

SIX Swiss Exchange AG
Sanction notice issued by
SIX Exchange Regulation
concerning
X.

SER 2011-MP-I/11

1. Facts of the case

Publication and submission of the 2009 annual report

1. X. ("X.", the "Company", or the "Issuer"), formerly Y., is a public limited company incorporated under Swiss law having its registered office in Z. [community]. The Company's shares are listed under the Main Standard on SIX Swiss Exchange AG ("Swiss Exchange").
 2. P. [employee] of Q. GmbH, Zurich ("Q.") is registered with SIX Exchange Regulation (SER) as the officer responsible for the Company's ad hoc publicity.
 3. In an ad hoc notice dated 16 April 2010, the Company announced that the publication of its 2009 annual report would be delayed, and that the report would now be published on 30 April 2010. The Issuer had originally intended to publish the report on 26 April 2010.
 4. On 27 April 2010, P. called SER to advise it that, based on information received from the Company's auditors, the Company would not be in a position to publish the 2009 annual report before the end of May 2010. A. (employee of SER) subsequently reminded P. by telephone and email of the requirement to publish and submit annual reports within four months of the balance sheet date, as laid down in Art. 10 of the Directive on Financial Reporting ("DFR"). The Company's balance sheet date was 31 December, which meant that the 2009 annual report had to be published and submitted before 30 April 2010. A. explained that if the Company was unable to meet this deadline, it should submit a written application for extension of time as soon as possible, but no later than 30 April 2010, setting out the reasons for such request. In an email dated 27 April 2010, P. confirmed that he had forwarded this information to the relevant officers at the Company.
 5. On 28 April 2010, i.e. two days before expiry of the period for publishing and submitting the 2009 annual report, the Company submitted an application to SER for the deadline to be extended to 31 May 2010. In an email dated 29 April 2010, SER directed the Company to provide responses to some further questions regarding the application, and to produce one additional document. X. responded to these supplementary questions by letter dated 3 May 2010.
 6. The main reason put forward by X. for applying for an extension of time was that the Company's auditors, R. ("R."), had only notified it on 26 April 2010 that they required additional information and documents from the Company. Secondly, X. referred to its acquisition of S. ("S." [subsidiary]), Canada, during the 2009 financial year, which had necessitated the adoption of IFRS for the first time in the preparation of S.'s financial statements. For this reason, according to X., the Company had to recruit an additional IFRS expert. The third reason put forward by X. was that its Chief Executive Officer (CEO) had tendered his resignation in the 2009 financial year; that, however, he was going to be reinstated as CEO on 29 April 2010. X.
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submitted that it had been necessary for the former/new CEO to inspect the 2009 annual report before this could be approved.

7. It should also be noted in this respect that R.'s letter to X. dated 26 April 2010 also referred, among other things, to X.'s "late and incomplete audit preparation", and the fact that X. had "not carried out important tasks and documented and presented them in time". R. states that X. had only recruited the new member of staff with IFRS expertise on 23 April 2010, although the acquisition of S. had taken place in September 2009. According to R., the Company had failed to prepare the requisite documents and IFRS financial statements to a reasonable standard of quality and present these documents and statements within the timeframe required.

The external auditors ultimately issued a "Disclaimer of Opinion" on the 2009 annual report, which states that the X. Board of Directors and Management were unable to provide them with "sufficient, appropriate audit evidence" regarding the acquisition of S. According to the auditors, the lack of evidence was "so material and pervasive that we are unable to determine the extent of adjustments necessary in respect of Purchase Price Allocation, Goodwill Accounting and the elements making up the statement of comprehensive income, statement of financial position, statement of changes in equity, statement of cash flows and disclosure notes". They also stated that "because of the significance of the matters discussed in the preceding paragraph, we do not express an opinion on the consolidated financial statements." With respect to X.'s internal control system, the auditors further stated that "in our opinion, the internal control system does not comply with Swiss law, therefore we cannot confirm that an internal control system exists, which has been designed for the preparation of the consolidated financial statements". R. did not subsequently stand for reelection at the ordinary general meeting on 29 June 2010.

8. By decision dated 11 May 2010, the Issuers Committee of the Regulatory Board approved X.'s application for the time period for publishing and submitting the 2009 annual report to be extended until 31 May 2010 at the latest, essentially subject to the following conditions: (i) unless the Company published its 2009 annual report by 31 May 2010, the trading of its securities on the Swiss Exchange would be suspended until such publication; (ii) the Company would be required to publish an ad hoc notice regarding the Regulatory Board's decision.
 9. X. **failed** to publish the 2009 annual report by 31 May 2010, or submit the report to SER by this date. Thereupon, SER contacted the Company in the afternoon of 31 May 2010 and was advised, in response to its inquiries, that the Issuer would not be able to meet the new publication and submission deadline. The Issuer had not requested any further extension of the deadline, with the result that Swiss Exchange suspended trading of the Company's shares on 2 June 2010. SER published a notice to this effect on 2 June 2010 in which it expressly reserved the right to initiate an investigation.
 10. X. published the 2009 annual report and submitted it electronically to SER on 8 June 2010. Swiss Exchange thus resumed trading in the Company's
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shares on 9 June 2010, and a media release to this effect was also issued by SER on 9 June 2010.

11. In a letter dated 14 July 2010, SER initiated an investigation in accordance with section 3.3 of the Rules of Procedure (RP) on the grounds of a possible breach of regular reporting obligations pursuant to Annex 1 of Circular No. 1 (CIR 1, Annex 1; failure to publish and submit the 2009 annual report in due time). SER issued a media release to this effect on 16 July 2010.

2. Findings

2.1 Applicable law and jurisdiction

12. X. is a public limited company incorporated under Swiss law. It has its registered office in Z. and its shares are listed under the Main Standard of the Swiss Exchange. X. is therefore subject to the sanctioning regime of the Swiss Exchange. X. signed declarations of approval confirming its agreement to the sanctioning regime on 21 February 2003 (when the Company was still operating under the name Y.) and on 23 November 2009.
 13. The applicable legal rules are as follows: the SER Listing Rules (LR), which took effect on 1 July 2009, and the implementing provisions and rules appertaining thereto, in particular the regular reporting obligations laid down as a condition of maintaining listing (Arts. 49 to 56 LR in conjunction with Annex 1, CIR 1). The applicable rules of procedure are laid down in the SER Rules of Procedure (RP), which also took effect on 1 July 2009.
 14. Art. 60 LR provides that one of the sanctions described in Art. 61 LR may be imposed where an issuer is in breach of its obligations, as laid down in the LR, Additional Rules, or the implementing provisions appertaining thereto (in particular breaches of the duty to cooperate and to provide or disclose information), or in the event that an issuer fails to ensure compliance with these provisions and rules. The sanction decision must be published once it has acquired legal force (section 6.3 (1) RP).
 15. According to Art. 59 LR, responsibility for instigating and conducting sanction proceedings is governed by the Rules of Procedure. Section 3.5 (2) RP provides that the SER Listing & Enforcement department may issue a sanction notice for a violation of the rules if possible sanctions include a warning, reprimand or fine. If an investigation is concluded with a legally enforceable sanction notice, the fact will be made public (section 6.2 (5) RP). The sanction notice will generally be made available on the SIX Exchange Regulation website in anonymized form (section 6.2 (6) RP).
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2.2 Breach of Art. 49 (1) LR in conjunction with Art. 10 and Art. 13 DFR and point 2.01 of Annex 1, CIR 1

16. X.'s equity securities have a primary listing on the Swiss Exchange. Issuers with a primary listing are required to publish an annual report within four months of the balance sheet date for the annual financial statements. Issuers must also submit their annual reports to SER no later than at the time of publication. Annual reports must also be published on issuers' websites (Art. 10 and Art. 13 DFR and point 2.01 of Annex 1 CIR 1).
17. The Company's balance sheet date is 31 December (cf. section 3 above), which means that the Company had an obligation to publish and submit its 2009 annual report by 30 April 2010 at the latest.
18. The Regulatory Board may authorize exemptions from certain provisions of the Listing Rules, provided such exemptions are not prejudicial to the interests of investors or the stock exchange, and provided the applicant can demonstrate that the purpose of the provisions in question can be served satisfactorily by other means. Requirements and conditions may be attached to the authorization of an exemption (Art. 7 LR).
19. By decision dated 11 May 2010, the Issuers Committee approved the Company's application for the time period for publishing and submitting the 2009 annual report to be extended until 31 May 2010 at the latest. However, X. failed both to publish its 2009 annual report and to submit the report to SER within the extended time period. The Company only published and submitted its 2009 annual report 8 days later, on 8 June 2010. The annual report was also published on the Company's website on this date. The 2009 annual report ought to have been published, submitted and placed on the website within the time limit stipulated by the Issuers Committee in order to prevent a breach of the applicable rules. In failing to take such action within the specified time period, the Company is in breach of Art. 49 (1) LR in conjunction with Art. 10 and Art. 13 DFR and point 2.01 of Annex 1, CIR 1.

2.3 Degree of fault, severity of the breach and impact of the sanction

20. Art. 61 (2) LR provides that in determining the sanction to be imposed, due consideration must be given, in particular, to the severity of the breach and the degree of fault. When setting the level of fines, the competent body will also take the impact of the sanction on the party concerned into account.

2.3.1 Degree of fault

21. A sanction under Art. 61 LR may be imposed if a Company is held to be in breach of its publication obligations, whether such breach was committed intentionally or through negligence.
 22. Anyone who knowingly and willfully commits a breach of the relevant rule is deemed to have acted with intent. An issuer is deemed to have acted with
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contingent intent if it did not intend to breach its regulatory duties, but at the very least is alert to the possibility of a breach occurring, and accepts the risk that such a breach may occur.

23. An issuer is deemed to have acted negligently if, through culpable carelessness, it has failed to consider the consequences of its actions. The essential condition for a breach of the duty of care to apply is the foreseeability of the outcome.
 24. All issuers are expected to familiarize themselves with the stock exchange rules, any commentary in relation thereto, and the established practices of the SER judicial bodies. In the event of any questions, companies also have the option to contact SER employees with any queries by telephone, email or fax. As part of their duty of care, issuers are essentially required to familiarize themselves with the applicable rules and act in accordance with those rules.
 25. The following findings are made with respect to the breach of the periodic reporting rules under Art. 49 (1) LR in conjunction with Art. 10 and Art. 13 DFR and point 2.01 of Annex 1, CIR 1:
 26. At the Company's request, the Regulatory Board agreed to extend the time period for submitting the 2009 annual report until 31 May 2010. This shows that the Company was well aware of the requirement to submit annual reports within 4 months of the balance sheet date for the annual financial statements – or in the Company's case the obligation to submit its report by 31 May 2010, i.e. within the extended time period.
 27. With respect to the foregoing, it should be noted that the Company only submitted its application for an extension of time on 28 April 2010, i.e. two days before the 30 April deadline for submitting the 2009 annual report. If its application had been declined, X. would hardly have been in a position to meet the 30 April deadline for submitting the report, so it effectively presented the Issuers Committee with a *fait accompli*. The Company only informed SER late in the afternoon of 31 May 2010 – and only in response to SER's inquiries on this subject – that it would be unable to comply with the publication and submission requirements by the end of 31 May, i.e. within the extended time period. The Company did not request any further extension of time.
 28. One of the reasons put forward by X. for requesting an extension was that the Company's auditors had only notified it on 26 April 2010 that they required additional information and documents from the Company. It further submitted that it was required to adopt IFRS for the first time in the preparation of S.'s financial statements, necessitating the recruitment of an IFRS expert by X. However, in its letter to X. dated 26 April 2010, R. makes reference, among other things, to X.'s "late and incomplete audit preparation" (cf. section 6 f. above for more extensive comments). Given the different stances of the Company and its auditors on this issue, it is not possible to reliably determine the truth or otherwise of X.'s submissions. However, it can be stated with certainty that issuers are responsible for ensuring that they are familiar with and have expertise in the accounting standards selected by them. Boards of Directors have the inalienable and
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non-transferable duty to prepare annual reports in accordance with the applicable rules and standards (Art. 662 (1), Art. 716a (1) paras. 3 and 6 of the Swiss Code of Obligations).

29. As a further reason for requesting an extension, X. cited the fact that the CEO tendered his resignation in the 2009 financial year; that, however, he was going to be reinstated as CEO on 29 April 2010. X. submitted that it had been necessary for the former/new CEO to inspect the 2009 annual report before this could be approved (cf. section 6 above). In regard to this submission, it should be noted that issuers must have proper internal organizational structures in place, so as to ensure that they are able to meet their obligations under stock exchange rules at all times. Issuers that fail in this regard must be deemed to have been negligent in their duty to provide the proper organizational structures. Inadequacies in internal organizational structures are no “defense” to a breach of stock exchange rules (cf. Decision of SIX Swiss Exchange AG date 23 January 2009 [GBZ-MP-I/08]; Decision of the Sanction Commission dated 16 April 2009 [SaKo-2009-AHP/MP-II/08]).
 30. The Company had previously published and submitted its 2008 annual report 15 days late, on 15 May 2009. The Company attributed this delay at the time to changes in personnel and unresolved internal issues in relation to the annual report. X. received a telephone call then already, on 4 May 2009, notifying it that the publication and submission deadline could not be extended unless a prior request had been submitted to and approved by the Issuers Committee. On 5 May 2009, the Company was informed by email that by failing to publish and submit its 2008 annual report in time it was in breach of its obligations as a condition of maintaining listing and that proceedings may be brought.
 31. Despite the delay in publishing and submitting the 2008 annual report and SER's explicit warning that this constituted a breach of the rules, the Company also failed to publish and submit the 2009 annual report within the extended time period granted by the Issuers Committee. X. again cited changes in personnel as one of the reasons for this delay. The Company does not appear to have made the necessary improvements with regard to its personnel or organizational structures in order to prevent a second delay in publishing and submitting its annual report. In light of these circumstances, the fault to be attached to the Company must be viewed as all the more serious.
 32. X. failed to either publish or submit its 2009 annual report by 31 May 2010 and thus comply with the extended time limit. It also failed to request any further deadline extension within the extended time period. It only informed SER on the evening of 31 May 2010 – just as the deadline was about to expire, and only in response to SER's inquiries – that it would be unable to meet the deadline. The Company therefore knowingly took the risk of breaching stock exchange rules. Accordingly, the Company must at the very least be deemed to have acted with **contingent intent**.
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2.3.2 Severity of the breach

33. Annual reports are among the most important publications for investors produced by Issuers. In this case, information on X.'s performance in the 2009 financial year was not available to market participants until the 2009 annual report was finally published on 8 June 2010, i.e. not until eight days after the extended publication and submission period had elapsed. It is not possible to ensure fair and orderly trading unless financial reports are presented within the specified periods. In these circumstances, the aforementioned breach must be described as **severe**.

2.3.3 Impact of the sanction

34. In assessing the impact of the sanction, due consideration must be given, in particular, to the company's financial resources and, where appropriate, its reputation. The same fine is likely to impact more heavily on issuers with more limited economic resources than those with greater financial capacity. In determining the impact, a number of financial ratios must be taken into account, including sales, operating income (EBIT), profit, current assets and fixed assets. In order to ensure that the sanction is commensurate with the issuer's actual financial capacity, it is necessary to consider a group's consolidated financial ratios, where appropriate, not just the figures of a single holding company in isolation.
35. In its 2009 annual report, X. reported a net revenue for the Group of CHF [...] million, gross profit of CHF [...] and a loss for the year of CHF [...] million. The Group's current assets were stated to be CHF [...] million and its fixed assets CHF [...] million. The reported loss, which exceeds current assets, accounts for around one tenth of fixed assets. The Company also incurred losses in the two preceding years. The 2008 and 2007 annual reports recorded a loss for the year of CHF [...] million and CHF [...] million respectively. In view of these circumstances, the impact of the sanction on the Company, i.e. the imposition of a fine, should essentially be evaluated as above average.

2.4 Overall assessment and imposition of sanction

36. Possible sanctions include a reprimand or fine of up to CHF 10,000,000 in cases of wrongful intent (Art. 61 (1) LR).
 37. In determining the sanction to be imposed, the competent body will take into consideration, in particular, the severity of the breach and the degree of fault; when setting the level of fines, the competent body will also take the impact of the sanction on the party concerned into account (Art. 61 (1) LR).
 38. The breach of duty falls into the category of contingent intent (cf. section 32 ff. above) and constitutes a severe case of non-compliance with the rules (cf. section 35 ff. above). The impact of the sanction on the Company should generally be assessed as above average (cf. section 35 f. above).
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39. Further, in calculating the penalty, any prior sanctions imposed in the last three years must be taken into account (section 2.6 (4) RP). The Sanction Commission previously ordered X. to pay two fines of CHF 50,000 each in decisions dated 25 March 2009 (SaKo-RLE II/08 – SaKo-AHP I/08; financial reporting and ad hoc publicity) and 26 November 2009 (SaKo-RLE-VII/09; financial reporting).
40. In the totality of the circumstances and in view of the breach of the Listing Rules, a fine of CHF 15,000 pursuant to Art. 61 (1) (2) LR is justified. This sum does not seem disproportionate given the imposition of the two earlier fines against the Company. In accordance with section 6.3 (2) RP, this sanction decision must also be published once it has acquired legal force.

2.5 Costs

41. The List of Charges dated 29 October 2008 / 1 October 2010, which took effect on 1 July 2009 (LOC) shall apply. Section 9.8 LOC provides that if sanction proceedings are required, the applicable costs shall be determined on the basis of expenditure incurred.
 42. In this case, X. is ordered to pay costs of CHF [...], which would seem reasonable and justified in this matter, having regard to the expenditure required in respect of previous proceedings.
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3. Sanction notice

SIX Exchange Regulation hereby issues the following sanction notice:

1. It is held that X. has breached the periodic reporting rules under Art. 49 (1) LR in conjunction with Art. 10 and Art. 13 DFR and point 2.01 of Annex 1, CIR 1 by failing to publish its 2009 annual report as well as to submit the report to SIX Exchange Regulation by 31 May 2010, i.e. within the additional time period granted by decision of the Regulatory Board dated 11 May 2010.
2. X. is ordered to pay a fine of CHF 15,000.
3. X. is ordered to pay costs of CHF [...].

The sanction notice against X. will be published by SIX Swiss Exchange AG once it has acquired legal force (section 6.3 (1) RP).

(sanction notice dated 8 March 2011)

An appeal against this sanction notice may be lodged with the Sanction Commission of SIX Swiss Exchange AG within ten trading days of the date on which the sanction notice has been served with the issuer (Art. 5.2 (1) RP).

Any appeal must be substantiated and seven copies thereof filed within the prescribed period with the:

Office of the Sanction Commission of SIX Swiss Exchange AG
Dr. Dieter Sigrist
Selnaustrasse 30
P.O. Box 1758
CH-8021 Zurich