

## **Violation of the Ad hoc Publicity regulations of art. 72 Listing Rules and the Ad hoc Publicity Directive**

### Decision:

The Sanction Commission has rendered a decision as follows:

1. X Ltd. has violated art. 72 LR and ref. nos. 3, 5, 6 and 7 AhPD in not treating all market participants equally by giving information on the appointment of Y to the Management Committee to its employees at 12.00 already and to the recipients on its global news distribution list and the medias at 12.30 only and by not distributing the information to SWX ninety minutes ahead of time.
2. A reprimand is issued to X Ltd.
3. This decision is published by SWX once it has acquired legal force.
4. The costs of the procedure are charged to X Ltd.

### Reasons for decision:

1. X Ltd. is listed company at SWX Swiss Exchange and is subject to the provision of the Listing Rules (LR) on ad hoc publicity and subject to sanction regulations as set down in the LR.
2. If an issuer breaches its obligations to provide information by not publishing potentially price-sensitive announcements in accordance with the regulations, the Sanction Commission of the SWX may, in accordance with Art. 81 para 1 and 3 LR, impose the sanctions envisaged in Art. 82 LR.
3. In its media release, X Ltd. announced that Y had been appointed as the new Head of Global Human Resources and as a new member of the Management Committee. The release was first sent internally to the employees at 12.00 pm, and then at 12.30 pm to the recipients on the Company's global news distribution lists. The Admission Division of SWX considered that doing so, X Ltd. violated its obligations under the LR. X Ltd. disputed that this announcement qualifies as potentially price sensitive fact in the sense of Art. 72 LR and stated that it must be room for certain qualifying distinction between the various positions and functions of the members of company management.
4. According to Art. 72 para 1 LR, the issuer must inform the market of potentially price-sensitive facts which have arisen in its sphere of activity and are not of public knowledge. Such a fact must also be price-sensitive, i.e. capable of triggering a significant price change (second sentence of Art. 72 para 1 LR). However, in assessing price-sensitivity, it is irrelevant whether the share price actually changed. It is sufficient that a fact has the potential to have a substantial effect on the share price.
5. The "Commentary re Ad hoc Publicity", issued 1 May 2005 and published on the SWX-Website under "Ad hoc Publicity / Related documents" states to no. 3 of the AhPD that there is no comprehensive list of potentially price-sensitive facts (N 1). Nevertheless it gives under N 13 ff. examples that should be taken merely as typical cases of the duty to provide information in accordance with the rules of ad hoc publicity. A clearly formulated example is N15: "Major personnel changes: Changes in the membership of the board of directors, *the management board* or other key

positions; change of (group) auditors.” The Commentary is not more stringent than the LR itself, as X Ltd. seems to suggest (in its letter of 14 January 2008), but details the AhPD.

6. In stating that there must be room for certain qualifying distinctions between the various positions and functions of the members of company management, X Ltd. seems to base on N 3 to no. 4 of the Commentary (“significantly price-sensitive”, “erhebliche Kursrelevanz” in German) saying that the issuers must be given a certain latitude in their judgment in the context of responsible information management. Such certain latitude is possible where the comments to no. 3 AhPD give room to interpretation. This is for example the case in N 17 “*major changes* in earnings” but not in examples as listed in N 15 where there is no room for interpretation who is member or not of the board of directors or the *management board* etc. There is no doubt that the “Management *Committee*” of X Ltd. is a management *board* in the sense of AhPD and according to the publications on Corporate Governance of X Ltd., Y is member of the this management committee.
7. Thus it is established that the appointment of a new member of the Management Committee of X Ltd. was a potentially price sensitive fact that had to be published according to Art. 72 para 2 LR and ref. no. 5 AhPD. As the information was given first to the employee at 12.00 and to the public at 12.30, the principle of equal treatment of market participants is set out under Art. 72 para. 4 LR was violated (ref. no. 6 AhPD). As it was published during trading ours but not sent to SWX ninety minutes ahead of time, the information was not distributed according to ref. no. 7 AhPD.

#### Sanction:

8. If an issuer violates the LR, according to Art. 81 and 82 the SWX sets a sanction taking into account the gravity of the offence and the degree of fault (Art. 82, para 1 LR). The sanctions are imposed on issuers as legal entity, but not on the persons acting for them. X Ltd.’s communication of the appointment of Y as a new member of its Management Committee was not in accordance with the rules governing ad hoc publicity. Nevertheless, this appointment was not an extraordinary event. The new member of the management board had a career in X Ltd. and the change was not in the context of an unexpected reorganisation. Thus, the violation of the rules of AhPD in this case was not severe (see precedent SK/AHP/107 published [http://www.swx.com/admission/being\\_public/sanctions/integrated\\_publication/adhoc\\_de.html](http://www.swx.com/admission/being_public/sanctions/integrated_publication/adhoc_de.html)) and it is not apparent that responsible persons acted intentionally.

In assessing the case, it is to be taken into account that the SWX has already imposed one reprimand against X Ltd. in the last three years for violating the provisions of the Listing Rules by an incorrect statement of impairment in the segment reporting of the 200X consolidated financial statements. But the present breach of rules concerns another area of the LR’s obligations of issuers and therefore there is no repeated violation of the rules of AhPD. There is sufficient reason to believe that as result of the present procedure, in the future, X Ltd. will take care to prevent any new violation of its obligation under the AhPD or another violation of the LR. Considering this and the fact that the present case is not severe, the Sanction Commission imposes on X Ltd. a reprimand.

9. According to point 6.3. para 1 of the Rules of Procedure (RP), sanctions decisions are published by SWX once they have acquired legal force.
10. According to point 2.9 and 4.5 of the RP, the costs of the procedure are imposed to X Ltd.