Decision

in the procedure SaKo V/2022

SIX Exchange Regulation AG
Hardturmstrasse 201
8021 Zurich

vs.

X.___
[Address]

represented by [Legal representatives], [Address]

The Sanctions Commission (**SaKo**) – [...] (Chairman), [...] (Member), [...] (Member), [...] (Secretary) - decided on 31 January 2023 as follows:

Decision

1. **X.___ violated the applicable rules regarding Listing and thereby its obligations pursuant to Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 (1) and Annex 1 Ciph. 2.01 (1) DRRO and Art. 10 para. 1 DFR LR with conditional intent by failing to publish and file an annual report for the financial year [Year - 1] with SIX Exchange Regulation AG within the regulatory and repeatedly extended deadline.**

2. **X.___ shall be ordered to pay a fine in the amount of CHF 100'000.**

3. **X.___ is ordered to bear the cost of the proceedings incurred by SER in the amount of CHF [...] and additionally the charges incurred by the Sanctions Commission in the amount of CHF [...], resulting in total costs of CHF [...].**

4. **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 to the public in a media release, with the names of the parties mentioned.**

An appeal can be filed against this decision according to Ciph. 5.3 al. 2 LOC within 20 trading days after being served with this decision. Arbitration proceedings will be instituted upon delivery of a written notice of arbitration against the other party to the lower instance, i.e. the Sanctions Commission ([...]) according to Ciph. 2.1 Rules of Arbitration.

Reasons for the decision

1 Proceedings Overview

1 X.___ (**X.___** or **Issuer**) failed to publish and file an annual report with SIX Exchange Regulation AG (**SER**) within the initial deadline stipulated by the Directive on Regular Reporting Obligations (**DRRO**) and the Directive on Financial Reporting (**DFR**) until [Date].

2 X.___ was granted three consecutive extensions of the deadline by SER and an additional non-extendable extension by the Regulatory Board of SIX (**RB**). The ultimate (i.e. fourth) and final extension granted expired on [Date]. However, X.___ failed to publish and file the [Year - 1] annual report within this substantially extended final deadline. The annual report [Year - 1] has been provided on [Date] only, after the Sanction Proposal was elaborated.

3 Because of X.___' failure to publish and file the [Year - 1] annual report, by decision dated [Date], SER ordered a trading suspension of X.___' shares based on Art. 57 LR. This suspension was lifted after the Company finally published its annual report on [Date].

4 Based on these circumstances, SER initiated an investigation in the sense of Ciph. 3.3 para. 1 of the Rules of Procedure (**RP**) against X.___ on [Date]. For the purpose of further ascertaining the facts as part of the investigation (Ciph. 3.3 para. 2 RP), X.___ was requested to answer additional questions and to submit related documentation. X.___ responded timely to the letter regarding the initiation of an investigation by answer dated [Date].

5 The Issuer published its half-yearly report (ending [Date]) on [Date] after it had been granted a corresponding exemption. This extension was necessary as a half-yearly report includes the balance sheet figures of the full-year report.

6 On [Date], SER submitted a Sanction proposal dated [Date] as well as the response from X.___ dated [Date] to the Sanctions Commission (**SaKo**).

7 After SaKo confirmed receipt of the file, SER requested to file a reply to X.___'s statement. Therefore, SaKo allowed a further exchange of submissions and fixed the formal deadlines (Ciph. 4.1 para. 2 Rules of Procedure).

8 SaKo received the statement of position by SER on [Date] and the statement of X.___ to such submission on [Date], both within the deadlines set.

9 The delegation discussed the Proposal on [Date] and decided on the case.

2 Findings

2.1 Formal Findings

10 X.___ is a company incorporated under the laws of the [Country] with its registered office in [Place]. The company's registered shares are listed pursuant to the [Listing segment] of SIX Swiss Exchange AG. On [Date], X.___ signed the Declaration of Consent and thereby accepted

to be bound by the stock exchange regulations, the LR, the additional rules, implementing provisions and the RP each 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 considered both the exculpatory and inculpatory facts with equal care. All objects and information that serve to determine the facts of the case are subject to free evaluation and are deemed to be evidence (Ciph. 3.1 para. 1-2 RP).

2.2.1.1 X.___'s failure to publish and file the Annual Report [Year - 1]

13 X.___'s financial year [Year - 1] ended on [Date].

14 As X.___ was unable to publish and file the annual report [Year - 1] within the initial deadline until [Date], it requested an extension of the deadline until [Date] by letter dated [Date]. X.___ essentially stated that the delay occurred due to "the issuance of new shares related to the business combination" which took place on [Date]. The request was granted by SER on the same day, with reservations and under multiple conditions.

15 By letter dated [Date], X.___ requested a second extension of the deadline until [Date] on the same grounds. SER granted X.___'s request with reservations and under multiple conditions by decision dated [Date]. A third extension of the deadline until [Date] was requested by X.___ on [Date] and granted with reservations and under multiple conditions by SER on [Date].

16 On [Date] X.___ filed with SER another request to extend the deadline to publish and file its annual report [Year - 1] until [Date], stating in essence that even though the annual report [Year - 1] was completed, extra time to review and write the independent auditors report was needed. By decision dated [Date] the Regulatory Board (**RB**) granted X.___'s request for a temporary exception respectively exemption from the disclosure obligation in connection with the publication and the filing of the annual report [Year - 1] with reservations and under multiple conditions. The publication deadline was extended for the last time until [Date]. Prior to that SER, however, ordered a trading suspension of X.___' shares on SIX Swiss Exchange based on Art. 57 LR in order to guarantee orderly and fair trading. The final extension of the publication exemption granted by the RB expired on [Date] without X.___ publishing and filing the annual report [Year - 1] with SER. The annual report [Year - 1] was published on [Date] only, more than 1.5 months later than the repeatedly extended deadline had provided for.

17 As regards the reasons for its failure to publish and file the annual report [Year - 1] with SER X.___ stated, as it did previously but in less detail in its requests to extend the publication deadline, the following by its answer dated [Date] to the letter regarding the initiation of an investigation:

"In [Month] [Year - 1] X.___ acquired through a Reverse Acquisition the A.___ Group. The accounting methodology of the acquisition – Reverse Acquisition –, the collection of the proper financial information and documentation, never audited before, from the different Companies of the A.___ Group has been a very long and really complicated job because of the multinational structure of the Group –[Country], [Country], [Country]- the different source and languages and the different kind of accountability, as reported also in the [Auditor]'s Letter to the board dated [Date] hereto attached. This activity took much more time than forecasted."

In support of these claims, X.___ provided a letter dated [Date] issued by its auditor [Auditor]. It essentially states that the accounting and information gathering with regard to the acquisition of A.___ Group in the financial year [Year - 1] were complex and required a substantial amount of time. Moreover, [Auditor] stated that the audit was in an advanced stage and that the final version would be provided by the end of [Month] [Year] . Finally, [Auditor] noted that there were no major issues or material unadjusted differences to report at this stage.

18 Furthermore, X.___ stated that after B. ___ (X.___'s former Chief Financial Officer) had left the company in [Month] [Year - 1], his role was not filled but instead assumed ad interim by C. ___, the Chief Executive Officer of X.___. Also, X.___ claimed to have engaged an external partner to assist with its accounting and in the preparation of the annual report.

19 X.___ stated in its response to the sanction proposal: "With regard to the exemptions asked for by the Company in [Year], it is to be noted that purchase accounting, required after the reverse take-over in [Year - 1], is a very challenging exercise. There are only few CFOs, even of large companies that are proficient in purchase accounting. Very often, the task comes along with unexpected requests by the auditors that may lead to fundamental changes in methodology or lengthy memoranda. At hand, for example, the Company had to provide a memorandum how to account for the reverse acquisition (reverse acquisition memorandum). Moreover, even auditors are very often slightly overwhelmed by auditing purchase accounting and need to find internal resources to support the audit team in doing the audit properly. In particular, in a company like the Company, which is in a not easy financial situation but which is at the same time a small company, the auditor will tend to have a less experienced team on the mandate and will have a bigger challenge to make internal resources available. That is one of the major reasons why the audit took a long time although the financials were available. In essence, the auditor's audit team consisted of one person only, D.___, taking care of the audit, while the partner, E.___, only came effectively in [Month]. This became apparent to the Company only very late. Moreover, the Company was reassured by the auditor, that they will finalize the audit at least within the extended time. The Company did not expect, and did not have to expect, that the audit will suddenly be much more extended and was also not alerted by the auditor in that regard. That is evidenced by the audit cost, which were [currency 1] [amount] in [Year - 3] and [Year - 2] (offer for audit in), while those costs exploded unexpectedly to more than [currency 1] [amount] for [Year - 1] (audit invoices). The consolidated figures were with [Auditor] in early [Month] [Year] (E-mail of [Date]) and the draft report in early [Month] [Year] (E-mail of [Date]). The auditors always knew about the extensions, but never warned the Company that they will not manage to finalize the audit. As a matter of fact, the auditor simply did not put

sufficient personnel on this mandate and allowed responsible persons to take vacations without proper substitutes."

20 X.___ accepted that "SER may only grant exemptions for three months and that, thereafter, the responsibility flips back to the Issuers Committee. However, the Company was under the erroneous impression that they could not ask for a further extension. In reality, they could have done so, but would have had to file for an extension with the Issuers Committee. Of course, it is correct that this is the Company's own fault since they have not consulted lawyers on their rights before this filing. However, it also shows that the Company acted clumsily, but certainly not with bad intent. SER did also not inform the Company on the possibility to file for an extension with a higher instance."

21 SER responded to these arguments: "It must be emphasized once again that the binding letter of intent regarding the merger with A.___ Group was concluded as early as in [Month] [Year - 2] and the transaction was closed in [Month] [Year - 1]. The diligent and timely planning of a post-merger integration - including the financial integration and the fulfilment of the specific audit requirements - is an essential prerequisite for any acquisition. X.___ had ample time to undertake these tasks. There is no ground for an exculpation by referring to the complexity of the endeavour. The fact that the Issuer was apparently surprised by the auditors "unexpected request" for an accounting memorandum (reverse acquisition memorandum) demonstrates that it lacked the necessary experience to effectively facilitate and oversee the audit process. Auditing a listed company is highly regulated and subject to supervision and inspection by a public audit regulator. An auditor failing an inspection is at risk of losing his license. In this context, the auditors request for an accounting memorandum for a complex transaction is not surprising at all, but very reasonable, if not necessary. The fact that the Company was surprised by such a request for documentation shows a lack of understanding of its responsibilities as a listed company. The statement that it "became apparent to the Company only very late" that the audit was allegedly short-staffed and the audit partner "came only effectively in [Month]" is also surprising and appears not credible. In order to meet the regulatory deadlines for publishing and filing financial statements, a regular communication between an issuer and the auditor is necessary. It can reasonably be expected that such communication would only intensify once a deadline was not met and needed to be extended. The purported claim that the Company became aware of the auditor being short staffing only so late shows that it did not engage enough with the auditor and fell short of its duty of overseeing the process."

22 X.___ argued that "there was regular communication between the auditor and the Company. However, such communication is channelled through a certain employee at the auditor with others copied. It is impossible to see for a company who is actually working and who is just copied."

2.2.2 Rules regarding Listing

23 Art. 49 para. 1 Listing Rules (**LR**) provides that the issuer is required to publish an annual report comprising the audited annual financial statements, in accordance with the applicable financial reporting standard, as well as the corresponding audit report. According to Art. 9 Ciph. 2.01 (1) and Annex 1 Ciph. 2.01 (1) DRRO as well as Art. 10 para. 1 DFR, the annual report must be

published, together with the annual financial statements, within four months of the balance sheet date for the latter and must be submitted to SER no later than at the time of publication.

24 According to Art. 49 para 1 LR, the issuer is and remains responsible for publishing an annual report including the audited annual financial statements within the timeframe of four months stated by the DRRO and the DFR. While an issuer needs to appoint an auditor in order to achieve this, the issuer retains sole responsibility for meeting the deadline. This requires that an issuer must duly plan, facilitate, and oversee the audit process. These obligations cannot be delegated.

25 X.___ accepts that the issuer is responsible for meeting the deadline. "However, the issuer cannot do much more than engage a qualified auditor - which the Company undoubtedly did - and to work with the auditor to achieve the goal. Once the audit started and even some time before, there is no chance anymore for the Company to replace the auditor, i.e. the issuer is fully dependent on the auditor performing the work within the deadline. The auditor at hand knew all the deadlines, the fact of the reverse merger, and all other requirements, but nevertheless caused the delay. The auditor did also not warn the Company, that the deadline will or might not be met. Thus, there is nothing the Company could have done at the time to speed up the process. …

The reverse takeover transaction closed [Date]. As everyone knows, post-merger integration in the field of financial statements cannot start before the closing of the transaction, simply because no sufficient insight is given to either party before closing due to confidentiality and competition law reasons, but also because no one puts any efforts into this given the possibility of failure of any transaction. Thus, post-merger integration could only start from closing. As mentioned, the Company was on time with its figures for auditing and then publishing the financials within the extended deadline, but the auditor did not sufficiently staff the team to cope with the audit within the deadline. A stock exchange deadline is nothing a (foreign) supervisor would care about, and so all the arguments about the regulatory environment of auditors are irrelevant. Also, there was no delay caused by the requested accounting memorandum."

26 The annual report is one of the most important instruments for investors to assess and analyse the financial and other parameters pertaining to a company. It is only relevant and useful to investors if it is published reasonably close to the end of the reporting period it relates to. Due to the great attention its content generates and its importance for the market, Art. 4 para. 2 Directive on Ad hoc Publicity (**DAH**) stipulates that the annual report must always be published with an ad hoc announcement pursuant to Art. 53 LR (see Issuers Committee Circular No. 1 dated 10 March 2021, para. 10).

27 According to Art. 7 para. 1 LR the Regulatory Board may exempt issuers from certain duties deriving from the LR provided that the interests of the investors and/or the stock exchange are nevertheless protected. SER may grant a temporary exemption from disclosure obligations for a period of maximum three months. If an application exceeds a total of three months, the Issuers Committee of the Regulatory Board of SIX is responsible for the assessment of such

application in accordance with Art. 1.4 lit. l) of the Internal Regulations for the Regulatory Board (**IRRB**).

28 X.___ disputes that the financial statements always are an important instrument for investors to assess a listed company. "In particular in companies that are in the course of developing a product and bringing it to the market, the financial statements say little about the situation and the prospects of the company. The key information are product approvals, entering into distribution agreements, hiring of personnel for ramping up production, etc. Very few of these core information are visible from the financial statements. That is exactly the case at hand for the Company. The Company is in the run up of bringing their core product to the market and for that purpose ramping up production. The Company will not inform by their financial statements about the major achievements in that process, but by ad hoc notifications."

29 SER argues: "Even for development stage companies with hardly any revenue, such as the Issuer, financial statements still include a lot of relevant information for investors, for example cash balances, burn rates, financing arrangements, assessment of going concern, etc. Even if the claim were true that financial statements of development stage companies are not important, which is not the case, this would still not apply to the [Year - 1] financial statements, where the Company carried out a reverse merger. By definition, a reverse merger is a significant structural change where the legally acquired company is more significant than the previous issuer. It follows that the financial situation of a company after a reverse merger may be quite different than before, which would make such financial statements even more relevant to investors. Furthermore, it must again be emphasized in this context that - regardless of the potential extent of importance for the investors - issuers on SIX Swiss Exchange are mandatorily required by stock exchange regulations (Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 and Annex 1 Ciph. 2.01 DRRO and Art. 1 Opara. 1 DFR) to publish and file the annual report with SER within the regulatory or as in the case at hand extended deadline."

30 The Issuer points out that "The prospectus set up for the reverse merger already set out what was necessary to know about the combined entity. Further, the Company in fact published provisional key-figures with its release on [Date]. Thus, should the Sanctions Commission be of the view that the financial statements of the Company have the importance attributed to them by SER, it is to be noted that the provisional key figures were already known in [Month] [Year] and that there was thus no lack of information for the market. This is important because one cannot only decide this matter based on an abstract assessment of the relevance of financial statements as it is done by SER. If the assessment by SER was correct, the listing rules would have to be amended and would have to provide that in each case where an issuer is late with publication of its financial statements it shall be delisted. At least, that is the rule SER seeks to implement by its Sanction Proposal and its Statement of Position. Clearly, a decision following such approach would be a violation of the listing rules because there is no such rule that not publishing financial statements in time triggers a delisting and it would also be arbitrary, and thereby a violation of the rules, because it would take into account or even only focus on one single aspect, being the capital market readiness, that is not a relevant aspect under the rules at all, be it for the listing be it for the maintenance of the listing."

31 The Issuer's arguments refer to the severity of the breach and the degree of fault, both dealt with below. As far as the findings are concerned, SaKo notes that X.___ did not publish and file with SER an annual report for the financial year [Year - 1] within the regulatory and repeatedly extended deadline. As a matter of fact, the annual report [Year - 1] has been provided on [Date] only, almost six months after the original due date and more than 1.5 months after the last extension. X.___ therefore failed to comply with the publication requirements regarding the annual report as set out in Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 (1) and Annex 1 Ciph. 2.01 (1) DRRO and Art. 10 para. 1 DFR. These requirements do not provide for an exemption for situations like the case at hand.

3 Sanction

32 Violations of Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 (1) and Annex 1 Ciph. 2.01 (1) DRRO and Art. 10 para. 1 DFR are to be 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 to be considered when setting the amount of the fine.

3.1 Degree of Fault

3.1.1 Commission of the Breach

33 The LR requires issuers to ensure compliance with the LR, additional rules and related implementing provisions at all times. In the present case, it should be noted that the issue at stake is the sanctioning of a legal entity and not of a natural person. The issuer shall be sanctioned if it is found of not have taken all necessary and reasonable organizational precautions to prevent a breach of the obligations deriving from the LR. Accordingly, the assessment of the possible fault is carried out according to largely objective standards. The conduct of the natural persons or bodies acting on behalf of the Issuer are attributed to the issuer (see decisions of the Sanction Commissions of 14 April 2015 [SaKo 2015-AhP-I/15], number 19; of 30 July 2010 [SaKo 2010-CG-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).

34 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).

35 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 give rise to a presumption of negligence by the issuer as to the fact that it failed 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).

36 In the case at hand, there are no indications suggesting that X.___ *willingly* violated its obligation to publish and file the annual report [Year - 1] pursuant to Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 (1) and Annex 1 Ciph. 2.01 (1) DRRO and Art. 10 para. 1 DFR and accordingly acted with direct intent. Therefore, it must be examined whether factors exist leading to the conclusion that the Company tacitly accepted the possibility of a violation of its reporting obligations (conditional intent), or that the Company did not take reasonable steps to provide the report within the deadlines (negligence) or that the violation of was completely beyond any control of the Issuer (no fault at all).

37 X.___ argues that "the Company was truly convinced that it will be able to publish at the end of the deadlines sought. However, given the circumstances described above, the Company was not able and did not even understand its inability to assess the time required. The Company's believe to be able to issue the report within the extensions granted was reinforced by the availability of the figures early [Month] and the financial statements in early [Month] [Year] and the time planning and offer of the auditor who were aware of the time required. However, the auditors did neither put sufficient resources on the matter nor did they warn the Company that they may fail to be on time. At the time of expiration of the last extended deadline the Company was simply not able to publish the annual report because the audit was not finished. The Company was unaware that it could have applied for a further extension with the Issuers Committee. However, this does not turn the violation into an intentional violation."

38 X.___ further points out: "SER is again arguing about the capital market capability of the Company. That is not relevant at hand. There is no general requirement in the listing rules on capital market capability, neither as a requirement for listing nor as a requirement for maintaining the listing. Thus, it is an entirely irrelevant argument and must not be heard. It is somewhat astonishing that a self-regulatory authority is bringing up this irrelevant argument again and again, although they are bound by clear self-regulatory rules that they issue themselves under art. 35 FMIA. Only in case of violations of the respective rules, the stock exchange may, according to art. 35(3) FMIA, take the contractually foreseen measures. This does not only follow from this rule but follows also from the contractual nature of the listing of the Company at SIX Swiss Exchange. Again and again repeating the lack of capital market capability of the Company although this is entirely irrelevant is problematic not only from a contractual point of view, but also with a view to art. 35 FMIA. Such repetitive statements get even more problematic given that SER is fully aware, but did not even mention, that the Company has meanwhile engaged both, a CEO and a CFO. SER is not a simple counter-party that may be silent on such facts and fight its case, but it has to take an objective position given its license, but also given its market power and almost full control of the public company market in Switzerland."

39 The benchmark to judge the degree of fault in case of a violation by an issuer is the behaviour of a listed company with due capital market capabilities and adequate organisation. SaKo understands the references by SER in this respect. No new listing requirements are introduced by such reference.

40 SaKo states that any issuer must take all steps including the necessary staffing, the set-up of an adequate organisation and the employment of all (including financial) resources to meet its obligations according to the listing rules. The level of such engagement has to be measured in the light of what is needed for companies to fulfil capital market requirements, There is no exemption for start-ups or companies with lower resources. It has to be expected that a listed company plans and executes any business operation, notably a complex merger, in such a way that it is able to meet its regulatory obligations. This includes, among others, appropriate legal advice, accounting, and audit capacities. If an issuer fails to do so, he at least accepts the possibility of a violation of the rules.

41 SaKo considers that an acquisition does not constitute an unforeseeable 'surprise' event but is chosen by the parties and known several months in advance. In the concrete case, the binding letter of intent regarding the merger with A.___ Group was signed as early as in [Month] [Year - 2] and the transaction was closed in [Month] [Year - 1]. There is no excuse not to prepare for the post-merger work ahead and setting up the necessary structures. Not doing so, is an indication that the Company didn't sufficiently care about the work to be done and therefore accepted at least tacitly a violation.

42 SaKo notes that despite the acquisition of A.___ Group in [Month] [Year - 1], X.___ did not fill the role of the Chief Financial Officer which was vacant since [Month] [Year - 1], but merely engaged an external partner to support it with the accounting and preparation of the annual report [Year - 1]. Especially in the context of an acquisition, a fortiori one that was allegedly complex, this circumstance constitutes a major deficiency in the organisation of a public company. Accordingly, X.___ did not fulfil its duty of care in this regard. Ultimately, it should be noted X.___ should have planned and set up its organisation (especially regarding the financials) accordingly.

43 X.___ argues that "SER apparently concludes from its own knowledge (specialist in accounting) on the required role of a CFO. However, as mentioned above there are numerous other tasks a CFO needs to fulfill and there are hardly any super-CFOs on the market, who could take care of all of these tasks, and in particular not for an issuer like the Company. The Company therefore did exactly the right thing by engaging an external specialist. The conclusion of SER that the Company was not properly organized is therefore unfounded. ...The conclusion of SER that there is conditional intent is not only wrong, it also contradicts statements made by SER at other places in the Proposal. The only conclusion can be ... "... that there are no indications that the Company knowingly and willfully violated its obligations ..." - with the consequence that the Company at worst acted negligently. However, there are no established facts that would even suggest a negligent behavior, simply because the financial statements were available in [Month] and the only reason why the financial statements could not be published was the entirely delayed audit."

44 As far as the communication between the Issuer and the audit company is concerned, SaKo assesses that a stricter supervision and closer exchange by the Issuer would have been necessary, at least once it became apparent that an extension of the deadline would have to be requested. In such a situation, the Issuer could not simply rely on information and assurances provided by the auditor. Otherwise, one would have to conclude that the Company did not take the deadlines sufficiently serious and accepted a violation.

45 SaKo concludes, in view of all the facts of the case, that X.___ clearly could (and must) have forseen the potential commission of a violation with regard to the publication and filing of the annual report [Year - 1] and at least accepted it. Although the publication deadline has been extended multiple times, X.___ has not been able to publish the annual report [Year - 1] within the time set, contrary to the impression conveyed in the requests filed with SER. Each of the requests was submitted immediately before the expiry of the respective deadline. This indicates that the Company did not sufficiently follow the work necessary for publication of the annual report, including the necessary audit work. The contractual relation between the Issuer and the audit company are internal and do not discharge X.___ of its obligations. At the latest when the publication deadline was expressly extended for the last time and X.___ nonetheless let it expire unused and without notification of SER, the violation of stock exchange regulations must have been apparent and are at least accepted by X.___.

46 Given the above, SaKo concludes that X.___'s failure to publish and file the annual report [Year - 1] with SER occurred with **conditional intent *(Eventualvorsatz)***, and in any case with gross negligence.

3.1.2 Behaviour after the Breach

47 After being unable to meet the regulatory deadline for the publication of the annual report [Year - 1], X.___ requested multiple extensions of the deadline, indicating each time that it would be possible to publish and file the annual report within the requested timeframe (see above para. 8 et seqq.; SER act. 1, 3, 5 and 7). This has proven to be incorrect, as the annual report [Year - 1] has not been published and filed with SER to date. It must therefore be stated that X.___ did not communicate clearly regarding the publication date and created false expectations with both SER and the market.

48 X.___ contends that: "The Company truly believed that it can meet the deadlines. SER cannot conclude from the fact that the last deadline was missed, that SER and the market were misled. This conclusion is wrong because it would otherwise always be true in case of multiple extensions with a finally missed deadline. However, this is only the violation of the rule itself or, in other words, had the last deadline not been missed, would there be no violation and these proceedings would not proceed. SER incorrectly constructs a malicious intent out of the mere fact of missing the last deadline although that is only the violation itself. Apparently, SER concludes on malicious intent without presenting facts that would indicate such intent."

49 Furthermore, it must be mentioned in this context that by letter dated [Date], X.___ also requested an extension of the publication deadline regarding the half-year report [Year].

50 X.___ contests that this is a valid argument: "apparently, one cannot publish the half-yearly report without before publishing the yearly report. The mere fact that the Company asked for an extension shows that the Company wanted to comply with the rules and did not simply disregard the deadline for the half-yearly report. This is prove of the Company's eagerness to comply with the rules."

51 SaKo considers that the request for extension of the publication deadline regarding the half-year report [Year] does not constitute an aggravating factor.

3.1.3 Behaviour in the previous Years

52 SER point out that the Issuer applied for extensions of the deadline for the publication and filing of the respective annual report in previous years already. "*By letter dated [Date] X.___ requested an extension of the deadline until [Date]. SER granted X.___'s request with reservations and under multiple conditions by decision dated [Date]. SER notes that with the exception of the annual report [Year - 4], X.___ has not been able to publish its annual reports within the regulatory deadline since its listing on SIX Swiss Exchange on [Date].*"

53 To X.___, it is irrelevant whether the Company asked for extensions in previous years or not. The Company did not violate any rule during these times. It is against the principle of good faith to grant extensions again and again and then turn this fact to which SER contributed without hesitation into an accusation. In a relationship of trust, and that is still the case in the relationship between the stock exchange and the issuers, incidences that may have given rise to certain measures or discussions or the like, but which were accepted by the respective party without following up with measures or discussions, do not play any role in subsequent proceedings."

54 SaKo agrees that there is no entry in the sanctions register that needs to be considered in the assessment of the sanction in an aggravating sense. Previous requests for extension of deadlines are not to be considered as such. However, they are an indication of the organisational status of the Company. An issuer should be alerted by the need of such requests and take measures to avoid repeating such situations. This has been considered by SaKo when assessing the degree of fault.

3.2 Severity of the Breach

55 SaKo agrees with SER that the annual report is the most relevant publication of an issuer since it enables market participants to get a picture of the financial and other situation of an issuer. Without such information in the annual report, market participants cannot make a fully informed investment decision. Accordingly, the content of annual and interim reports generates a great deal of attention and is of the utmost importance for the market (see Issuers Committee Circular No. 1 dated 10 March 2021, para. 10).

56 X.___ does not perceive the annual report as being a crucial information. "The breach is a very minor breach. If what SER writes was correct, one would reasonably expect the rules to contain a differentiation with respect to late publication of financial statements and would qualify a delay in publication as a major breach. Moreover, SER would simply be barred from extending deadlines because that would be so detrimental to the market. Also, if SER extended deadlines

they would do so only by at the same time in each case stopping trading. None of this occurred or was the case. There is thus an apparent contradiction between SER's own actions and the rules on the one hand and what it states in its Proposal on the other hand. As a result the 1.5 months delay, which is in fact a breach, is just a minor breach."

57 Further, X.___ states: "The prospectus set up for the reverse merger already set out what was necessary to know about the combined entity. Further, the Company in fact published provisional key-figures with its release on [Date]. Thus, should the Sanctions Commission be of the view that the financial statements of the Company have the importance attributed to them by SER, it is to be noted that the provisional key figures were already known in [Month] [Year] and that there was thus no lack of information for the market."

58 SaKo does not agree with X.___'s position with that regard. The Listing Rules as well as complementing regulations are approved by the Financial Market Surveillance Authority and the Stock Exchange is obliged to enforce these rules without further ado. Market participants can and do expect that listed companies implement these rules as they stand. There is no exemption for certain companies to publish the annual report. Therefore, there is no room to arbitrarily deviate e.g. from the obligation to publish the annual report within the deadlines set. If extensions are requested and granted, all ordinary procedures must be followed. This was not the case as X.___ did not respect the last extended deadline, even without notification. Further, a delay of 1.5. months represent more than one third of the regulatory deadline to publish an annual report and was even substantially longer than the last extension granted by the Regulatory Board.

59 The possibility for extension is provided for in the Rules, however under strict limitations and ensuring full transparency. This is no contradiction to the obligation for SER to apply the rules referring to the publication of the annual reports in a strict manner.

60 SaKo acknowledges that the prospectus and provisional key-figures have been available to investors in [Month] [Year]. However, this information allows a fragmented assessment only. In addition, there are substantial differences between the provisional figures and the audited annual report.

61 SaKo assesses X.___'s failure to publish and file the annual report [Year - 1] within the regulatory and repeatedly extended deadline with SER as being a **severe violation**.

3.3 Proposed Sanction

62 SER considers the fact "that X.___, with the exception of the annual report [Year - 4], since its listing on SIX Swiss Exchange on [Date] has never been able to publish its annual reports within the regulatory deadline and, with regard to the financial year [Year - 1], failed to do so despite multiple extensions of the publication deadline, and concludes that X.___ evidently lacks the necessary capital market capability that a listing on SIX Swiss Exchange requires. SER considers the delisting of X.___ from SIX Swiss Exchange (Art. 61 para. 1 Ciph. 4 LR) to be the appropriate sanction in the case at hand."

63 X.___ opposes firmly this request: “Previous delays are irrelevant at hand. SER tries to sanction events which were no breaches by proposing a delisting. Also, there is no general competence of SER to delist or to propose the delisting of issuers where SER deems that they do not have the necessary capital market capability. The latter is neither a listing requirement nor is it a criteria for maintaining the listing. It is a violation of own rules by SER to propose a delisting on such grounds which is also questionable with a view to SER's compliance with the pertinent rules of the FMIA. Also, given that the breach at hand is likely not even a negligent breach and that financial statements are of little importance for the assessment of the Company, proposing a delisting is disproportionate.”

64 X.___ adds further: “The sanction of delisting may satisfy the desire to be a tough regulator. However, that does not help the stock exchange, nor does it help any investor or shareholder. The Company shows in fact a turnover in its share which is quite substantial. Thus, there is an active market and the Company actively uses the public market for financing. There are companies listed at SIX with deplorable turnover and that never use the public market for financing. Would they be regarded as the champions of the stock exchange simply because they have never violated any rules? Moreover, the legislator by amending art. 704 CO (to enter into force on 1 January 2023) with the rule that the general meeting needs to approve a delisting by a qualified majority, clearly stated that there shall be no delisting lightly.”

65 X.___ further argues in its statement of [Date]: “From a private law point of view, a delisting amounts to a termination of an agreement. Under private law, such termination is, where not specifically regulated, as at hand, only possible in extraordinary cases, i.e., if the continuation of the agreement can no longer be expected of the other party. The delisting request fails this test on several counts: (i) the fact that the time for publishing the financials has been extended multiple times without stop trading shows that the financials cannot be so important for that a delay of ultimately 1.5 months makes the continuation of the listing relationship unacceptable to the stock exchange; (ii) the Company only failed to publish in time its financials in a very special situation where there was a reverse takeover to deal with, which shows that there is hardly any risk of repetition of such situation; (iii) SER only puts forward circumstances that have nothing to do with the present case and argues that the Company has no capital markets capabilities, which shows that SER is not arguing based on the breach that happened and is thus unable to sufficiently substantiate the application for termination of the listing relationship; and (iv) finally, even if such arguments of SER were relevant, they have all been cured: the annual report has been published and the semi-annual report has been published on time, and the Company is now equipped with a CEO and a CFO.”

66 SER points out: “SER's competence to request the delisting of an issuer before the Sanctions Commission is based on Art. 61 para. 1 Ciph. 4 LR and requires that the issuer commits a breach of the LR, the Additional Rules or their implementing provisions (specifically breaches of duties to cooperate and to provide or disclose information) or that it does not ensure compliance with these rules and regulations (Art. 60 para. 1 LR). As set out in detail in the Sanctions Proposal, X.___ violated the Listing Rules and thereby its obligations pursuant to Art. 49 para. 1 LR in connection with Art. 9 Ciph. 2.01 and Annex 1 Ciph. 2.01 DRRO and Art. 10 para. 1 DFR with conditional intent by failing to publish and file an annual report for the financial year [Year - 1]

with SER within the regulatory and repeatedly extended deadline. It follows, that SER is indeed competent to request the delisting of X.___ from SIX Swiss Exchange..”

67 SaKo refers to the Listing rules providing for delisting as a possible sanction. This possibility shall be applied in cases of a severe violation, notably in cases where it can be doubted that the issuer will in the future respect the listing rules, thus endangering the interests of investors. Failure to provide necessary information within the regulatory deadlines can be such a situation, especially when the circumstances lead to the conclusion that an issuer does not have the adequate organisation to prevent future failures. Previous behaviour can be an indication to evaluate an appropriate organisation even if such previous behaviour is not directly part of an investigation. Therefore, SaKo understands the request by SER to delist the Issuer in the concrete case.

68 However, SaKo notes that the deficiencies have been now solved. Since the establishment of the sanction proposal, the annual report has been published and the half-year report per [Date] as well. The suspension of trading could be lifted. Further, a new CFO is in charge. Therefore, SaKo applies the benefit of doubt despite the severity of the breach and feels that a delisting of the Company is not necessary to ensure observance of the listing rules. This appreciation might change if further violations would happen, notably concerning reporting obligations.

69 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.

3.4 Sensitivity to Sanction

70 When quantifying the sanction amount the sensitivity to sanctions has to be taken into account. In order to assess the sensitivity to sanctions, the economic performance of the issuer is considered. An issuer with a lower economic performance will tend to be hit harder by the same fine than a company with a comparatively higher economic performance. For the determination of these fines, economic key figures can be taken into consideration, e.g. EBIT, net income, operating cash flow, cash and cash equivalents or equity (see decisions of the Sanctions Commission of 28 June 2012 [SaKo 2012-AHP-II/11], number 63 et seq. and of 8 December 2011 [SaKo 2011-AHP-I/11, SaKo 2011-CG-I/11], number 37).

71 X.___’s net loss for the financial years [Year - 2] and [Year - 3] amounted to [currency 2] [amount] and [currency 2] [amount] respectively. The cash flows from operating activities were [currency 2] [amount] and [currency 2] [amount] respectively. Cash and equivalents amounted to [currency 2] [amount] and [currency 2] [amount] while total equity stood at [currency 2] [amount] and [currency 2] [amount] respectively. As per the most recent half-yearly report, X.___ has cash of [currency 1] [amount] only.

72 SER denies that the cash position in the half-yearly report of [Date] is representative for X.___’s access to financial resources: “*Rather, the Company has been permanently dependent on new cash injections. In fact, based on the operating cash burn in the first half of [Year] of [currency 1] [amount] presented in the interim financial statements [Year] and without a further cash injection, the Company would have already run out of cash approximately in [Month] [Year]. The Company also*

needed new financing of [currency 1] [amount] in the first half of [Year], since its opening cash balance of [currency 1] [amount] was much lower than what it used in that period. Further, in Note [...] of the interim financial statements, the Company discloses that it has access to a convertible bond commitment of up to [currency 1] [amount]... the purported argument made by X.___ that the imposition of a fine in the amount of maximally [currency 3] [amount] could potentially result in the bankruptcy of the Issuer would indicate that X.___ does not have the financial resources expected for listed companies and thus supports SER's argument that X.___ in a number of ways lacks the necessary capital market capability that a listing on SIX Swiss Exchange requires.."

73 X.___ argues that "not a single financier is interested in spending money that is immediately taken away by SER. Also, even if there is access to such further sources of financing the proposal of a fine of [currency 3] [amount] is entirely disproportionate given the overall operating expenses of the Company. Further, the facility granted by F. ___ Group may extend to [currency 1] [amount]. However, draw-downs from such facilities are always subject to meeting tight conditions because the investor needs to be able to convert the notes they purchased; at hand, a further draw-down requires the conversion of outstanding tranches, unless waived by F.___ Group. As a result, there is no possibility to draw down at will and the possibility of further draw-downs before expiration of the facility in [Month] [Year + 1] is considerably lower than insinuated by SER. Moreover, those facilities always provide expensive financing (conversion price to be 93% of the lowest daily VWAP during a pricing period of 10 trading days). As a result, any issuer is not only limited in drawing down but also reluctant to draw down even if possible from such facilities."

74 In view of the above-described economic factors, SaKo asses X. ___'s sensitivity to sanctions as **high**.

3.5 Amount of Sanction

75 It should be noted that in recent years it has become clear that it is necessary to impose stronger sanctions for violations of the rules of the Exchange. The Financial Market Surveillance Authority expects that Stock Exchanges in Switzerland enforce all applicable rules with strict measures. The Sanctions Commission already warned earlier that it tends 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 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. Therefore, SaKo will make greater use of the full range for sanctions. As this has been indicated in several cases, the "rule of law" (*Rechtsstaatlichkeitsprinzip*) is duly respected.

76 The amount of a sanction cannot be measured by the financial capabilities of an issuer only. Reflections on an eventual case of bankruptcy and a potential application of an *actio pauliana* are irrelevant at this stage. First, any sanction has to be proportionate to the degree of the

breach as well as to the degree of fault. Further, it must reflect the preventive effect for other issuers. The aspect of sensitivity to the sanction is to be considered in the final gauging of the amount of the sanction only.

77 Considering all the relevant factors for determining the sanction, SaKo sanctions X.___ with a **fine of CHF 100'000.** This amount remains at the very low range for violations committed with (conditional) intend (up to CHF 10 Mio) and even at the low range for violations committed by negligence (up to CHF 1 Mio).

3.5.1 Publication of the Decision of the Sanctions Commission

78 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 the case.

3.5.2 Costs

79 In case of sanction proceedings, charges of SER are determined based on the expenditure incurred adopting an hourly rate of CHF 300 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, **charges of SER to date amount to CHF [...].** X.___ disputes this amount as disproportionate. SaKo considers the amount of 40 hours spent in the whole investigation as moderate and appropriate compared with similar cases or with usual legal fees.

80 The costs of the Sanctions Commission are **fixed at CHF [...],** considering preparation and meeting time. In fact, the total time spent for this case by SaKo and its secretary exceeds this amount significantly if counted in detail.

81 Therefore, SaKo obliges X.___ to cover **total costs of CHF [...].**

[Place], 27 February 2023

[Sig.]President [Sig.] Secretary