
SIX Exchange Regulation AG
Listing & Enforcement
SB-KTR-II/24

**Sanction Notice
dated 25 April 2024**

in the Matter of

Issuer

X. __
[address]

Represented by [...] / [legal representation], [address]

concerning

Violation of the Listing Rules (Art. 42 and Art. 55 LR)

A. Proceedings Overview

- 1 In accordance with the Listing Rules (**LR**) in conjunction with the Directive Procedures Equity Securities (**DPES**) and the Directive Regular Reporting Obligations (**DRRO**) SIX Exchange Regulation AG (**SER**) oversees the correct fulfillment of the issuer's obligation.
- 2 As a consequence of X. ___ (**X. ___**) exercise of securities out of conditional capital prior to their formal listing in [month] [year], SER initiated a preliminary inquiry in accordance with the Rules of Procedure (**RP**) concerning a potential violation of the listing and regular reporting obligations rules.
- 3 By letter dated [date], X. ___ requested an extension of the deadline until [date] to answer to SER's Preliminary Inquiry Letter. On [date], the requested deadline extension was granted by SER. X. ___ responded in due time by letter dated [date].
- 4 On [date], SER submitted follow-up questions. X. ___ responded to them in due time by letter dated [date].
- 5 After having considered all the evidence, SER concluded that there were sufficient indications indicating a violation of the LR and the rules on reporting obligations. On [date], SER initiated an investigation in the sense of Ciph. 3.3. para. 1 RP. In addition, X. ___ was informed in writing, that an investigation generally concludes with the abandonment 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). No media release was published with regard to the initiation of the investigation.
- 6 With letter dated [date], SER sent X. ___ the draft of the sanction notice (including files) for comments. With letter dated [date], X. ___ submitted its comments timely and declared that it did not have specific comments to formulate.

B. Findings

I. Formal Findings

- 7 X. ___ is a company incorporated under the laws of [place] with its registered office in [place]. The company's [securities] are listed in 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 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 sanctions listed in Art. 61 LR (Art. 60 LR). SER may issue a sanction notice for a negligent violation if possible sanctions include a reprimand or fine of up to CHF 100'000 (Ciph. 3.5 para. 2 RP).
- 9 Given that the violation occurred in [month] [year], the LR dated 25 July 2022, the Directive Procedures Equity Securities (**DPES**) dated 1 April 2023 and the Directive Regular Reporting Obligations (**DRRO**) dated 1 January 2023 are applicable.

II. Material Findings

1. Facts of the Matter

- 10 In establishing the relevant facts for this sanction notice, SER considered both the exculpatory and inculpatory facts with equal care. All facts 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 and 2 RP). In drafting this sanction notice, SER evaluated all facts presented by X. ___ even if not explicitly referred to in this sanction notice.

1.1 Exercise of securities out of conditional capital prior to their formal listing

- 11 According to X. ___, in [month] [year-1] X. ___'s general meeting approved an increase of the company's conditional capital by [number] securities (from [number] to [number] securities). X. ___'s Articles of Association (**AoA**) were amended accordingly. The formal listing of the [number] additional securities that could be issued out of conditional capital was not requested immediately. According to the information provided, X. ___ had issued [number] new securities out of its conditional capital to its management as variable compensation on [date]. In accordance with the relevant equity plan of X. ___, the share grants were subject to a blocking period of [number] to [number] years. On [date], X. ___'s board of directors amended the AoA of X. ___ to reflect the issuance of the new securities (reducing the number of securities that could be issued out of the company's conditional capital to [number]).
- 12 On [date], X. ___ reported the exercise of [number] securities out of conditional capital for [month] [year] to SER via Connexor Reporting. According to SER's information on the conditional capital of X. ___, only [number] securities out of

conditional capital had been formally listed at that time. Therefore, it was not possible to exercise [number] securities out of conditional capital. SER rejected the report.

- 13 X. ___ informed SER that it had submitted an application for the formal listing of [number] securities via its Recognised Representation on [date]. X. ___ explained that said application was the reason for the reporting of the conditional capital of [number] securities instead of [number] securities.
- 14 X. ___'s listing application dated [date] was granted by SER with decision dated [date]. On [date], the additional [number] securities were formally listed.

2. Rules regarding Listing and Reporting Obligations

- 15 According to Art. 42 LR, before securities may be listed on SIX Swiss Exchange, an application must be submitted. For capital transactions such as an increase in conditional capital, the listing application must be submitted no later than 10 exchange days prior to the date of the first possible exercise of conversion rights or option rights with regard to the conditional capital (Art. 3 para. 1 Ciph. 4 in connection with Art. 4 para. 3 DPES).
- 16 The issuer must provide notification of each and every change in the rights attached to the listed securities, in good time prior to the entry into force of such change, so that investors' ability to exercise their rights is safeguarded according to Art. 55 LR. The reporting of the conditional capital must be done in form of a monthly report from the time at which the conditional capital is formally listed; prepared on the first trading day of the following month (Art. 9 Ciph. 5.02 in connection with Annex 1 Ciph. 5.02 DRRO).
- 17 Strict observance of the LR and the relevant procedures is a precondition for the proper functioning of the stock exchange market. Therefore, listing procedures are core to the regulatory framework. SIX is directed by law to fully enforce the respective rules and to sanction violations (Art. 35 Financial Market Infrastructure Act, FinMIA). Such rules include, among others, any changes in the capital structure of an issuer and changes in the rights of the securities traded. The LR and in particular the DPES govern in detail the listing procedure for equity securities and are intended to give instructions in the planning and execution of the procedure as well as in the compilation of the required documents (Art. 1 DPES).
- 18 Before conversion rights or option rights with regard to the conditional capital can be exercised for the first time, they must be formally listed. This is a transaction that requires a formal application (Art. 3 para. 1 Ciph. 4 DPES). Furthermore, the listing application must be submitted no later than 10 exchange days prior to the date of the first possible exercise of conversion rights or option rights with regard to the conditional capital (Art. 4 para. 3 DPES). Additionally, the reporting of the conditional capital must be done in form of a monthly report from the time at which the conditional capital is formally listed (Art. 9 Ciph. 5.02 and Annex 1 Ciph. 5.02 DRRO).

- 19 The exercised securities out of conditional capital in [month] [year] ([number] securities) have exceeded the existing securities out of conditional capital ([number] securities) that were formally listed on [date] (deficit of [number] securities). For the formal listing of the additional [number] securities, a listing application was sent to SER on [date].
- 20 By failing to submit the application for the formal listing before the first exercise of conversion rights or option rights with regard to the conditional capital and the exercise of securities out of conditional capital which were not formally listed, X. ___ violated Art. 42 LR in connection with Art. 3 para. 1 Ciph. 4 DPES in connection with Art. 4 para. 3 DPES. Consequently, X. ___ reported wrong information by reporting the exercise of securities which were not formally listed via Connexor Reporting and therefore failed to comply with Art. 9 Ciph. 5.02 as well as Annex 1 Ciph. 5.02 DRRO.

3. Sanction

- 21 As set out in detail above, X. ___ violated Art. 42 LR in connection with Art. 3 para. 1 Ciph. 4 DPES in connection with Art. 4 para. 3 DPES. Additionally, X. ___ failed to comply with Art. 55 LR in connection with Art. 9 Ciph. 5.02 as well as Annex 1 Ciph. 5.02 DRRO.
- 22 Such violations can be prosecuted with the sanctions defined in Art. 61 LR. The sanctions listed therein may be imposed cumulatively. Art. 61 para. 2 LR states that in determining the sanction to be imposed, due consideration must be given to the severity of the breach and to the degree of fault. In cases where the issuer shall be sanctioned with a fine, the impact of the sanction on the party concerned has also to be considered when setting the amount of the fine.

3.1 Degree of Fault

3.1.1 Commission of the Breach

- 23 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. Accordingly, the assessment of 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 [Sa Ko 2010-CGII/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).
- 24 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-1/13], number 48; of

12 August 2013 [SER-KTR-FOR-I/13], number 26; of 4 February 2013 [SER-MT II/12/SER-AHP 1/12/SER-Listing I/12], number 101).

- 25 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 [Sa Ko 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, guidelines and practice of the judicial bodies. Any breach of the rules and regulations must raise a presumption of negligence of the issuer in failing to discharge its duty of care (see sanction notice of SIX Exchange Regulation of 11 October 2013 [SER-AHP-I/13], number 49; of 4 February 2013 [SER-MT 11/12/SER-AHP I/12/SER-Listing I/12], number 104).
- 26 In the case at hand, the violation occurred because of X. ___'s lack of knowledge. However there are no indications, that X. ___ acted intentionally. Nevertheless, and all facts considered, it cannot be denied that X. ___ acted negligently as an issuer and remains responsible to fulfill its obligations according to the applicable stock exchange regulations (Art. 42 LR in connection with Art. 3 para. 1 Ciph. 4 DPES in connection with Art. 4 para. 3 DPES as well as Art. 55 LR in connection with Art. 9 Ciph. 5.02 as well as Annex 1 Ciph. 5.02 DRRO).

3.1.2 Behaviour after the Breach

- 27 The behaviour after the breach does not give rise to comments and is assessed neutrally. X. ___ cooperated constructively throughout the proceedings.

3.1.3 Behaviour in the previous years

- 28 X. ___'s conduct in the previous years is assessed neutrally. There is no entry in the sanctions register that needs to be considered in the assessment of the sanction.

3.2 Severity of the Breach

- 29 Listing regulations aim to ensure the proper functioning and transparency of securities, as well as to ensure the protection of financial market participants. The purpose of the LR is to provide issuers with access to exchange trading that is as free and equal as possible, and to ensure transparency for investors with regard to issuer quality and the characteristics of individual securities (Art. 1 LR).
- 30 X. ___ acknowledges that securities were issued out of its conditional capital before the formal listing procedure was completed with respect to those securities.
- 31 According to the information provided by X. ___ in its answer to the preliminary inquiry letter dated [date], X. ___ *«acknowledges that shares were inadvertently issued out of its conditional capital before the formal listing procedure was completed with respect to those shares. That incident was the result of a mistake, which was based on*

the (as it turned out, erroneous) belief that share grants did not need to be listed as long as the relevant shares remained blocked and could not be traded».

- 32 According to X. ___, this did not pose a risk to the interests of individuals or the market, as the newly exercised [securities] were blocked and could not be traded. X. ___ claims that the misconduct was of administrative nature and the result of an error and not a deliberate disregard of the LR. The necessary listing was carried out shortly after the new securities were issued, and those securities remained blocked and could not be traded during the whole period that separated their legal issuance from the effectiveness of SER's listing decision. According to X. ___, at no point in time there was a risk that non-listed securities could be traded neither on nor off the exchange. X. ___ confirmed that all the [number] securities that were issued out of the conditional capital on [date] were and remain blocked under X. ___'s Senior Management Share Plan ([number] until [date] and [number] [date]), and where therefore not traded.
- 33 Considering the above and the specific circumstances of the case the violation is qualified as **light**.

3.3 Sanction and impact on the party concerned

- 34 Taken into account the severity of the breach and the degree of fault, SER considers a fine to be the appropriate sanction in accordance with Art. 61 LR.
- 35 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 to be 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).
- 36 X. ___ disclosed the following key financial figures in its most recently published Annual Report ([year-1]):

Financial Figures rency]	In	[cur-
Total revenues and other operating income		[amount]
Operating income (EBIT)		[amount]
Net income for the period		[amount]
Total assets		[amount]
Total equity		[amount]

Cash flow from operating activities	[amount]
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- 37 In view of the above-described economic measures the sensitivity to sanctions of the company is considered to be medium. The recently published figures in the [year] Semi-Annual Report offer no reason for a different assessment.
- 38 Considering all the relevant factors for determining the sanction, namely (and exclusively) the degree of fault, the severity of the breach and the sensitivity to sanctions, a fine of CHF 10'000 seems appropriate.

4. Conclusion of the Investigation and Publication of the Sanction Notice

- 39 The investigation at hand concludes with the issue of a sanction notice (Ciph. 3.4 para. 1 RP).
- 40 X. ___ and the Sanctions Commission will be informed in writing of the sanction notice (Ciph. 3.4 para. 3 RP).
- 41 Pursuant to Ciph. 6 para. 4 RP the public will, in the sense of an exception and without prejudice, not be informed of the conclusion of the investigation. The legally binding sanction notice shall be published on SER's website in anonymized form (Ciph. 6 para. 6 RP).

5. Costs

- 42 In case of sanction proceedings, charges 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).
- 43 In the present case, charges to date amount to CHF [...]. These costs shall be borne by X. ___.

C. Sanction Notice

SIX Exchange Regulation AG determines the following:

1. It is determined that X. ___ negligently violated the applicable listing rules and thereby its obligations pursuant to Art. 42 LR (in connection with Art. 3 para. 1 Ciph. 4 DPES in connection with Art. 4 para. 3 DPES) and Art. 55 LR (Art. 9 Ciph. 5.02 as well as Annex 1 Ciph. 5.02 DRRO) by:
 - exercising securities from conditional capital prior to their formal listing; and
 - reporting the exercise of securities which were not formally listed.
2. X. ___ is ordered to pay a fine in the amount of CHF 10'000.
3. X. ___ is ordered to bear the cost of the present proceedings in the amount of CHF [...].
4. This Sanction Notice shall be published in anonymised form on the website of SIX Exchange Regulation AG upon becoming legally binding.
5. This Sanction Notice will be notified to:
 - [...] / [legal representation], [address]
 - Sanctions Commission

SIX Exchange Regulation AG

[...]
Head Listing & Enforcement

[...]
Head Listing

Legal Remedy

The party concerned may lodge an appeal with the Sanctions Commission ([...]) against sanction notices by the investigative bodies within ten trading days (Art. 62 para. 1 LR in conjunction with Ciph. 5.2 para. 1 RP). No recess is taken into account (Ciph. 2.4.2 para. 2 RP). Having received the appeal, the Chairman of the Sanctions Commission will set the party concerned a deadline by which it must submit grounds for its appeal (Ciph. 5.2 para. 2 RP). The appeal may challenge all deficiencies relating to the investigation, to the proceedings themselves or to the sanction notice issued by the investigative bodies (Ciph. 5.2 para. 3 RP). Appeals generally are accorded suspensive effect (Ciph. 5.1 para. 2 RP).