



## SANCTIONS COMMISSION

# Decision

in the proceedings SaKo-II/2024

### **SIX Exchange Regulation AG**

(Listing & Enforcement)

Hardturmstrasse 201

8021 Zurich

vs.

**X. \_\_**

[Address]

Participants of the Sanctions Commission (SaKo): [...] (Chairman), [...], [...], [...] (Secretary)

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## Decision of 13 March 2024

- I. **SaKo has determined that X. \_\_ intentionally violated the applicable financial reporting standard Swiss GAAP FER and thereby its obligations pursuant to Art. 51 LR in combination with Art. 6 DFR by**
  - a. **failing to present consolidated financial statements for the full year [year] and therefore violating FER 30/1 et seq.;**
  - b. **restating the prior period [year-1] and the half-year [year] consolidated financial statements in the full year [year] non-consolidated financial statements and therefore violating the FER framework paragraph 30;**
  - c. **as a consequence of Ciph. a above, failing to disclose the details of the scope of consolidation and therefore violating FER 30/35;**
  - d. **as a consequence of Ciph. a above, failing to disclose personal expenses in the notes and therefore violating FER 3/10;**
  - e. **as a consequence of Ciph. a above, failing to publish a segment reporting and therefore violating FER 31/8.**
- II. **X. \_\_ is ordered to pay a fine in the amount of CHF 200'000.**



- III. **X. \_\_ is ordered to bear the cost of SER for the present proceedings in the amount of CHF [...] and the additional charges of CHF [...] incurred by the Sanctions Commission. The total costs to be covered by X. \_\_ amount to CHF [...].**
- IV. **Once the sanction decision has become legally binding, it will be made available in anonymised form on the SER website. Furthermore, the conclusion of the proceedings will be communicated to the public in a media release, with the names of the parties mentioned in the same way as when the file was submitted to SaKo.**

**An appeal can be filed against this decision according to Art. 62 para. 2 LR within 20 trading days of this decision being served. Arbitration proceedings will be instituted upon delivery of a written notice of arbitration against the other party to the lower court, i.e. SaKo ([...]) according to Art. 2.1 of the Rules of Arbitration.**

## Reasons for the decision

### 1. 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 [year] Swiss GAAP FER (FER) 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] with its letter dated [date].
- 3 After having considered all the evidence, SER concluded that there were sufficient indications suggesting a violation of the obligations set out by the applicable accounting standard FER. Therefore, on [date], SER initiated an investigation in the sense of Ciph. 3.3 para. 1 RP against X. \_\_ and submitted additional questions. In addition, the Issuer was informed in writing, 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 to the letter on [date].
- 4 SER submitted on [date] to the Sanctions Commission (**SaKo**) a sanction proposal of SIX Exchange Regulation AG dated [date] including the attachments and the response from X. \_\_ dated [date] regarding said sanctions proposal. The Secretary of SaKo confirmed the receipt on the same day. Neither party used the possibility to amend the statements, that was offered with the confirmation of receipt.
- 5 The parties were notified on [date] of the composition of the delegation for the decision determined by the President and no request for recusal was filed.



- 6 The delegation deliberated on the sanction proposal and made its decision on [date].

## 2. Findings

### 2.1 Formal findings

- 7 X. \_\_\_ (previously "[F. \_\_\_ Ltd]") is a company incorporated under the laws of [place] with its registered office in [place]. The Company's registered shares are listed in the [listing segment] of SIX Swiss Exchange AG. By signing the Declaration of Consent dated [date], X. \_\_\_ accepted to be bound by the stock exchange regulations, the LR, the additional rules, implementing provisions and the RP in their latest version.
- 8 The violation of the LR, any additional regulations thereto or any implementing provisions thereof may be sanctioned with one or more of the sanctions listed in Art. 60 and Art. 61 LR. SaKo is the competent body for deciding upon sanction proposals submitted by SER (Art. 3.4 and Art. 4 RP).
- 9 In establishing the relevant facts for this sanction decision, SaKo considered both the exculpatory and inculpatory facts with equal care. All information that serves to determine the facts of the case is subject to free evaluation and deemed to be evidence (Art. 3.1 para. 1 et seq. RP). In arriving at its decision, the Sanctions Commission is not bound by the sanction proposals submitted by the investigative bodies (Art. 4.4 para 4 RP).

### 2.2 Material findings

#### 2.2.1 Facts of the matter

- 10 On [date], the board of directors proposed to change the Company's name from "[F. \_\_\_ Ltd]" to "X. \_\_\_". Furthermore, a capital increase was proposed. Both proposals were accepted by the Annual General Meeting on [date] and the placement of the new shares, resulting in cash proceeds of [currency] [amount], was successful.
- 11 The cash proceeds from the capital increase were used to pursue the new business model which was focusing on the [business]. In this regard, X. \_\_\_ acquired a 100% ownership interest in A. \_\_\_ AG (**A. \_\_\_ AG**). The transaction was completed on [date]. A. \_\_\_ AG was set up as an intermediate holding company for acquisition activities of X. \_\_\_. A. \_\_\_ AG held a 100% ownership interest in B. \_\_\_ Srl (**B. \_\_\_ Srl**) and C. \_\_\_ LLC (**C. \_\_\_ LLC**), [place]. On [date], X. \_\_\_ confirmed the acquisition and consolidation of a 100% interest in B. \_\_\_ Srl and C. \_\_\_ LLC.
- 12 On [date] X. \_\_\_ announced that it had entered a partnership with D. \_\_\_ Sàrl (renamed into E. \_\_\_ Sàrl), a [place] investment firm. The focus was to expand the [business]. During this cooperation A. \_\_\_ AG sold 30% of B. \_\_\_ Srl for [currency] [amount] to E. \_\_\_ Sàrl and has written a call option for the remaining 70% for [currency] [amount].

- 13 On [date], just a few months after E. \_\_\_ Sàrl bought 30% of B. \_\_\_ Srl from A. \_\_\_ AG for [currency] [amount], X. \_\_\_ acquired 100% of E. \_\_\_ Sàrl for [currency] 2 [amount]. The acquisition was completed on [date] by A. \_\_\_ AG.
- 14 On [date] X. \_\_\_ announced its intention to divest C. \_\_\_ LLC.
- 15 After three deadline extensions granted by SER, X. \_\_\_ published its [year-1] annual report, with a delay of three months, on [date]. According to X. \_\_\_, the reason for the delay was the complexity added to the preparation of the financial statements resulting from the acquisition and first-time consolidation of A. \_\_\_ AG, B. \_\_\_ Srl and C. \_\_\_ LLC. In the [year-1] annual report, X. \_\_\_ presented consolidated financial statements including all subsidiaries.
- 16 On [date], X. \_\_\_ sold E. \_\_\_ Sàrl, which held 30% of B. \_\_\_ Srl. This transaction was disclosed in the [year] half-year report as a subsequent event. The [year] half-year report was published on [date] with a delay of two months. The reason for the delay was the acquisition and consolidation of E. \_\_\_ Sàrl, which was completed on [date].
- 17 On [...] December [year] X. \_\_\_ announced that it had exited the [business] completely and that it held no shares anymore in any related subsidiaries.
- 18 On [date], at about 3.30 p.m. CET, an attorney declaring that he is representing X. \_\_\_, called SER and raised the question, if the Company still had to prepare its financial statements on a consolidated basis, considering the fact that the Issuer did no longer meet the size criteria. SER clarified that those criteria exclusively refer to the application of Core FER. SER further explained that the application of Core FER only is not allowed for listed companies and as a result, the Issuer has to prepare its financial statements on a consolidated basis according to FER 30/1 et seq.
- 19 On [date] X. \_\_\_ published its [year] annual report. The FER [year] financial statements including the comparative restated numbers for [year-1] were prepared on a non-consolidated basis. Some excerpts from the notes to the non-consolidated FER financial statements are quoted below:
- *“Starting 1 January [year], the financial statements have been prepared in accordance with the entire existing accounting principles of FER (Generally Accepted Accounting Principles FER), as well as the additional rules for the listing at the SIX Swiss Stock Exchange.”*
  - *“On [...] December [year], the Company has fully divested of A. \_\_\_ AG.”*
  - *“Since on 31 December [year] the Company had no consolidation perimeter, it has prepared its financial statements in accordance with a recognized accounting standard (Swiss GAAP FER).”*
  - *“Accounting policies have been consistently applied to all years presented. [year-1] figures may have been reclassified to be comparable versus the current period.”*

20 X. \_\_\_ admits the presentation of facts above but adds in its statement of [date]:

— *“One of our lawyers has indeed contacted SER to enquire whether the Company was still obliged to prepare its financial statements on a consolidated basis, since the company did no longer meet the size criteria. The response perceived by our lawyer differed slightly from what was presented in the sanction proposal. The employee of SER was unable to provide a definitive and precise answer given the lack of legal precedent or experience at SER regarding our specific situation. He responded that they had never encountered this particular case before, and in case of doubt the consolidation should be prepared. SER clarified that it was the responsibility of the Board of Directors to decide whether a consolidation was to be prepared, given the provisions.”*

### 2.2.2 Rules regarding Financial Reporting

21 According to Art. 51 LR, annual and interim financial statements must be prepared in accordance with a financial reporting standard that is recognized by the Regulatory Board.

22 As set out, the Company’s registered shares are listed in the [listing segment] of SIX Swiss Exchange AG. Therefore, X. \_\_\_ must apply either FER or the financial reporting standard under the Swiss Banking Act (Art. 6 Ciph. 2 DFR in connection with Annex 1 DFR). As X. \_\_\_ is neither a bank nor a securities firm, it has to submit its annual and interim financial reports in compliance with FER.

23 Consolidated financial statements are the financial statements of a group of companies as described by the scope of consolidation and comprise the annual accounts of the holding company and its subsidiaries (FER 30/1). FER 30/2 requires that subsidiaries are fully consolidated. FER 30/45 defines a subsidiary as an organisation that is controlled by the holding company. Control is assumed, when a holding company holds directly or indirectly more than half of the voting rights of a subsidiary (FER 30/46).

24 As set out, X. \_\_\_ acquired A. \_\_\_ AG which was the intermediate parent company of B. \_\_\_ Srl and C. \_\_\_ LLC. As a result, and in compliance with FER 30/1 et seq., X. \_\_\_ presented [year-1] annual consolidated financial statements which was leading to a considerable delay in the publication of the [year-1] annual report. Similarly, the publication of the [year] half-year report was delayed due to the consolidation of E. \_\_\_ Sàrl which was newly acquired on [date].

25 As both financial statements were prepared on a consolidated basis, it had to be apparent to X. \_\_\_ that the obligation for preparing consolidated accounts pursuant to FER 30/1 et seq. applied.

26 During [year], X. \_\_\_ decided to abandon their newly established business model regarding the [business] and sold its subsidiaries:

— On [date], X. \_\_\_ sold E. \_\_\_ Sàrl, which held 30% of B. \_\_\_ Srl;

- On [date] X. \_\_\_ divested the remaining 70% stake in the subsidiary B. \_\_\_ Srl.
- 27 In contrast to the [year-1] annual report and the [year] half-year report, the [year] annual report was not prepared in accordance with FER 30. In other words, X. \_\_\_ has not presented consolidated financial statements in their [year] annual report.
- 28 Subsidiaries need to be consolidated from the date the Company gains control until the date on which control no longer exists (FER 30/2 in connection with FER 30/45 and 30/46). X. \_\_\_ had a controlling interest in B. \_\_\_ Srl and C. \_\_\_ LLC via A. \_\_\_ AG but also E. \_\_\_ Sàrl in [year-1] and in [year] up to the date of disposal. Accordingly, X. \_\_\_ should have prepared consolidated financial statements for the [year-1] comparative period as well as the income statement and cash flow statement including the associated notes until the date of sale in [year] because the subsidiaries were only sold during the reporting period on [...] August [year] and [...] December [year].
- 29 Contrary to the above, X. \_\_\_ decided to present its [year] annual financial statements on a non-consolidated (stand-alone) basis for the entire year, including the [year-1] comparative period. On SER's request to explain this approach, X. \_\_\_ stated that it falls under certain thresholds regarding revenue, total assets and employees outlined in Art. 963a of the Swiss Code of Obligations (CO) and therefore can apply a consolidation exemption. According to X. \_\_\_, the divestment of A. \_\_\_ AG triggered the conditions needed to present non-consolidated financial statements for the year [year]. This view has been confirmed by X. \_\_\_ in their response dated [date], despite SER explicitly requesting an explanation with reference to the guidance in the applicable accounting standard FER.
- 30 According to SER, X. \_\_\_' argumentation *"completely ignores that according to Art. 51 LR and Art. 6 DFR, companies have to apply one of the recognized accounting standards. As already set out above ..., X. \_\_\_ opted for FER. The CO reporting standard is not permitted for listed companies at SIX Swiss Exchange. As a result, the exemption due to size pursuant to Art. 963a CO does not apply. If there were any arguments according to which X. \_\_\_ would have been allowed to refrain from consolidating its subsidiaries, they would necessarily need to originate from FER. However, no such arguments can be found in FER."*
- 31 X. \_\_\_ agrees that *"X. \_\_\_, as listed company, has to comply with the whole body of rules and regulations of the Swiss GAAP FER according to FER 1/1. Moreover, according to the same provision, listed companies are not permitted to solely apply the core FER. We agree with the SER's position, where our Company cannot apply the Core FER. This is undisputed. Our Company has to comply with the complete set of rules, from FER 1 to FER 41."*
- 32 However, X. \_\_\_ sees an important limitation: *"While preparing the financial statements, each recommendation has to be analysed if it is applicable for our company: Valuation (FER2), Presentation and format (FER3), etc. For instance, standard number 21 is applicable to charitable non-profit organisations. If our company does not adhere to this specific standard, it does not imply a violation of standards. It is rather a recommendation that is not applicable in our situation. Our understanding, which seems to*

*differ between the point of view of our experts and those of SER, is the implementation of FER 30. Nowhere in the FER recommendations are the conditions specified for a group to consider consolidation. Given the absence of explicit guidance, our experts concluded that the sole provision elucidating whether a group needs to do a consolidation is the Swiss Code of Obligations (CO). If the CO indicates the obligation for a consolidation, then the recommendation FER 30 will be applicable. Since our Company does not meet the criteria enumerated in Article 963a CO, we made the conclusion that FER 30 was not applicable. Moreover, the CO has not specifically addressed the preparation of consolidation but instead refers to a recognised financial reporting standard. The only use of CO 963a is to determine whether a Swiss entity is obligated to consolidate its accounts."*

- 33 SaKo notes that the example mentioned by X. \_\_\_ refers to the nature of an organisation not to the size. Such an exemption is not applicable in the current situation. It is obvious that there is no reason to exempt X. \_\_\_ from the application of FER 30 due to the nature of its activities. FER does not have a size-based exemption from presenting consolidated financial statements such as the CO. Firstly, the simplifications for small companies to apply Core FER does not include an exemption from consolidation (see Swiss GAAP FER booklet in the section 3. Structure and content of the Recommendations-3.2 Concept). Secondly, FER 31 explicitly states that for listed companies the application of the Core FER is prohibited. As a consequence, any listed company - regardless of its actual size - has to apply all FER standards.
- 34 According to FER 30/45 et seq., X. \_\_\_ would have been required to deconsolidate their subsidiaries at the time of disposal, i.e. when it lost control. As such, the balance sheet as of 31 December [year] is not obviously wrong since the Company did not have any subsidiaries to consolidate anymore on that date. However, the income statement and cash flow statement for the year [year] including the related disclosures in the notes should have been prepared on a consolidated basis until [...] December [year].
- 35 X. \_\_\_ claims that they had not sufficient reliable information and that the investment in the [business] was not significant: *"Regarding the reliability principle, the information has to be reliable (FW para 32). Our company had difficulties in obtaining the required information from the newly acquired subsidiary E. \_\_\_ Sàrl to get the half-year financial statements. Less than three months later, we announced our divestment from these structures due to their incompatibility with our internal requirements. As of today, we do not have the information enabling us to consolidate the profit and loss accounts as of [...] December [year]. According to FER 30/52, a subsidiary might be excluded if it is not significant in their entirety. By exiting the [business], the company remained for a very short time in the business. Our experts also considered our intention to sell this business quickly, in justifying the exclusion of the subsidiaries. Considering the impairment recognized prior to the selling of the subsidiaries, a consolidation computation would not have impacted the overall consolidated result of the company."*
- 36 Consolidation is a fundamental principle of all accounting standards providing a true & fair view, including FER, which impacts primary statements and their associated notes significantly. Thus, the [year] financial statements are materially misstated. This can be evidenced by the fact that the financial key figures (income statement, balance sheet, cash flow statement) presented in the [year] annual

report are virtually the same in the FER financial statements and in the CO statutory stand-alone financial statements, whereas this was not the case in the [year-1] annual report, where the FER financial statements were presented on a consolidated basis and the CO statutory financial statements on a stand-alone basis. The [year] non-consolidated financial statements give the impression that X. \_\_\_ was never involved in the [business]. Rather, the non-consolidated financial statements falsely present that X. \_\_\_ was only holding financial investments and granting loans in these periods.

- 37 SER lists in the sanction proposal several consequential errors such as:
- Personal expenses: FER 3/10 requires an entity to disclose, amongst others, personal expenses in the notes if expenses are presented by their function (“activity-based income statement presentation method”). X. \_\_\_ prepared its [year] income statements according to the “activity-based income statement presentation method”. However, it failed to disclose the personal expenses. X. \_\_\_ explains that personal expenses were not disclosed in the notes since all personnel was employed by the former subsidiaries. X. \_\_\_’ explanation would only be conclusive, if it were correct to not present consolidated financial statements for the entire period.
  - Segment reporting: FER 31/8 requires listed companies to publish a segment reporting used on the top management level to steer the business. Segment revenues and segment results must be reconciled to the income statement. A justification, e.g. competitive disadvantage compared to non-listed or bigger sized listed competitors, clients or suppliers, has to be disclosed in the notes. In its [year] annual report, X. \_\_\_ discloses that it operated in the following three segments during the financial year [year-1]: Automotive, Media and Finance. There is no segment information published in the [year] annual report since the Company does not present consolidated financial statements. Upon request from SER, X. \_\_\_ explains that after the divestment of all its subsidiaries it presents itself as an investment company holding a limited number of listed securities. However, X. \_\_\_ did operate in the mentioned segments in the financial years [year-1] and [year], since it divested its subsidiaries only during the financial year [year]
  - Disclosures (consolidation scope): FER 30/35 requires an entity to disclose the details of the scope of consolidation, including changes in the scope of consolidation compared with the previous year as well as the date from which this change is considered.
  - In its [year] annual report, X. \_\_\_ did not disclose any scope of consolidation or changes thereof, notably the disposals of A. \_\_\_ AG, B. \_\_\_ Srl and C. \_\_\_ LLC.
- 38 SaKo notes that X. \_\_\_ does not contest the presentation of consequential errors if there is an obligation to present consolidated financial statements at the end of [year].

- 39 FER framework paragraph 30 outlines that financial statements have to be consistent with the prior year principle. Deviations from consistency are only possible for changes in accounting principles, errors in prior year financial statements and changes in accounting estimates. For changes in accounting policies and for correction of errors, the prior year financial statements are restated, as if the new accounting principles have already been applied initially or as if an error had never occurred (retrospective method). For changes in accounting principles, the Company needs to disclose why the accounting principle has been changed, the nature of the change and its financial impact. In the event of errors in prior year financial statements, the effects of the errors are to be explained and disclosed quantitatively in the notes.
- 40 X. \_\_\_ states in the notes to the [year] financial statements that the Company had no consolidation perimeter as of 31 December [year]. Furthermore, X. \_\_\_ explains that accounting policies have been consistently applied to all years presented and [year-1] figures may have been reclassified to be comparable versus the current period.
- 41 As a matter of fact, X. \_\_\_ restated the entire comparative period. However, according to the rules of FER Framework paragraph 30, the sale of subsidiaries does not constitute a change in accounting policies nor a correction of errors that would justify a restatement of prior periods retrospectively. Rather, this is a change in the actual facts and circumstances that has to be accounted for when and as it happens. Therefore, X. \_\_\_ should not have restated the comparative period. In order to ensure consistency and comparability, X. \_\_\_ should have presented the comparative period as published in the previous [year-1] annual report on a consolidated basis and report consolidated results for the financial year [year] until the time, when the last subsidiary was divested, i.e. until [...] December [year].
- 42 For the sake of completeness, it has to be mentioned, that even if it were correct to restate the comparative period, which is not the case, the Company failed to disclose the quantitative effects of the restated income statement, balance sheet, cash flow statement as well as many of the disclosures in the notes for the comparative period [year-1]. As a result, the Company would have violated the disclosure requirements according to FER Framework paragraph 30 with respect to restatements.
- 43 In summary, by restating the comparative period [year-1] in its [year] annual report, X. \_\_\_ violated the principle of consistency and therefore one of the most central principles of any accounting standard to guarantee comparability between different years.
- 44 **SaKo concludes, that X. \_\_\_ has violated FER 30 by not preparing [year] annual consolidated financial statements:**
- Prior to the acquisition of the new subsidiaries the Company issued several press releases about its change of strategic direction. Furthermore, this is repeated in Note 1 to the full year [year-1] consolidated financial statements.

- Note 21 of the [year-1] consolidated financial statements shows that the three subsidiaries were acquired for a consideration of [currency] [amount]m of which [currency] [amount]was paid in cash. This is clearly material for an entity which had total assets of [currency] [amount]as at 31 December [year-1].
- By consolidating the entities in its full year [year-1] and half year [year] consolidated financial statements the Company already acknowledged that a consolidation was required. For these reports the Company appears to have been able to obtain reasonable financial data on its subsidiaries.
- The fact that by the end of [year] all subsidiaries had been sold is irrelevant for the requirement to produce consolidated financial statements. As of 1 January [year]and for much of [year] the Company did have material subsidiaries.
- Disposal of all subsidiaries during the year is not a justification to restate prior period financial statements.

### 3. Sanction

- 45 As described in detail above, X. \_\_\_ violated Art. 51 LR in combination with Art. 6 DFR, FER conceptual framework, FER 3, FER 30 and FER 31.
- 46 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 is to be sanctioned with a fine, the impact of the sanction on the party concerned must also be considered when setting the amount of the fine.

#### 3.1 Degree of fault

##### 3.1.1 Commission of the breach

- 47 The LR requires issuers to ensure compliance with the LR, additional rules and related implementing decrees at all times. In this case, the sanction is addressed to a legal entity and requires that the issuer has not taken all necessary and reasonable organisational 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 SaKo decision of 14 April 2015 [SaKo 2015-AhP-I/15], No. 19, and of 30 July 2010 [SaKo 2010-CG-II/10/SaKo 2010-MP-I/10], No. 13; see also sanction notice of SER of 12 August 2013 [SER-KTR-FOR-I/13], No. 28, and of 4 February 2013 [SER-MT II/12/SER-AHP I/12/SER-Listing I/12], No. 103).
- 48 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).

- 49 Listed companies are expected to be in full compliance with all stock exchange regulations. The responsible employees and officers must be familiar with the relevant regulations, including the applicable accounting standards, comments and practices of the stock exchange bodies (see SaKo decision of 14 April 2015 [SaKo 2015-AHP-I/15], No. 26, and of 13 August 2013 [SaKo 2013-AHP-I/12], No. 37). Because of the issuer's duty of care, every issuer is expected to be familiar with the applicable stock exchange regulations, commentaries and practices of the judicial bodies. Any breach of the rules and regulations must raise a presumption of negligence on the part of the issuer in failing to discharge its duty of care (see sanction notice of SER of 11 October 2013 [SER-AHP-I/13], No. 49, and of 4 February 2013 [SER-MT II/12/SER-AHP I/12/SER-Listing I/12], No. 104; also see SaKo decision of 2 August 2019 [SaKo 2019-AHP-I/19], No. 53, for further details).
- 50 SER claims that *"the Issuer prepared its [year] financial statements on a non-consolidated basis. X. \_\_\_ did this, even after being advised by that, as a listed company, it must apply all FER Standards including FER 30 (Consolidated financial statements). Therefore, SER has indications that X. \_\_\_ violated the provisions intentionally. ... With regard to the [year] annual report it has to be noted that the failure to present consolidated financial statements is a very serious mistake. As a listed company, X. \_\_\_ should have been aware of the FER accounting principles, especially the rules regarding consolidation, which is a fundamental concept in accounting. Furthermore, X. \_\_\_ should have been aware that any simplifications for small organisations do not include an exemption from consolidation (see FER 30, Introduction) and do not apply to listed companies regardless of size (FER 1.2 and FER 31, Introduction). And most importantly, X. \_\_\_ should have known that for a listed company, provisions of FER take precedence over those of the CO. All the above is even more true considering that X. \_\_\_ should have been already familiar with FER Framework and FER 30, given that it had already been sanctioned for violations in connection with these provisions in the past."*
- 51 X. \_\_\_ responds: *"SER cannot attribute intention to the Board of Directors due to the absence of both awareness and willingness. Given that, after obtaining information from the experts engaged by the Board of Directors and the call with the SER expert, the absence of confirmation regarding an obligation of consolidation, makes it impossible to assert that the Board of Directors acted conscientiously, voluntarily or with intention. Of course, had SER, legal precedents, or doctrine confirmed the mandatory nature of consolidation, the Board of Directors would have taken the decision to consolidate. However, this was not the case here. The negligence is also impossible to consider. The Board of Directors has diligently taken all the precautions required by the circumstances. They hired reputable and excellent experts, and promptly sought guidance from SER when doubts arose to refine their position. It is really complicated to understand what further precautions the Board of Directors could have taken in this situation of shortcoming."*
- 52 SaKo does not agree with the arguments of X. \_\_\_. There is no room for an exclusion from the obligation to present consolidated financial statements in the

current situation. X. \_\_\_ is obliged to report according to the FER Accounting and Reporting Recommendations. FER does not include an exemption from consolidation due to the size of the company. In fact, X. \_\_\_ presented previous year and [year] interim statements on a consolidated basis. Reference to SaKo 2020 SaKo-RLE-II/19 is misplaced as in that case a subsidiary was consolidated despite the lack of control.

- 53 It is not documented on which basis the experts consulted have given their advice. In any case, this information and its consequences only concern the internal relationship between X. \_\_\_ and the experts. This information is not binding for the SaKo. SaKo notes that the Company remains fully responsible for compliance with the stock exchange rules and the respective accounting standards. The enquiry with SER is not an exculpation (furthermore, the advice given was to present consolidated accounts). SaKo notes that FER 30 is clear and does not provide for an exemption that could be applicable in the current case.
- 54 Reference to difficulties in obtaining the necessary information is no reason neither to refrain from presenting consolidated accounts. It is the full responsibility of the Company to organise its work in accordance with its obligations to comply with all applicable rules.
- 55 As outlined above, 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. X. \_\_\_ decided explicitly not to present consolidated financial statements at the end of [year] despite the clear requirements of FER.
- 56 Based on its own considerations, X. \_\_\_ has decided not to present consolidated financial statements with the corresponding comparative figures as at the end of [year]. SaKo concludes that X. \_\_\_ has thus clearly **acted intentionally**.

### 3.1.2 Behaviour after the breach

- 57 The Issuer has been cooperative in the proceedings. It responded in full and on time to the questions raised by SER. Therefore, the Issuer acted in fulfilment of its obligations (Art. 6 para. 5 LR). Such behaviour is qualified as neutral since it is to be expected from listed companies.

### 3.1.3 Behaviour in the previous years

- 58 SER keeps a register of all sanctions that have become legally binding (Ciph. 26 para 1 RP). A register entry will be taken into account in the assessment of any subsequent sanctions if not more than three years have elapsed between the previous sanction acquiring legal force and the time of the latest violation of the regulations (Ciph. 2.6 para. 4 RP).
- 59 On [date] the Sanctions Commission sanctioned X. \_\_\_ (previously [F. \_\_\_ Ltd]) for a gross negligent violation. This violation was centered around FER 20, FER 30 and the FER Framework.

- 60 As the violations set out in this Sanctions Proposal occurred with the publication of the [year] annual report on [date], they occurred within three years after the previous sanction acquired legal force. Therefore, the Issuer's conduct in the previous years has to be taken into account as an aggravating factor when assessing the sanction at hand, especially considering that the current violations, just as those sanctioned with the decision of the Sanctions Commission of 18 September 2020 [SaKo-RLE-II/19], centered around FER 30 and the FER Framework.
- 61 Therefore, SaKo decides to **increase substantially the sanction** to be imposed compared to a sanction that would be appropriate for an issuer that has not been sanctioned in the recent past.

### 3.2 Severity of the breach

- 62 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 decisions of the Sanctions Commission dated 31 January 2023 [SaKo V/2022], number 55; dated 13 August 2013 [SaKo 2013-AHP-I/12], number 33; dated 28 June 2012 [SaKo 2012-AHP-II/11], number 56). Since financial reports and especially the annual report carry so much weight, it is all the more important that those reports are presented fairly in all material aspects, meaning in particular, but not exclusively, that the applicable accounting standards are applied correctly.
- 63 SER concludes that "*X. \_\_\_' [year] annual report does not comply with the requirements of FER 30 due to the failure to present consolidated financial statements. This resulted in an incorrect income statement and cash flow statement as well as notes for the year [year]. Furthermore, the entire comparative period's income statement, balance sheet, cash flow statement and notes have been erroneously restated which constitutes a violation of FER Framework as well as the principles of consistency and comparability. As a result, the [year] annual report has been materially misstated.*" SaKo finds that this significantly prevents market participants from adequately analysing the Company's financial data.
- 64 X. \_\_\_ argues that "*in our opinion, a shortcoming in the Swiss GAAP RPC, leading to discrepancies should not be compared to a breach of a known standard. That being said, this shortcoming should not result in a penalty, at most, a reprimand according to Article 3.5 par 2 RP, which will serve as a precedent. It is generally admitted that FER standards, outlined in a book of approximately two hundred pages, can result in rules that are sometimes imprecise and allow various alternative methods. In comparison, IFRS and US GAAP standards are documented in books of around three thousand pages for IFRS standards and thirty thousand pages for US GAAP standards.*"
- 65 SaKo does not see any "shortcoming in the Swiss GAAP FER" in the current case. Although the FER rules are shorter and less detailed compared to IFRS and US GAAP, they cannot be considered for the issues raised in this case as "sometimes imprecise rules". As discussed above, FER under the section in its booklet on

Structure and Content of the Recommendations and FER 30 do not provide for an exemption to present consolidated financial statements due to size, contrary to the (here not applicable) accounting rules of the Swiss Code of Obligations (CO). If X. \_\_\_ would prefer more extensive rules like for example IFRS, the Company could have chosen such rules for the listing. However, the accounting rules according to CO are not sufficient for a company listed at SIX.

- 66 Considering the nature of the error and the fact that these errors have a significant impact on investors' trust, SaKo considers the breaches as a **severe violation of the LR**.

### 3.3 Sensitivity to sanctions

- 67 When determining the sanction, SaKo is not bound by the sanction proposal nor by the statements of the Company. Taking 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. A reprimand, as requested by X. \_\_\_, is definitively not sufficient.
- 68 When quantifying the sanction amount the sensitivity to sanctions must 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).
- 69 X. \_\_\_' net loss attributable to the shareholders for the financial years [year] and [year-1] (consolidated) amounted to [currency] [amount] and [currency] [amount], respectively. The net cash inflows from operating activities were [currency] [amount] and [currency] [amount]. Cash and cash equivalents and listed securities amounted to [currency] [amount] and [currency] [amount] while total equity stood at [currency] [amount] and [currency] [amount], respectively. At 30 June [year+1] the Company's half year [year+1] financial statements show a total of [currency] [amount] as cash and cash equivalents and listed securities.
- 70 In view of the economic figures described above, SaKo considers the Company's **sensitivity to sanctions as high**. However, SaKo notes that the Company has sufficient cash and cash equivalents and listed securities to pay a fine.

### 3.4 Amount of the sanction

- 71 When imposing a sanction, SaKo must bear in mind the credibility of the system of self-regulation at the stock exchange. All market participants must be able to trust in the strict observance of the rules. Sanctions of a purely symbolic nature are in general not sufficient to establish this trust. The Swiss Financial Market Supervisory Authority (FINMA) as well as the market participants expect stock exchanges in Switzerland to enforce all applicable rules with strict measures. The purpose is

not only to penalise the issuer for past breaches, but also to prevent breaches of the rules in the future. The sanction should in fact have a preventive effect. This policy was confirmed, for instance, in the SaKo decisions 026/19, 051/21, 061/21, I/2022 and II/2022, all of which saw SaKo taking steps to impose higher sanctions in respect of a preventive effect.

- 72 The limit for a sanction is CHF 10 million for intentional violations. Sanctions can be combined in cases of multiple violations. In the current case, the degree of fault as intention and the severity of the breach lead to a sanction in a higher range, whereas the size of the Company and the Company's sensitivity to sanctions justify a lower amount. As mentioned, the previous sanction to be considered, leads to an additional increase.
- 73 Considering all the relevant factors for determining the sanction, SaKo sanctions X. \_\_\_ with a **fine of CHF 200'000**, still remaining at the very low end of the scale, mainly due to the size of the Company and the Company's sensitivity to sanctions.

### 3.5 Publication of the decision of the sanctions commission

- 74 According to Art. 6 para. 7 RP, the public will be informed of any investigation concluded by a legally binding sanction decision. In addition, the legally binding SaKo decision will then be published on SER's website in anonymous form (Art. 6 para. 8 RP). In addition, there will be a media release, including the name of the Company, informing the public of the closure of the case. The company shall be informed in advance of the publication with a short notice period. Factual errors can be corrected, but there is no negotiation on the text as such. The company remains free to maintain its own communication.

## 4. Costs

- 75 In case of sanctions proceedings, charges are determined based on the expenditure incurred, adopting an hourly rate of CHF 300 per person according to Art. 3.7 in connection with Art. 4.1 of the List of Charges Regulatory Bodies (LocRB).
- 76 In this case, the charges incurred by SER to date amount to CHF [...]. They are not contested by the Company. The costs incurred by SaKo amount to CHF [...] and shall also be borne by X. \_\_\_. Therefore, X. \_\_\_ must cover total costs of CHF [...].

[place], [date]

[...]  
[Sig.] Chairman

[...]  
[Sig.] Secretary