting often involves management override of controls that otherwise may appear to be operating effectively. Fraud can be committed by management overriding controls using such techniques as:

   - Recording fictitious journal entries, particularly close to the end of an accounting period, to manipulate operating results or achieve other objectives;

   - Inappropriately adjusting assumptions and changing judgments used to estimate account balances;

   - Concealing, or not disclosing, facts that could affect the amounts recorded in the financial statements;

98) ISA 240 further stipulates that fraudulent financial reporting can be caused by the efforts of management to manage earnings in order to deceive financial statement users by influencing their perceptions as to the entity's performance and profitability. Such earnings management may start out with small actions or inappropriate adjustment of assumptions and changes in judgments by management. Pressures and incentives may lead these actions to increase to the extent that they result in fraudulent financial reporting. Such a situation could occur when, due to pressures to meet market expectations or a desire to maximize compensation based on performance, management intentionally takes positions that lead to fraudulent financial reporting by materially misstating the financial statements. In some other entities, management may be motivated to reduce earnings by a material amount to minimize tax or to inflate earnings to secure bank financing.

2.3.2.1.2. Subsumption

99) For the sake of clarity, it needs to be reminded that the use of the term fraud in accounting (IAS 8.5) and auditing (ISA 240) refers to misappropriation of assets or the intentional misstatement of financial reporting. No evidence of misappropriation of assets came to light during the proceedings and no allegations are made in this regard. Any use of this term shall solely be understood as intentional misstatement of financial reporting in terms of IAS 8.

100) To be considered a faithful representation in accordance with the IFRS CF, financial information needs to be depicted in a neutral way without consideration whether it will be received favourably or unfavourably by users. This is particularly important for a balance sheet item like provisions that is by its nature subject to uncertainty (IAS 37.10). A large company like X.___ will have dozens, if not hundreds of individual provision items. If each single one of these is estimated carefully, neutrally and without bias, there will still be measurement inaccuracy, with some of these provisions being estimated too low, while others would be estimated too high. However, it is assumed that generally there will be an offsetting effect between these individually inaccurate estimates, and overall, such a neutral and unbiased estimate is considered a faithful representation in the sense of the IFRS Conceptual Framework despite any remaining measurement uncertainty.

101) However, this is not the case anymore, if there is deliberate intent to use estimates in a biased way to achieve a certain outcome. In such a scenario, there will be a systematic over- or understatement of the estimates and the resulting numbers can no longer be considered a faithful representation.

102) Regardless of whether an error is quantitatively material, immaterial errors made intentionally are always to be treated as material errors according to IAS 8.41. Material prior period errors must be corrected retrospectively ("restatement") according to IAS 8.42. This is also confirmed by the investigation, where it is stated that materiality for the purpose of a retrospective correction refers to both quantitative and qualitative aspects. An example of the latter is an error because of fraud or an intentional misstatement to achieve a certain target.

103) X.___ states that total corrections due to the [20X1] restatement increased the continuing operations in [20X1] EBITDA by only [digit <1] percentage points ([low two-digit number]%) after the restatement as the EBITDA increased to CHF [...] million ([low two-digit number]% EBITDA margin) from the amount before restatement of CHF [...] million EBITDA ([low two-digit number]% EBITDA margin).

104) By correcting the [20X1] financial statements with a restatement, X.___ concedes that the errors corrected in the [20X1] financial statements are either immaterial errors made intentionally or material errors. Since the total correction changed X.___'s important performance indicator EBITDA in percent of sales by a relatively immaterial [digit <1] percentage points only, it follows according to SER that the restatement is a result of intentional misstatement.

105) SER claims that "X.___ does not dispute that the [20X1] financial statements contain errors regarding the recognition and measurement of provisions. X.___ also does also not take the position that the errors are material." X.___ takes a contrary view on this in its statement of [date] [20X4]: "The quantitative materiality applied on an annual basis was CHF [...] million in terms of EBITDA impact (... [auditor] Audit Report on [20X2] Consolidated Financial Statement...), The corrections ultimately made affected the [20X1] EBITDA by approximately CHF [...] million, which means that a restatement of the [20X1] financial statements had to be made anyway, regardless of any qualitative factors or assessment. ..."

106) Even if the errors would be quantitatively material, the following facts further substantiate in the view of SER that the correction of errors constitute intentional misstatements.

107) The final report of B.___ explicitly specified an amount of CHF [...] million of the total correction as “intentional misstatements”.

108) For example, the recognition of a restructuring provision requires a detailed plan, including the timing when it will be implemented. Restructuring provisions were booked and kept on the books even though the plan was not initiated after 16 months and no exit date for several employees was agreed. For the “contingency” part of the provision of CHF [...] million no detailed calculation was provided. Therefore, this provision does not meet the requirements of IAS 37.72 of a detailed formal plan specifying when it will be implemented, and that fact was known to responsible employees.

109) The first whistle-blower report as of [date] [20X2] states that the requested bookings constitute a breach of X.___’s code of conduct, the IFRS accounting standards and the ethical standards upheld by the Certified Public Accountants (CPA) in [country 1]. Also, the employee working in the tax department, who was filing the second whistle-blower report raised concerns that those bookings are not ethical and will “put the CPA license on the line”. The withdrawal of a CPA license is a very severe measure that occurs only in the event of grave violations of ethical standards upheld by the [country 1] Institute of Certified Public Accountants. This indicates that the first whistle-blower considered X.___’s practice of using provisions for EBITDA steering to constitute intentional misstatements.

110) When the CFO was confronted with the documentation of the findings, he denied that there were EBITDA targets that needed to be achieved and that he had not intended a steering by way of provision-building. This denial, however, in B.___’s view cannot be brought in line with the documentation and e-mails sent out. While it may be true that the numbers communicated to him do not always exactly correspond with the figures which were ultimately reported, it would have been expected of him to question the rationale for the "targets" sent to him (which were apparently taken from the “Milchbüechli”). It is also difficult to understand why the CFO was apparently not stunned by the fact that the Head of [controlling department] asked him for his "preferences for the two EBITDA" to do a "fine steering". In contrast, he rather replied by stating specific figures. B.___ noted that the CFO occasionally even made particular suggestions for additional provisions in consideration of an EBITDA target. Therefore, X.___ has followed the recommendation of B.___, according to which the CFO was deemed unsuitable to provide a guarantee for the IFRS-compliant [20X2] annual financial statements in a representation letter. Given his expertise over the financial situation of a company, a CFO is an ideal assurance provider for the auditor. It follows that if a CFO is not found suitable to act as assurance provider, the allegations against him must be considered to be grave.

111) The Regional Head of [financial department] and the Head of [controlling department] were suspended in [month] and [month] [20X3], respectively, and were given notice of termination with effect as of [date] [20X3]. The Regional Head of [financial department] managed a broad array of financial matters including tax accounting, controlling and treasury functions. The Head of [controlling department] initiated and managed accounting entries. As set out in e-mails under the [country 1] workstream, both employees were involved in communications and decisions regarding the overstatement of provisions and accruals to meet EBITDA expectations. Irrespective of the fact that both were longstanding employees with in-depth knowledge of

X.___'s business, it was decided to dismiss them due to the breaching of IFRS standards and X.___'s code of ethics. The dismissal of longstanding senior management personnel is a measure not taken lightly that further substantiates the severeness of the matter.

112) Despite considerable pressure applied in the meeting as of [date] [20X3], [auditor] refused to sign off before the investigation was finalized. In [auditor]'s opinion the e-mails regarding provisions were leading to material uncertainty. Denying or postponing the issuance of the audit opinion is an extreme measure that an auditor will only undertake if there is reason to suspect fraudulent financial reporting according to ISA 240 because it can likely jeopardize the re-election as auditor.

113) [Auditor]'s investigation during their audit process identified weaknesses in X.___'s internal control system (**ICS**) as the root cause of the problem. Members of senior management exploited those weaknesses in the ICS to have provision-related accounting entries executed to intentionally achieve and be able to publish a predetermined EBITDA outcome on a yearly, half-yearly and quarterly basis. As a result, estimates were biased, and provisions were not recorded in line with IAS 37. Evidence demonstrated a conscious and concerted effort to misrepresent or withhold information from the financial reporting department required by the ICS for the critical assessment and review of proposed accounting entries concerning provisions.

114) During [auditor]'s audit process, they have reached the following conclusions:

- Documentation was extremely limited, in some cases, only context-lacking e-mail communication was presented;
- Documentation or clarifications were provided close to or after publication dates;
- Contentious entries would not be sent to specific individuals known for their integrity and thoroughness of review in the financial reporting department in order to circumvent the four eyes principle and facilitate management override of controls;
- The controlling function acted as a de-facto guardian of information and exploited X.___'s lack of communication between departments (HR, Tax, Accounting) to influence and facilitate incorrect accounting entries in the area of provisions;
- IFRS requires provisions to be reassessed at each reporting date, which includes quarterly publications. In fact, provisions were selectively reassessed to facilitate the desired EBITDA outcome;
- X.___ has historically relied on a disproportionate amount of topside accounting entries to complete its financial reporting in a timely manner. The perpetrators leveraged this weakness and steered provision accounting as top-side entries.

115) [Auditor]'s claims that the results of the investigation by B.___ alleging **intentional misstatement** for the [20X1] consolidated financial statements were credible, resulting in the following:

- The conclusion that an amount of CHF […] million (comprising personnel provision and restructuring provisions) of CHF […] million, which have been restated in the [20X1] financial statements, was intentionally misstated;
- The [20X1] restatement of CHF […] million is split into CHF […] million for continuing business and CHF […] million for discontinued business;
- Seven quarters from March [20X1] to September [20X2] as well as the [20X1] and [20X2] half-year financial statements and the [20X1] consolidated financial statements of the Company had to be restated;
- Nine senior management members were deemed not fit to provide direct or indirect contributions to the financial reporting process without oversight;
- Two senior management members have been suspended;
- A comprehensive remediation package has to be executed by X.___.

116) X.___ asserts in the response letter that [auditor] concluded that the allegations regarding earnings management were credible, but that no further evidence of pervasive fraud could be found. X.___'s assertion that [auditor] has not found any further evidence of fraud, is taken out of context. [auditor] explicitly states that CHF […] million of restated provisions were intentionally misstated in the [20X1] consolidated financial statements. [auditor] considered that there was evidence which demonstrated that there was a conscious and concentrated effort to misrepresent or withhold information from the financial reporting department required by the ICS for the critical assessment of the accounting entries. However, from the audit procedures performed ***after*** the correction of errors by a restatement and the immediate remediation measures taken, ***no further*** evidence of pervasive fraud was identified.

117) SER summarizes, if quantitatively immaterial errors are restated, it must be concluded that the errors constitute intentional misstatements. Irrespective of whether the corrected errors are assessed to be material, the independent investigation led by B.___ detected non-IFRS compliant provisions, of which a portion of CHF […] million were found to be intentionally misstated. Finally, this conclusion was also reached by the external auditor [auditor].

118) X.___ opposes this interpretation by SER in the statement of [date] [20X4]:

- *"B.___ categorized six transactions with an aggregate volume of CHF […] [Mio] as "Non IFRS Compliant Transactions (Intentional Misstatements)". This is a categorization by using the defined term "Non IFRS Compliant Transactions (Intentional Misstatements)". In the same document, B.___ makes it clear that this term has to be understood as presented int the [date], [20X3], presentation. In the [date], [20X3], presentation, B.___ defined the relevant transactions under the term "Non IFRS Compliant Transactions – EBITDA Steering") as follows: "Unconfirmed Transactions for which the material identified by the Investigation suggest that it is more likely than not that such transaction was recorded as part of an effort to steer EBITDA. … We believe that from a legal point of view, a qualification of "more likely than not that such transaction was recorded as part of an effort to steer EBITDA" is not tantamount to a qualification as an* *"intentional misstatement", and the difference matters in X.___'s view. Already 51% are "more likely than not".*

- *In [auditor]'s detailed report dated [date], [20X3], to the AC and to the BoD for the year ended 31 December [20X2], [auditor] concluded "that the results of the investigation can be relied upon as audit evidence" and that the "investigation found the allegations to be credible, resulting in: B.___ concluded that CHF […] mio of CHF […] mio that have been restated in the [20X1] financial statements was intentionally misstated". Hence, [auditor] after its own review piggybacked on B.___'s conclusion, since in [auditor]'s view the results of the investigation could be relied upon as audit evidence, but [auditor]'s statement regarding B.___'s conclusion is not fully supported by (or possibly just a summarized presentation of), and therefore limited to, B.___'s own conclusions as set out above.*

- *… The findings of the investigations were "more likely than not" for the six transactions listed. … Audit (or accounting evidence) is not the same as legal evidence. In addition, [auditor] explicitly states that the "auditor does not make legal determinations of whether fraud has occurred"."*

119) SaKo renders its decision based on legal not on accounting considerations. Although a sanction imposed by SaKo in the form of a fine is to be qualified as a measure of civil law (e.g. as contractual penalty), SaKo has to be "fully convinced of the correctness of a certain fact beyond reasonable doubt". The level of "more likely than not" is not sufficient to substantiate "intentional misstatement".

120) SaKo considers that the points mentioned above by SER indicate substantial weakness in internal controls and an inappropriate aggressiveness of accounting policies. However, SaKo does not follow SER's conclusion that an intent can be sufficiently attributed to X.___ neither from the restatements made nor from the above-mentioned factors. The Sanctions Proposal does not provide sufficient substantiation of intent but mainly repeats certain other findings of the investigation. For example, allegations of whistle-blowers are no proof for intentional misstatements. It was for the investigation to investigate and determine whether the allegations raised were true and could be proven beyond reasonable doubt to represent an "intentional misstatement" of the Company's financial results. The individual facts mentioned in the Sanctions Proposal demonstrate the significant weakness in the controlling and accounting system of X.___. But they are insufficient proof for intentional misstatements. The fact of a restatement is also not proof neither as the restatement was needed for quantitative considerations irrespective of qualitative arguments only as alleged by SER.

121) Nevertheless, the cumulative impact of the errors identified by the investigation did result in a need to restate [20X1] consolidated financial statements as the total amount of the adjustments exceeded the [auditor] limit for recording adjustments. As a consequence, X.___ must be held responsible for violations of the applicable rules and regulations in the preparation of its [20X1] consolidated financial statements.

2.3.2.2. Insufficient disclosures related to the error correction in the [20X2] IFRS consolidated financial statements

122) According to IAS 8.5 prior period errors are misstatements in the entity's financial statements for one or more prior periods arising from a failure to use, or from misuse of reliable information that was available when financial statements for those periods were authorized for issue and could reasonably be expected to have been considered in the preparation and presentation of those financial statements. Such errors include the effects of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud.

123) According to IAS 8.49 an entity shall disclose prior period errors by indicating the nature of the prior period error. For each period presented, the amount of the correction for each financial statement line item affected and the basic and diluted earnings per share shall be published. In addition, the amount of the correction at the beginning of the earliest prior period presented has to be disclosed. If retrospective restatement is impracticable, the circumstances that led to the existence of that condition but also how and from when the error has been corrected needs to be described.

124) The correction of errors should be done by restating the comparative amounts for the prior period(s) presented in which the error occurred. If the error occurred before the earliest prior period presented, the opening balances of assets, liabilities and equity for the earliest prior period must be restated.

125) Consequently, IAS 8.49 requests an entity to disclose prior period errors by indicating the nature of the prior period error which are specified in IAS 8.5 as mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud.

126) SER outlined, that X.___ disclosed in Note [...] "Restatements – Correction of errors" that the deviations from previously reported figures resulting from the restatement of the [20X1] financial statements are mainly due to over- or understated provisions and accruals. The disclosure requirement regarding the nature and impact of the restatement was covered by listing different classes of provisions in compact form and a reference to the notes, which provided a numerical breakdown of the restatement by different classes of provisions.

127) X.___ remained silent whether the restatement is a matter of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, or fraud.

128) As a result, the disclosure requirements according to IAS 8.49 are not met in the view of SER: "Given the consequences and implications, the missing disclosures on the nature and impact of the error need to be considered as qualitatively material." The statement that provisions were adjusted to correct errors and a compiled list of provision classes concerned, is not an adequate description of the nature and impact of the error that resulted in those far-reaching consequences and implications of the investigation.

129) X.___ disagrees with this view and states in its statement of [date] [20X4]: "X.___ notes that the restated [20X1] financial statements and the [20X2] financial statements were audited by [auditor] and respective disclosure expressly confirmed by [auditor] to be in order. ... [auditor]

concludes that the disclosures related to the error corrections in the [20X2] IFRS financial statements and with respect to the restated [20X1] annual financial statements were in line with IAS 8. …".

130) SaKo shares the view of [auditor] and of X.___. Note […] does mention the circumstances that led to the restatement and that the appropriateness of the measurement of provisions and accruals was the key reason for the restatement.

131) SaKo considers that the disclosures around prior year errors were sufficient considering IAS 8.49. SaKo determines that X.___ did not violate IAS 8 in connection with X.___'s disclosures related to the error corrections in the [20X2] IFRS financial statements. SaKo, therefore, rejects the allegations made by SER under this section.

3. Sanction

132) As set out above, X.___ violated Art. 51 LR in combination with Art. 6 DFR, IAS 37 and the IFRS conceptual framework by enabling Non-IFRS Compliant Transactions to be recorded in its accounting records due to weaknesses of internal control and too aggressive accounting policies leading to a necessary restatement.

133) Such violations are sanctioned in accordance with Art. 61 LR. The sanctions listed therein may be imposed cumulatively. Art. 61 para. 2 LR provides that in determining the sanction to be imposed, due consideration must be given to the severity of the breach and to the degree of fault. In cases where the issuer shall be sanctioned with a fine, the impact of the sanction on the party concerned has also to be considered when setting the amount of the fine.

3.1. Degree of Fault

3.1.1. Commission of the Breach

134) The LR requires issuers to ensure compliance with the LR, additional rules and related implementing decrees at all times. In the present case, the sanction is addressed to a legal entity and requires that the issuer has not taken all necessary and reasonable organizational precautions to prevent a breach of the obligations under the LR. Accordingly, the fault is assessed based on largely objective standards. The conduct of the natural persons or bodies acting on behalf of the issuer are attributed to the latter (see decisions of the Sanction Commissions of 14 April 2015 [SaKo 2015-AhP-I/15], number 19; of 30 July 2010 [SaKo 2010-CG-II/10/SaKo 2010-MP-I/10], number 13; sanction notice of SIX Exchange Regulation AG of 12 August 2013 [SER-KTR-FOR-I/13], number 28; of 4 February 2013 [SER-MT II/12/SER-AHP I/12/SER-Listing I/12], number 103).

135) Anyone who violates the relevant provision consciously acts intentionally. An issuer acts with conditional intent, if it does not directly intend to violate an obligation, but at least accepts the likelihood of a violation (see decisions of the Sanctions Commission of 28 June 2012 [SaKo 2012-AHP-II/11], number 46; sanction notice of SIX Exchange Regulation AG of 11 October 2013 [SER-AHP-I/13], number 48; of 12 August 2013 [SER-KTR-FOR-I/13], number 26; of 4 February 2013 [SER-MT II/12/SER-AHP I/12/SER-Listing I/12], number 101).

136) 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, including the applicable accounting standard, comments and practice of the stock exchange bodies (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 issuer's 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-I/13], number 49; of 4 February 2013 [SER-MT II/12/SER-AHP I/12/SER-Listing I/12], number 104).

137) Regarding the Company's [20X1] consolidated financial statements it must be noted that an elaborate investigation led to the identification of accounting errors, which in their cumulative effect resulted in an obligation to restate the [20X1] consolidated financial statements as the cumulative amount exceeded the threshold set by the Company's external auditors for such an adjustment.

138) SaKo acknowledges that it is common practice for controlling departments to simulate and evaluate the consequences of required and potential period-end closing entries on the period-end financial results and comparing these results to targets and expectations. Therefore, an excel-sheet performing this function, even if called "Milchbüechli", cannot be taken by itself as an intentional steering of results. However, SaKo expects that all closing entries are sufficiently documented to ensure compliance with accounting standards and that changes in their circumstances are regularly reflected in the calculation and measurement of the amount recorded at each period-end. This is particularly the case for the more judgemental areas, such as provisions.

139) Like many companies, the Issuer is extremely target oriented. In these circumstances, in order to avoid that over-zealous finance team members do not use inappropriate means to meet the financial targets, it is important that there are strong internal financial control checks and balances to ensure all accounting rules and regulations have been respected.

140) In the opinion of SaKo, the Company had several significant breakdowns in its system of financial internal controls and did not ensure that all its internal checks were followed. Significantly it did not periodically and rigorously assess the appropriateness of all period-end accruals and provisions by its senior Head of [accounting department].

141) As a result of this, the Company accepts that it has recorded several Non-IFRS Compliant Transactions in its financial statements which resulted in the requirement to restate its [20X1] consolidated financial statements.

142) X.___'s conduct is qualified by SaKo as **negligent.** However, SaKo considers that the number and value of the individual errors detected after the extensive investigation, does not meet the high legal hurdle of pervasive "intentional misstatement".

143) Regarding SER's views that there are **insufficient disclosures** related to the reasons given for the error correction in the [20X2] IFRS financial statements, SaKo disagrees with SER and concludes that there is **no violation of the IFRS rules**.

3.1.2. Behaviour after the Breach and in the proceedings

144) The behaviour of the Issuer after the violations is regarded as positive. Once the whistle-blower reports had been received, X.___ investigated into the allegations and initiated an internal and later, when the suspicion was substantiated, an external investigation. Further X.___ took organizational measures and important steps (such as suspension of Regional Head of [financial department]) to prevent similar violations occur again. These facts are considered by SER as mitigating factors.

3.1.3. Behaviour in the previous years

145) On [date] [20X0] the Sanctions Commission already sanctioned X.___. The Decision entered into force 20 trading days later. The violations set out in section 1.1 occurred with the publication of the [20X1] annual report on [date] [20X2]. Accordingly, the Decision of [date] [20X0] must be taken into account when assessing any subsequent sanctions (Ciph. 2.6 para. 4). In summary it can be stated, that X.___'s conduct in previous years is to be considered negatively. SaKo takes this into account by imposing a more severe sanction.

3.2. Severity of the Breach

146) The annual financial statements are one of the most important instruments for investors to assess and analyse the financial situation of a company. Therefore, it is of the utmost importance to present fairly, in all material aspects, the financial position of a company (see decision of the Sanctions Commission dated 13 August 2013 [SaKo 2013-AHP-I/12], number 33 and dated 28 July 2012 [SaKo 2012-AHP-II/11], number 56).

147) As discussed above X.___'s [20X1] annual report and consolidated financial statements contained various errors which in total required a restatement of the [20X1] consolidated financial statements. However, the consequence of this was that the key financial figures were only slightly improved. Further, the misstatements have been corrected in the subsequent annual report and numerous steps have been undertaken to prevent similar errors. Considering the nature of the cumulative error (discovered by X.___ during an investigation concentrated on the potential manipulation of EBITDA margins) and the impact on investors' trust, the breaches have to be considered to be in **the lower range of severity**.

3.3. Sensitivity to Sanction

148) Taken into account the severity of the breach and the degree of fault, SaKo considers a fine to be the appropriate sanction in accordance with Art. 61 LR.

149) When quantifying the sanction amount the sensitivity of the company to sanctions must be taken into account. 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-II/11], number 63 et seq. and of 8 December 2011 [SaKo 2011-AHP-I/11, SaKo 2011-CG-I/11], number 37).

150) X.___'s net result attributable to the shareholders for the financial years [20X2] and [20X1] amounted to CHF [...] million and CHF [...] million respectively. The net cash inflows from operating activities were CHF [...] million and CHF [...] million respectively. Cash and cash equivalents amounted to CHF [...] million and CHF [...] million respectively while total equity stood at CHF [...] million and CHF [...] million, respectively.

151) In view of the above-described economic situation the **sensitivity to sanctions** of the Company **is low**.

3.4. Amount of the sanction

152) The Financial Market Surveillance Authority expects that Stock Exchanges in Switzerland enforce all applicable rules with strict measures. The Sanctions Commission has already warned that it intends to raise the fines for breaches compared to the practice of earlier years, so prior levels of fines do not automatically set the standard for its current practice. The purpose of fines is not only to penalize the past, but also to prevent breaches of the rules in the future. The sanction should in fact have a preventive effect [SAKO 2016 – SER 29/15]: "*in recent years it has become clear that it is necessary to impose stronger sanctions for violations of the rules of the Exchange. The Sanctions Commission therefore is tending to raise the fines for breaches compared to the practice of earlier years … The sanction should have a preventive effect."*. This policy was confirmed e.g. in the decisions SaKo 026/19, 051/21, 061/21, I/2022 (not yet entered into force) or II/2022 taking steps to impose higher sanctions in respect of a preventive effect.

153) The limit for a sanction is CHF 10 Mio for intentional violations and CHF 1 Mio in cases of negligence. Sanctions can be combined in cases of multiple violations. In the current case, one of the two alleged violations must be sanctioned. The commission and the severity of the breach lead to a sanction in the lower range, whereas the previous behaviour, the weaknesses in the organization, the size of the company and the sensitivity to a sanction justify a higher amount.

154) Considering all the relevant factors for determining the sanction, SaKo sanctions X.___ with a **fine of CHF 150'000**.

3.5. Publication of the Decision of the Sanctions Commission

155) As stated in the interim decision of [date] [20X4], the information of the public shall be co-ordinated with the communication on the second proceeding against the same Issuer relating to ad hoc publicity. Therefore, any publication on this case will be postponed until both decisions enter into force or the time to submit an appeal has elapsed. If an appeal should be filed against one of the decisions, only the publication of the decision against which an appeal has been filed, shall be postponed.

156) According to Ciph. 6 para. 7 RP, the public will be informed of any investigation concluded by a legally binding sanction decision. In addition, the legally binding decision of the Sanctions Commission will then be published on SER's website in anonymous form (Ciph. 6 para. 8 RP). In

addition, there will be a media release, including the name of the company, informing the public on the closure of both cases.

3.6. Costs

157) In case of sanction proceedings, charges are determined based on the expenditure incurred adopting an hourly rate of CHF [...] per person according to Ciph. 3.7 in connection with Ciph. 4.1 of the List of Charges Regulatory Bodies (LOC). In the present case, SER indicates its charges to date with CHF [...]. SaKo **reduces these charges to CHF [...]** as the Sanction Proposal was followed only partially.

158) The costs of the Sanctions Commission amount to **CHF [...]** and shall also be borne by X.___. These costs include half of the costs for the interim decision. The other half will be considered in the second proceeding.

159) Therefore, X.___ must cover **total costs of CHF [...]**.

[city], 13 June 2023

The Chairman: The Secretary:

[Sig.] Chairman [Sig.] Secretary