

SaKo-RLE VII/09
Decision of the
Sanction Commission
concerning
X.

The Sanction Commission - [...] - has rendered a decision as follows:

1. X. has violated the accounting standards set out in Art. 66 oldLR by failing to restate an erroneous prior period ([...]) option valuation in its IFRS financial statements for [...], thus breaching the provisions of IAS 8p42 on the correction of errors and the disclosure thereof as set out in IAS 8p49.
2. A fine of CHF [...] is inflicted upon X.
3. The decision will be published by SIX Swiss Exchange AG once it is in force.
4. The costs of the procedure of CHF [...] are charged to X.
5. X. may file a complaint with the Court of Arbitration within 20 trading days [...].

Reasons for the decision

1. On [...] the Sanction Commission issued a fine of CHF [...] on X. for failing to comply with the accounting regulations and the provisions on ad-hoc disclosure in the financial statements for [...]. On [...] SIX Exchange Regulation initiated another investigation into X. that relates to the failure to correct the IFRS financial statements for [...] on the basis of this decision of the Sanction Commission.

2. The X group balance sheet of [...] showed the following (CHF mio.):

[...]

X. is a very small listed company and its reported capital is now by far below under the CHF [...] required by the today's listing rules for the first day of trading.

3. In its decision of [...] the Sanction Commission established that X. breached the obligation pursuant to Art. 70 of the Listing Rules (oldLR) to prepare financial statements for [...] in accordance with IFRS, by failing - contrary to IAS 39AG82(b) - to factor the credit risk into the valuation of an acquired put option for the sale of its shares in Y AG to Z AG in return for a cash payment and failing to make the disclosures required by IFRS 7p34(c) and IFRS 7pB8. A fine of CHF [...] was imposed on X. This decision has become legally enforceable. This decision was received by X. prior to [...], date when the Board of Directors of X. approved the IFRS financial statements for [...].
4. X. did not correct this error in the prior-period disclosures for [...] in its IFRS annual financial statements for [...]. X. explicitly stated in the notes on page [...]: "X. is accused (by SIX Exchange) of failing to factor the credit risk of its counterparty Z. into the valuation of its option to return the above stake in Y AG [...] as of [...] and of failing to disclose the aforesaid credit risk. X. maintains its view that, as of the date of publication of its annual report for [...], this credit risk was not identifiable and thus could not be reliably valued - this was discussed internally prior to publication. X. applied its findings retroactively from the first half of [...]. Nevertheless, X. accepts the legal implications of the decision".
5. IAS 8 addresses "Accounting Policies, Changes in Accounting Estimates and Errors". IAS 8p41 states that errors can arise in respect of the recognition, measurement, presentation or disclosure of elements of financial statements. According to

IAS 8p42(a), a company must correct prior period errors in the first full set of financial statements issued thereafter by disclosing the error and restating the comparative amounts for the prior period.

6. The breach established by the Sanction Commission's decision of [...] constitutes an error within the meaning of IAS 8. Therefore, the error should have been disclosed and corrected in the prior period data in the IFRS statements of X. for [...]. In this case, X. did not do this. Thus, it failed to comply with the provisions of IAS 8 and in doing so violated Art. 66 oldLR.
7. Under Art. 81 para. 1 section 3 oldLR (applicable in the present case), if an issuer breaches its obligation to provide certain information by failing to issue prescribed publications or does not issue them in accordance with the provisions or discloses false or misleading information, the sanctions set out in Art. 82 oldLR may be imposed. Art. 82 para. 1 oldLR stipulates that the degree of fault and the severity of the breach are to be taken into account when imposing sanctions.
8. In its IFRS financial statements for [...], X. explicitly declared that it upheld its opinion that the credit risk at issue had not been identifiable and it opted not to apply the correction prescribed by the accounting standard and to make the corresponding disclosures.

In its letters to SIX of [...] and [...], X. stated that it were not aware that it had to correct this prior period error in the financial statements for [...]. On [...], X. wrote that it still did not agree with the Commission's decision. On [...], X. declared on the one hand that the Board of directors and the CEO did not want to waste time and energy in an appeal and that they preferred to deal with the futures of the company. On the other hand in the same letter, X. repeated the view of "its own IFRS-Experts" saying that X. did not breach an IFRS-rule in the prior period.

It is evident that internal discussions took place and that the responsible persons did deliberately not correct the prior period data as stated by the Commission's decision.

9. The put option as set out in the statements for [...] for the sale of X.'s shares in Y AG to Z AG in return for a cash payment was carried as a long-term financial asset in X.'s IFRS financial statements for [...] at a value of CHF [...] as of [...]. Despite the Sanction Commission's decision, X. had failed to correct this error in the IFRS financial statements for [...] pursuant to IAS 8p41 ff.
 - by omitting to restate the put option as of [...] such that it factors in the credit risk in compliance with IAS 39AG82(b),
 - by omitting to make the disclosures in respect of the put option in compliance with IFRS 7p34(c) and IFRS 7pB8
 - and by omitting to describe these adjustments as corrections of error in the notes to the financial statements.

X. thus withheld from investors the fact that it had made a material error in the application of IAS 39 and IFRS 7, despite better knowledge.

10. It is impermissible not to appeal against sanction decisions - for whatever reason – and instead to refuse to comply with them. Such conduct constitutes a blatant infringement of the principles of good faith, seriously undermines the enforcement of listing obligations and thus inaccurately represents the regulation of the Swiss capital

market. Additionally and bearing in mind the clear rules of IAS in that case, there was no reason to consider a chance of an appeal.

11. Thus, X. committed a serious and deliberate breach in the application of the IFRS.
12. In its answer to the Commission of [...], the new CEO of X. – who started his function in [...] - stated that there is no reason not to do the correction. He asked for a hearing to receive further direction to the final accounting settlements to be accomplished into the [...] financial statements. This is not a valid argument in this procedure. On the one hand, the Sanction Commission has not the function of giving advice to listed companies and neither does SIX Exchange Regulation. On the other hand, X. has to admit its own responsibility to organize and acquire the necessary skills and advisors to fulfil the demanding tasks of the accounting of a listed company. The Commission state on the past, not on the future plans of X., but it takes note of the intention of X. to respect the SIX Exchange requirements.
13. X. is a small company and it is evident that the burden of listing obligations and of accounting according to IFRS is most probably too burdensome for it. It has to be noted that up to the date of the present decision, the fine of CHF [...] and the procedural costs of CHF [...] of the Commission's decision of [...] have still not been received. But considering the size of the company and the fact that the average investor has the relevant information to buy, hold or sell the shares of X., there is no need for further investigation into X. relating to correct application of IAS/IFRS for [...] or [...] because this would not influence the decisions of investors any more. But it should be considered both by X. itself and SIX Exchange Regulation whether the company should continue to be listed.
14. If an issuer violates its obligations as set in the listing rules, SIX Swiss Exchange sets sanctions ranging between a reprimand and a fine of up to CHF 200'000. In order to set a sanction, SIX takes into account the degree of fault and the severity of the breach (Art. 82 para. 1 old LR). The sanction is inflicted on the issuer as such.

Considering on the one hand the degree of fault and the severity of the breach and on the other hand the size of X., the already imposed fine of CHF [...] for breach of the aforementioned accounting and ad-hoc disclosure regulations and taking into account the general maximum of CHF 200'000 in the old LR, another fine of CHF [...] is deemed appropriate by the Sanction Commission.
15. According to the Rules of procedures, the Commission has to publish its sanction decisions that have acquired legal force.
16. According to the Rules of procedures, the costs of the procedure of CHF [...] are imposed to X.

(Sanktionsentscheid vom 26. November 2009)