Appeals Board of SIX SWISS EXCHANGE LTD.

[…]
[address], [place]

The Appeals Board,
composed of […], Chairman
[…] and […]

has on 31 October 2023

in the procedure

X. ___
[address], [place]

Complainant

represented by
[Legal representation]
[address], [place]

against

SIX Swiss Exchange Ltd.
Hardturmstrasse 201, 8005 Zurich

Defendant

re

Delisting of Complainant

decided as follows:

after having considered

History of the Case

A. On [date], Complainant filed a complaint to the Appeals Board, challenging the decision of Defendant having delisted the shares of Complainant in accordance with Art. 58 para. 1 no. 2 Listing Rules (LR), dated [date]; specifically, Complainant submitted the request that the Delisting Decision shall be annulled.

B. The Appeals Board was constituted by decision of [date], also containing some procedural orders. By letter of [date], Complainant confirmed that its submission of [date] ("Appeal") does not constitute a Notice pursuant to art. 6.3 of the Appeals Board Rules (ABR), but as the Statement of Appeal pursuant to art. 6.4 ABR.

C. By brief of [date], Defendant submitted a defense statement in which Defendant requested that the Appeal shall be dismissed and the Delisting Decision of the Regulatory Board (Defendant) of [date] shall be confirmed.

D. On [date], the Chairman of the Appeals Board ordered that a second exchange of statements would be indicated. Thereupon, by brief of [date], Complainant submitted the replication statement with unchanged Prayers for Relief in substance and an additional procedural motion requesting the Appeals Board to grant suspensive effect to the Appeal of Complainant if the decision on the merits would not be rendered before [date].

E. By brief of [date], Defendant submitted the rejoinder with unchanged Prayers for Relief in substance and requested to dismiss the procedural motion or, eventually, to only grant suspensive effect under the condition that Complainant produces a financial guarantee. By an early mail of [date], Complainant confirmed receipt of the rejoinder statement.

F. The relevant facts, whether contested or not, will be discussed in the context of the subsequent legal analysis.

Legal Analysis

Procedural and Formal Issues

1 With its replication statement, Complainant requested that the Appeals Board grants suspensive effect to the Appeal of Complainant if the decision would not be rendered before [date]. Since the substantive decision on the merits of the case is rendered by the Appeals Board on [date], a decision on the procedural motion of Complainant is not to be taken, since the respective request has become devoid of object.

2 Art. 58 LR is the basic provision for a delisting of securities. This norm is the legal anchor for the assessment of the present case. For the sake of completeness, it may be added that a delisting of securities would also be possible as a special sanction for non-compliance with mandatory requirements of the Listing Rules (art. 61 para. 1 LR). For example, the non-compliance with the obligations pursuant to art. 59 and art. 60 LR could lead to a sanctions' procedure; in fact, Complainant has been subject to such sanctions' procedure and the delisting of the shares of Complainant has been requested by Defendant in the sanctions' procedure. However, the Sanctions Commission has rendered a decision denying the need for a delisting at that moment but reserving the right to do so in case of further non-compliance of Complainant with the applicable regulations, notably concerning reporting obligations (decision of Sanctions Commission, SER act. […], no. […]). But such kind of procedure, based on art. 59 and art. 60 LR, does not have any further impact on the present procedure that is based on the delisting provision of art. 58 LR.

3 Complainant argues that its right to be heard has been violated (Appeal, no. […]; replication statement, nos. […]). The addressed question whether the relation between Complainant and Defendant is of a private law or public law nature does not bear any decisive relevance for the present procedure under both assumptions. If the Delisting Decision should have been based on wrong assumptions due to non-compliance with the principle of the right to be heard, Complainant does have all procedural possibilities to submit its arguments to the Appeals Board and the Appeals Board "renders judgment on the merits of the case and with full cognition in regard to all requests from the parties" (art. 6.10 ABR). Complainant was granted the full rights to be heard in this procedure and the complaint that Defendant did not invite Complainant to present further arguments in the delisting procedure does not hold justified.

4 Furthermore, Complainant has received a draft of the Delisting Decision at the end of [month] [year] (defense statement no. […] and SER act […]). Whereas Complainant did not at all refer to these documents in the initial Appeal, the replication statement (no. […]) argues that the given time delay had been too short to respond with a substantive answer. This argument does not convince the Appeals Board: On the one hand, Complainant has been represented by legal counsel in the sanctions' procedure having resulted in the decision of the Sanctions Commission of [date] (SER act. […], indeed represented by the same legal counsel as in this procedure); therefore, it had been easy for Complainant to forward the Delisting Decision to the legal representative with the objective to respond to

Defendant. On the other hand, it is in the interest of the market and the investors to come to a timely delisting of securities if the conditions for the listing are not anymore fulfilled. In addition, Defendant is not obliged by the Listing Rules to submit a draft of the Delisting Decision to the concerned company; moreover, Defendant has the possibility to immediately issue the Delisting Decision if a justification reason contained in art. 58 LR is fulfilled. If the concerned company (Complainant) does not agree to the Delisting Decision, an appeal to the Appeals Board can be launched and the Appeals Board can review the reasons of the Delisting Decision with full cognition (no. 3 above). Therefore, the right of Complainant to be heard has not been jeopardized in the procedure.

Substantive Issues

5 The Delisting Decision is based on art. 58 para. 1 no. 2 LR. Defendant has not argued that the situation of illiquidity of Complainant is given (contrary to the statement in the Appeal, no. […]), but that the "solvency of the issuer is in serious doubt" (in German language: "steht die Zahlungsfähigkeit des Emittenten ernsthaft in Frage"). In the interpretation and application of this not clearly defined legal notion a certain room for discretion is granted to Defendant. However, Defendant has to submit the appropriate evidence making it probable that a situation of the "solvency in serious doubt" is indeed given.

6 Apparently, comparable delisting decisions do not seem to be available. But a comparison with cases that – according to Complainant (replication statement, no. […] and no. […]) – have not caused a delisting notwithstanding similar circumstances cannot be subject to the present procedure. The Appeals Body has to decide on the merits of this very case. Legal doctrine also does not exist to the interpretation of the notion "solvency in serious doubt" (see for example Huber/Hodel/Staub Gierow, Praxiskommentar zum Kotierungsrecht der SWX Swiss Exchange, Zürich 2004, art. 80 nos. 4-5 [art. 80 corresponding to now art. 58 LR]). Therefore, the Appeals Board assesses the interpretation of the notion in other legal fields.

7 The term "solvency" plays a role in corporation and accounting law (incl. IFRS or IAS standards), mainly in connection with the aspect of being required to consider liquidation or bankruptcy proceedings (art. 725 CO). In this situation, in contrast to the mentioned stock exchange law (no. 5 above), the concerned company is obliged to present evidence for the solvency. Irrespective of the different allocation of the burden of proof, the available court decisions and legal doctrine merit to be analyzed. Furthermore, the concept of impending insolvency as a criterion for determining the ability of a company to continue its business as a going concern is methodically based on IFRS (IAS 1.26; see Peter Böckli, Schweizer Aktienrecht, 5th ed. Zurich 2022, § 11 no. 108). Since Complainant prepares its financial reporting in accordance with IFRS, it is therefore appropriate to refer to the relevant doctrine and practice on the respective provisions of corporate and accounting law in Switzerland for the interpretation of the term of "solvency".

8 According to the Federal Court, solvency is not anymore given, if the debtor does not have enough liquid means to pay the due debts and if this situation holds for a certain

duration, i.e. is not only temporarily given (BGer 5A_108/2021 of 29 September 2021, Erw. 2.2; similar wording in BGE 137 III 460, 468, Erw. 3.4.1). Another element can be the lack of being able to get credits for the payment of the debts (BGE 111 II 206, Erw. 1). Legal doctrine uses comparable wordings (see for example Oliver Kälin, Der Begriff der Zahlungsunfähigkeit, ZZZ 2014/2015, 135-140; Böckli, op. cit., § 11 no. 113); in particular, the solvency is doubtful if no material indications are given that the financial situation of the debtor will be improved (Kälin, op. cit., 138). It is a matter of a presumably permanent inability to meet the obligations due (Böckli, op. cit., § 11 no. 113). It is not necessary that the debtor completely stops to pay any due debts; moreover, it suffices that the non-payment of debts concerns a major part of the business activities (BGE 137 III 460, 468, Erw. 3.4.1).

9 This general legal analysis will have to be applied in respect of the facts of the present delisting procedure.

10 In the Delisting Decision (no. […]), Defendant refers to the “unaudited key figures” as of [month] [year] and the difficult financial situation of Complainant (in respect of EBITDA, cashflow and profit). With the Appeal, the audited Annual Report, dated [date], has been submitted by Complainant (act. […]); in substance, Complainant argues (complaint, no. […]): “the business my look bad, but there is no means to say anything about the solvency”. Defendant reiterates in the defense statement that Complainant would be overindebted and have a negative equity of more than [currency] [amount] causing serious doubts as to the solvency (no. […] and no. […]). Furthermore, due to the accumulated losses (no. […] and nos. […]) and due to the fact that the alleged loans in the amount of [currency] [amount] of the CEO and the Chairman of Complainant could not be considered as a sound financial restructuring and were also not evident from the unaudited interim financial statements [year] and therefore constitute a mere claim (no. […]), the financial situation of Complainant would be “precarious”; therefore, the soundness of Complainant’s standing as a “going concern” would be exposed to material uncertainty (nos. […]), not at least since business activities had actually not been executed anymore (no. […]).

11 In its replication statement, Complainant submits several arguments why its solvency would still be intact. Apart from references to specific figures, Complainant is of the opinion that a negative equity is not a strong indication of the insolvency (no. […]); insofar it must be said that art. 58 para. 1 no. 2 LR does not require “insolvency” but serious doubts about solvency being a threshold on a lower level. In addition, Complainant argues that delaying the execution of payments “says nothing about solvency” (no. […]) being a statement that is not fully in line with the referenced court practice and legal doctrine (no. 8 above). Furthermore, Complainant refers to the loans in the amount of [currency] [amount], granted by two board members (see note […] of audited financial statements, act. […] to Appeal), having not yet been fully used and providing for liquid means (replication statement, nos. […]).

12 Defendant submits as counterarguments in its duplication statement that “serious doubts” about the solvency still exist; but contrary to no. […] of the statement, the Appeals Board

is of the opinion that Defendant has to prove the serious doubts, not Complainant its solvency (no. 5 above). In particular, Defendant refers to losses, negative operating cash flows, no revenues, negative equity and unpaid invoices (no. […]); in fact, throughout its statement, Defendant argues that the many unpaid invoices would be a clear indication of the insufficient solvency (nos. […]) and that the granting of the two loans by the two board members did apparently not solve the solvency problems (nos. […]). In addition, the discussions about a possible business combination would not have an impact on the solvency (nos. […]).

13 Considering the concrete circumstances of the present case, the Appeals Board puts weight on the aspect of not paying the invoices when they fall due if the non-payments last for a certain duration. The most intensively discussed invoices concern the Defendant itself. The total sum of these invoices exceeds [currency] [amount]; the details are evidenced by attachments submitted by Defendant in this procedure, and are not contested by Complainant. The fact that invoices are not paid does not as such constitute an insolvency or a high risk of insolvency. Invoices can be contested. However, in the given case the Delisting Decision refers to the unpaid invoices and their amounts in clear words; in such a situation, it would have to be expected that the concerned company, i.e. Complainant, produces reasonable arguments why the payment of the invoices should remain outstanding. But Complainant does not contest the existence of unpaid invoices; moreover, Complainant only argues that the new board could not direct the focus of its activities to unpaid invoices (replication statement, no. […]); this statement contracts its own concession in the letter of [date] that the new board would "immediately take action to settle all debts … including the auditor, the SIX itself and ..." (SER act. […]).

14 The fact that the respective payments were not executed within five months after this "promise" of "immediately take action" has been made and after – according to Complainant – sufficient liquidity based on two loans of the CEO and the Chairman of Complainant has been produced, raises serious doubts about the ability of Complainant to pay these (and other unpaid) invoices. The Appeals Board also cannot align the promise of "immediately take action" with the cited statement that the board could not focus its attention on unpaid invoices. Furthermore, Complainant invites Defendant to start legal action in enforcement proceedings in order to get the payment for the uncontested outstanding invoices (replication statement, no. […] and no. […]). Such an approach requesting enforcement proceedings even in case of uncontested invoices is not really appropriate and does not increase confidence into the ability of Complainant to pay its not contested due debts.

15 Only for the sake of completeness, it must be added that the reference of Complainant to an abusive (rechtsmissbräuchlich) behavior and thus an arbitrary (willkürlich) behavior is not convincing (Appeal, no. […]): Defendant did not assume insolvency, only serious doubts about solvency (see no. 5 above) having the consequence that art. 167 Penal Code and the actio pauliana would not be applicable. In addition, a creditor does have the right to accept partial payments (art. 69 para. 2 CO) without forfeiting its right to claim the outstanding amounts. If Complainant puts so much weight on the risk of insolvency

(action pauliana), it appears to silently admit that serious doubts about the solvency are justified.

16 The non-payment of many invoices by Complainant fulfills the requirement as set by court practice and legal doctrine when interpreting the notion of lack of solvency ("Zahlungsunfähigkeit", no. 8 above). This situation is also not only of a temporary nature in case of Complainant; the unpaid invoices date back several months, i.e. the criterion of duration is also fulfilled.

17 In the opinion of the Appeals Board, other elements of circumstantial evidence also justify serious doubts as far as Complainant's solvency is concerned. The following eight examples merit to be mentioned:

18 (i) Both the [year-1] Consolidated statements of profit and loss (act. […], p. […], and replication statement, act. […], p. […]), as well as the [year] unaudited interim Consolidated statement of profit and loss of Complainant (replication statement, act. […], p. […]) show that the Complainant no longer generates any revenues. Complainant itself admits at least in an indirect way that Complainant is a "shell company" (replication statement, nos. […]), it only contests that a "shell company" must be delisted; however, it is hard to understand how the solvency situation can improve if Complainant does not exercise actual business transactions.

19 (ii) Complainant announced to be in progressed discussions about a business combination (replication statement, no […] with act. […] and […]); however, the press releases remained quite vague and a high degree of certainty that the business combination will be successful cannot be drawn therefrom. In addition, such a business combination could also be done after the delisting (and possibly a new listing would anyhow have to be done in view of the changed circumstances).

20 (iii) The audited Annual Report [year-1] of Complainant (act. […] to Appeal) states at the end of no. […] of the "Notes" the following: "… the Company remains subject to uncertainties about its relaunch and its ability to start generating revenues and consistent cash flows to adequately support its operations …". In addition, in section […] of the Report it is stated that the Group is exposed to "significant liquidity risk". This Report dates from [date] and no evidence that the situation has improved has been submitted by Complainant.

21 (iv) In the Independent auditor's report on the [year-1] financial statements, the auditors also strongly qualify their "going concern"-assessment and refer to sections […] and […] (on page […] after p. […], i.e. p. […], respectively) in which the aforementioned strong reservation for a favorable forecast on the establishment of the business is made. Finally, they have not revised the [year] interim financial statements at all.

22 (v) The loans guaranteed by the CEO and the Chairman of the Complainant in the amount of [currency] [amount], which according to the audit opinion of [date] (act […] to Appeal p. […] after p. […], i.e. p. […], respectively) would have saved Complainant from immediate insolvency, were merely promised by Complainant in the [year-1] Annual

Report and were allegedly granted on [date]. They should then have been disclosed in the Interim Financial Statements [year]. However, they do not clearly appear in the [year] Interim Financial Statements, nor were they supported by confirmation in an auditors' report to the interim financial statements or otherwise. The loans in the amount of [currency] [amount] are mentioned only in the audit report on the [year-1] financial statements (p. […] after p. […], i.e. p. […], respectively), but there the auditors place them under the aforementioned strong reservation of sections […] and […]. In addition, in the unaudited interim financial statements of [year], Complainant declared cash inflows from financing activities of only [currency] [amount] (act. […] to replicant statement, p. […]) although the liquidity requirement from these loans would obviously have been higher simply because of the long overdue invoices of SIX in the amount of around [currency] [amount]. All this raises doubts about the suitability of these loans to ensure the solvency of the Company.

23 (vi) The doubts are aggravated by the remark of the auditors in the attachment to the Annual Report (p. […] after p. […], i.e. p. […], respectively) that "sufficient and appropriate audit evidence regarding possible guarantees or other obligations regarding the related bank accounts" have not been obtained by the auditors. This comment again stresses doubts about the stability of the financial situation of Complainant.

24 (vii) Especially in a difficult financial situation, the board of directors of a corporation is obliged to produce a liquidity plan; no such document has been submitted by Complainant to the Appeals Board showing that future prospects are more positive.

25 (viii) Finally, Complainant would also have had the opportunity to dispel the reasonable doubts about its solvency by submitting further evidence, such as revised interim financial statements [year], settling the outstanding invoices or providing evidence of existing loan agreements. However, it failed to do so, which ultimately underscores the reasonable doubts presented.

26 *Taking all considerations together and assessing their weight*, the Appeals Board arrives at the conclusion that Defendant's doubts about the solvency of Complainant were and are justified and that these doubts must be considered as being serious. Therefore, the conditions for a delisting of the Complainant's shares pursuant to art. 58 para. 1 no. 2 LR are fulfilled and the Appeal against the Delisting Decision is to be rejected.

27 In consequence of this outcome of the procedure, Complainant is responsible to bear the costs of the Appeals Board in the total amount of CHF […] (art. 6.13 ABR, Art. 63 VwVG).

28 According to art. 6.13 ABR, the Appeals Board "may award compensation" to the prevailing party (i.e. Defendant in this case). Defendant requested payment of a compensation amount of CHF […] (no. […] of duplication statement). In view of the fact that the interpretation of the relevant legal terms has not been possible based on a clear court practice and legal doctrine and that the interpretative discretion did not indicate that Complainant's Appeal would be outside of any reasonable chances of success, the Appeals Board is of the opinion that – based on its discretion in interpreting "may" – Complainant should not be obliged to pay a compensation to Defendant.

and therefore decided:

1. The Appeal of Complainant is dismissed in full.
2. The procedural motion has become devoid of object.
3. Complainant is obliged to bear the costs of the appeals procedure in the amount of CHF […]; this amount will be drawn from the cost advance; its remaining part is to be repaid to Complainant.
4. Complainant is not obliged to pay any compensation amount to Defendant.
5. Notification by E-Mail and thereafter by written registered mail to Complainant and Defendant.
6. An appeal against this decision can be filed within 30 days to the special Arbitration Court of the SIX Swiss Exchange AG.

Appeals Board of SIX Swiss Exchange Ltd.

[…] […] […]