Exchange Regulation

SIX Swiss Exchange Ltd
Sanction Notice issued by
SIX Exchange Regulation
in the matter of X Ltd.

SER-AHP-I/13

1. Statement of facts and overview of proceedings

1.1 The Issuer and its related parties

1. X Ltd. (hereinafter referred to as "X", the "Company" or the “Issuer”) is a company incorporated under the laws of [jurisdiction] with its registered office in [city], [country]. According to its annual report as of December 31, 2012, the Company has [number of] ordinary shares outstanding each with [amount] par value. The Company's registered shares are listed at SIX Swiss Exchange according to the regulatory standard for real estate companies.

2. A Ltd. (“A”) is a company incorporated under the laws of [jurisdiction] with its registered office in [city], [country]. A is listed at SIX Swiss Exchange according to the main standard. Until December 19, 2012, A was the Company’s largest shareholder with a stake of 40.4% of the outstanding shares.

3. B Ltd. (“B”) is a company incorporated under the laws of [jurisdiction] with its registered office in [city], [country]. B is listed at SIX Swiss Exchange according to the regulatory standard for investment companies. B is a majority owned-subsidiary of A and held (an unknown number of) shares in X until December 19, 2012.

1.2 Statement of facts

4. On December 20, 2012, 07.02 a.m. CET, A issued an ad hoc notice announcing the sale of its stake in the Issuer to C, a fund managed by D Ltd., [city], [country] (“C Fund”) (“A-Ad hoc notice”).

5. The headline of the A-Ad hoc notice read: “[headline of A-Ad hoc notice]*“*. According to the A-Ad hoc notice, the stake that was sold by A to C Fund accounted to approx. 40% of the shares in X.

6. Also on December 20, 2012, 07.01 a.m. CET, B issued an ad hoc notice announcing the sale of its shares in X (the exact amount is not publicly known nor was it announced in the ad hoc notice) to a subsidiary of A who, according to B, subsequently has sold all these shares to C Fund (“B-Ad hoc notice”).

7. After having received the above mentioned ad hoc notices, SIX Exchange Regulation (“SER”) contacted the Issuer shortly after 8 a.m. CET by phone and at 08.21 a.m. CET by email. SER did not receive any reaction to the phone call. In the email, SER mentioned the A-Ad hoc notice and the B-Ad hoc notice announcing the sale of shares in X. SER held that in its view this information was price-sensitive in regard to X and recommended an immediate publication of an ad hoc notice (“you should publish an Ad hoc-notice as soon as possible, preferentially before the opening of the stock exchange today”).

8. At 08.52 a.m. CET, the Company issued an ad hoc notice under the headline "significant shareholding notifications" ("X-Ad hoc notice"). In the notice, the Company announced that it was notified that stakes in the Company held by A and affiliated companies fell below 3% as per close of business on December 19, 2012, whereas at the same time, C Fund has acquired more than 66 2/3% of the voting shares (the "Change in Shareholdings" or the "Transaction").

1.3 Overview on proceedings

9. On [date], 2012, SER opened a preliminary investigation against the Issuer. On [date], 2013, a first investigation letter with questions regarding the statement of facts was sent to the Issuer. The Issuer answered timely with its letter of [date], 2013.

10. Subsequently, on [date], 2013, a second investigation letter with certain follow-up questions and requests for clarification was sent to the Issuer. The Issuer answered timely with its letter of [date], 2013.

11. In a letter dated [date], 2013, SER informed the Issuer of the opening of an investigation in connection with possible breaches of the provisions governing ad hoc publicity. The letter also mentioned that the public would be informed of the initiation of the investigation on [date], 2013. The publication of the media release took place as announced on [date], 2013.

2. Findings

2.1 Applicable law and jurisdiction

12. The Company's shares are listed and admitted to trading according to the regulatory standard for real estate companies of SIX Swiss Exchange (see sec. 1 above). On [date], the Company signed a declaration certifying that it agreed to be bound by the Listing Rules (LR), the provisions implementing the LR, and the Rules of Procedure (RP).

13. The requirements for maintaining listing under the LR and its implementing provisions include amongst others the obligation to disclose potentially price-sensitive facts in accordance with Art. 53 et seq. LR and the Directive on Ad hoc Publicity (DAH). If an issuer breaches its disclosure obligations as a condition of continued listing, Art. 60 LR provides that one of the sanctions described in Art. 61 LR may be imposed. The relevant procedures and responsibilities are governed by the RP (Art. 59 LR).

2.2 Breach of rules governing ad hoc publicity

2.2.1 Obligation to disclose potentially price-sensitive facts

14. Pursuant to Art. 53 para. 1 LR, issuers must inform the market of any potentially price-sensitive facts that have arisen in their sphere of activity, and are not in the public domain, by issuing a press release, which must be published in accordance with the ad hoc publicity rules. Furthermore, disclosure must be made in such way as to ensure the equal treatment of all market participants (Art. 53 para. 3 LR, Art. 6 DAH).

15. An event must fulfill four elements in order to qualify as a potentially price-sensitive fact that has to be published in accordance with the ad hoc publicity rules: it must be a (1) fact, (2) that is potentially price-sensitive, (3) has arisen in the sphere of activity of the issuer and (4) is not yet publicly known. These elements – except the first, which is uncontested – are to be examined in the following.

2.2.1.1 Potential price-sensitiveness

16. According to Art. 53 para. 1 LR, price-sensitive facts are facts that are capable of triggering a significant change in market prices. The notion of „potentially price-sensitive“ is concretized in the DAH. Pursuant to Art. 4 DAH, a fact is to be considered significantly price-sensitive if it can be expected to trigger a price change that is considerably greater than the usual price fluctuations (para. 1), which must be decided on a case-by-case basis (para. 2). Only qualified events trigger the disclosure requirement; an event is deemed relevant within the meaning of Art. 53 LR if it is capable of affecting the average market participant in his investment decision (Art. 3 DAH). There is no exhaustive list of price-sensitive facts (see N. 23 Commentary on the DAH [“Com. DAH”]) but there are several types of events that often qualify as price-sensitive. Changes in shareholdings constitute, under certain circumstances, such type.

17. The structure of shareholdings of an issuer as well as the identity of significant shareholders constitute an important information for actual and/or potential investors. Various shareholder rights depend on the amount of shareholdings (under Swiss Law e.g. Art. 699 para. 3 Code of Obligations, CO), the same is obviously true for the possibility of influencing the decision-making of a company and any controlling interests of shareholders (see N. 46 and 56 Com. DAH). Not only the amount of shareholdings, but also the identity of significant shareholders may be relevant for investors for various reasons: e.g., the information that a certain (well-known) investor sells or acquires certain securities is a meaningful message regarding the potential or expected development of an issuer and may therefore have a signaling effect for other investors who value and follow such “advises” (see N. 46 Com. DAH). Accordingly, if an important amount of shareholdings is affected – e.g. the achievement of a threshold entitling to important shareholder rights or a controlling majority, which can under certain circumstances even trigger an obligation to publish a public takeover offer (Art. 32 Federal Act on Stock Exchanges and Securities Trading, SESTA) –, such event is to be qualified as potentially price-sensitive.

18. In the case at hand, on December 19, 2012, a very significant change in the structure of shareholdings of X has occurred (see sec. 4 et seq. above): various shareholders in connection with A left the Company, whereas C Fund newly entered the Company with shareholdings of 66 2/3%. With shareholdings of 66 2/3%, a company is usually controlled without limits. Such shareholder influences the decision making of a company basically at its sole discretion. At hand, the information about the Change in Shareholdings therefore qualifies as potentially price-sensitive.

19. X submitted that the Change in Shareholdings did not qualify as potentially price-sensitive for two reasons (First Response Letter, answer 1): first, the sale of a significant stake in the Company was in this case less important because a subsidiary of A would continue to act as discretionary manager of all affairs of the Company and thus A would continue to exert an "operating influence" on X (the incumbent management would remain in charge of day-to-day business of the Company). Second, X argued, information regarding changes of large shareholders was generally not very important for the Company and its investors, as the Company is not domiciled in Switzerland and thus was at that time not subject to the rules on public tenders pursuant to Art. 22 et seq. SESTA, in particular the rules on mandatory tender offers. As the Company's minority shareholders for this reason would not benefit from the protection afforded by those rules (in particular the possibility of an "exit" by accepting a mandatory tender offer in case of a change of control), the information on the Change in Shareholdings was not as important to the Company's investors (as it could be for investors of Swiss companies) and would therefore not constitute a potentially price-sensitive information.

20. The arguments submitted by the Company are not convincing. Regarding the first argument: Being a shareholder and thus an owner of a company on the one side and providing management services to a company (through a wholly-owned subsidiary) on the other side are two different things. Even if the management is formally fully independent from the majority owner of a company, it generally aligns with the majority owner's interest (at least to a certain point) – if necessary, the majority shareholder can normally exert its influence through its representative(s) in the company's board of directors who determines the company's strategy. Thus, in case of a change of the major shareholder it is not unlikely that also the management strategy is re-assessed and possibly changed according to the major shareholder's interests. A majority shareholder who is active in a similar business area as the company might also be interested interlinking the operations of the companies or setting up a cooperation between them. More radical, the majority shareholder may also replace the management team. In both cases it is sufficient from a point of view of price-sensitiveness that the possibility for such changes exists; an actual change is not necessary. Such is true even more for a major change of shareholdings as in the amount of (at least) 66 2/3% of the voting rights, as in the case at hand. All these items are relevant information for an investor.

21. Accordingly, it is in the case at hand not relevant that the Company will be managed by a subsidiary of A also after the Transaction: the possibility to replace the management – under the applicable agreements at that time this would have been possible with a notice period of three months and eventually incurring termination fees (see Second Response Letter, answer 1 and annex 1, article [■]) – or at least the possibility to change the management's strategy in combination

with the experience that such replacements or changes often correlate with a change of the major shareholder (see sec. 20 above) is sufficient to affirm a potential price-sensitiveness of the facts in question, the Change in Shareholdings. The fact that the relevant management agreement has been revised recently and that there have been several changes in the board of directors and the management team of the Company (see various press releases by X since [date], 2013 as well as the statement of the board of directors in the half year report of X [Semi Annual Review 2013, dated [date] 2013, p. 4]) supports the plausibility of this *ex ante* view.

22. Neither the second argument of X is convincing. First of all it must be hold that the disclosure obligations under the rules on ad hoc publicity on the one hand and the rules under Art. 20 SESTA (disclosure of shareholdings) as well as under takeover law on the other hand are applied independently of each other (see N. 11 and 56 Com. DAH). Accordingly, the fact that minority shareholders did not benefit from the "protection" provided by takeover law (in particular the provisions regarding mandatory tender offer) does as a principle not influence the obligation on ad hoc publicity. One could on the contrary argue that it speaks ***for*** the necessity to provide the minority shareholders at least with full information regarding changes in relevant shareholdings so that they can estimate the price-relevance and could react accordingly (e.g. sell their shares if deemed necessary). The Sanction Commission held this argument in its decision dated November 19, 2007 (SaKo/AHP/III/07) saying that particularly because of the lack of protection by takeover law, full information of the shareholders was important (sec. 6: "*Il était d'un intérêt crucial pour les investisseurs de connaître le nom de l'acquéreur. A défaut, ils ne pouvaient pas juger si celui-ci était en mesure de reprendre la société. Etant donné que les statuts de la X SA contiennent une clause d' «opting out» [en vertu de laquelle un acquéreur n'a pas besoin de soumettre une offre d'achat aux autres actionnaires], les actionnaires minoritaires ne pouvaient pas se faire une idée de l'avenir de la banque sans connaître l'identité de l'acquéreur.*"). Even though the initial situation at hand is not comparable to the situation in the mentioned decision – at hand, not the surviving of the Company is in question but only a change of the major shareholder –, it shows that the argument submitted by the Company is not convincing: the possibility of a fundamental change of the Company's destiny by a new majority shareholder (see also sec. 20 et seq. above) is even more of crucial interest for actual and potential investors as they do not benefit from the protection by takeover law. This suffices to fulfill the criteria that determines potential price-relevance provided by Art. 3 and 4 DAH (see sec. 16 above): the Change in Shareholdings was capable of affecting the average market participant in his investment decision (Art. 3 DAH) and is therefore to be qualified as potentially price-sensitive.

23. Additionally, – and this is important to note in this context – the argument would not hold since May 1, 2013 either way: Art. 22 para. 1 SESTA has been amended in the sense that takeover law on public offers is also applicable to companies with registered office in jurisdictions other than Switzerland having its shares (fully or partially) mainly listed at a stock exchange in Switzerland. Similarly, Art. 20 SESTA has been amended by expanding the obligation of disclosure of significant shareholders also to issuers with foreign domicile. At the time of the Change in Shareholdings on December 19, 2012, it was not yet in force. Thus, an ad hoc notice issued by X was the only way to be informed quickly about this change for shareholders of X.

24. The fact that the share price of X did not move significantly after the announcement of the Transaction, as the Company stated (First Response Letter, answer 1), is not an evidence against the potential price-sensitiveness as only the *ex ante* view is relevant in this context (see decision of the Committee of the Admission Board dated November 1, 2004 [ZUL/AHP/II/04], sec. 13; decisions of the Sanction Commission dated July 30, 2007 [SaKo/AHP/I/07], sec. 2; dated January 31, 2008 [SaKo-AHP-VI/07], sec. 4; see also N. 92 Com. DAH).

2.2.1.2 Arising in the sphere of activity of the issuer

25. The issuer must inform the market about potentially price-sensitive facts that *have arisen in its sphere of activity* (Art. 53 para. 1 LR). The element "sphere of activity" is to be interpreted broadly and thus can under certain circumstances comprise also facts that have not occurred in the issuer's "sphere of activity" interpreted in a literally, narrow way (meaning essentially the issuer's operational business, e.g.), if such external events have a direct effect on the issuer's internal operations (N. 39 and 41 Com. DAH). Examples for such events can include decisions by a supervisory authority (N. 41 Com. DAH) or also changes in the ownership structure or in the pool of shareholders of an issuer (N. 46 Com. DAH and implicitly – without explicit reasons in this question – decision of the Sanction Commission dated November 19, 2007 [SaKo/AHP/III/07], sec. 6): if such events qualify as potentially price-sensitive – which is only the case in exceptional situations, e.g. the approval of a new important drug for a pharma company or major changes in the structure of shareholdings affecting controlling rights (N. 46 and 56 Com. DAH) –, this information must be published by the issuer in an ad hoc notice.

26. For changes in shareholdings in particular, this result is supported by the newly revised Art. 6a para. 6 Ordinance of the Takeover Board on Public Takeover Offers that states the parallel applicability of the rules on public takeover offers and the regulation on ad hoc publicity ("The regulations governing ad hoc publicity may apply in addition"). The Swiss Takeover Board is of that opinion for quite some time (see the decision of the Swiss Takeover Board no. 403/03 dated March 30, 2009, sec. 6). The obligation to make a public takeover offer is triggered by the excess of a certain threshold of shareholdings as a result of the acquisition of equity securities (see Art. 32 para. 1 SESTA) – with other words, a change in shareholdings. Thus, the Swiss legislator as well as the Swiss Takeover Board, a federal commission, are of the opinion that such event can fall under the rules of ad hoc publicity which necessarily requires that the mentioned element above – the arising in the sphere of activity of the issuer – is interpreted in a broadly way.

27. In the case at hand, as shown above (sec. 20 et seq.), the Change in Shareholdings qualifies as potentially price-sensitive. Thus, X's implicit objection that the sale of shares as external event would not qualify as "exceptional case" which triggers a disclosure obligation of the issuer (First Response Letter, answer 1), is not pertinent.

2.2.1.3 Not yet publicly known

28. Issuers must inform the market only of potentially price-sensitive facts that are not yet of public knowledge (see N. 47 et seq. Com. DAH). However, the publication of potentially price-sensitive information relating to an issuer by third parties does not release the issuer from its obligation to publish the same information itself in an ad hoc notice of its own. Information published by the issuer itself is – as a rule – perceived by market participants as being more credible than corresponding reports by third parties. Investors will therefore normally attach more importance to ad hoc notices from the company itself (see decision by the Committee of the Admission Board dated November 1, 2004 [ZUL/AHP/II/04], sec. 29; N. 9 Com. DAH). In addition, third-party reports are practically never addressed to exactly the same recipients as issuers' ad hoc notices as provided by Art. 7 et seq. DAH (N. 10 Com. DAH). This especially applies in regard to the such called push-service pursuant to Art. 8 DAH.

29. In the case at hand, A as well as B informed the market on December 20, 2012 shortly after 7 a.m. about the sale of shareholdings (see sec. 4 et seq. above). However, these two publications do not release the Company from its obligation to inform its investors and the market by its own about the potentially price sensitive fact. As mentioned above (sec. 28 above), information of third parties do practically never address exactly the same recipients as information of the issuer. Furthermore, the A-Ad hoc notice and the B-Ad hoc notice only contained information about the respective amount of disposed shareholdings, whereas the amount of shareholdings newly hold by C Fund was not public. Accordingly, the information about the Change in Shareholdings was not yet publicly known.

2.2.1.4 Conclusion

30. In summary it can be stated that **the Change in Shareholdings qualified as potentially price-sensitive fact under Art. 53 para. 1 LR which triggered a disclosure obligation of the Company**.

2.2.2 Timing and modalities of the publication

31. With regard to the timing of the publication of ad hoc notices, issuers must provide notification as soon as they become aware of the main points of the price-sensitive fact (Art. 53 para. 2 LR; Art. 5 DAH). Companies are deemed to have knowledge of a fact once the fact is known to a person in an executive management function or a non-executive director (see decisions of the Sanction Commission dated June 28, 2012 [SaKo 2012-AHP-II/11], sec. 28; sanction notice of SER dated December 22, 2010 [SER-AHP-I/10], sec. 27; N. 93 et seq. Com. DAH). Accordingly, potentially price-sensitive information must be disclosed as soon as the facts – at hand the Change in Shareholdings, in particular the disposal and, respectively, the acquisition of the shareholdings in X – are known to a member of the company's governing bodies (see N. 56 Com. DAH). This knowledge usually arises if a company receives the notification of the seller or the buyer of the shareholdings in question.

32. In the case at hand, it remains unclear at which point the Company (through one of its governing bodies) achieved knowledge about the sale in its shares by A to

C Fund, as the Company's involvement in the Transaction is unclear; the statements of the Company in that matter are contradicting:

33. According to the statements of X, the Transaction was executed as follows: The closing of the Transaction has taken place in the evening of December 19, 2012, but was only fully completed in the morning of December 20, 2012, at 08.40 a.m. Regarding the parties involved in the Transaction, the Company's statements are inconsistent: Initially, the Company reported a (not more precisely described) involvement in the Transaction (see First Response Letter, answer 3: "For confidentiality reasons, X had limited the number of persons involved in the preparation of the transaction to a minimum. Besides [manager 1], the Company's 'deal team' mainly included people located in [city]."). Later, X stated on the contrary that it was not involved in the Transaction (see Second Response Letter, answer 3:"the Issuer, who was not involved in the transaction" and answer 4: "[the Company] was not a party to this transaction itself, nor did the transaction concern the Company other than insofar as its shares were the subject of the transaction"). Independent from the question whether X was involved in the Transaction or not, it is certain that at least two persons were involved in the closing of the Transaction on the side of A having at the same time positions in the Company: [manager 1], director of the Company, and [manager 2], member of the management committee of the Company.

34. The Company stated that it was informed by D on behalf of C Fund of the purchase of shareholdings by fax on December 19, 2012, 06.18 p.m. CET, whereas the notification about the sale by A was handed over by [manager 1] to the Company, resp. to [employees of X], in the early morning of December 20, 2012 (First Response Letter, answer 2; Second Response Letter, answer 3). According to the Company, these notifications were compliant with the applicable rules (First Response Letter, answer 2): As the shareholders of X were at that time under no obligation to disclose shareholdings under Art. 20 SESTA (regarding the amendment to Art. 20 SESTA see sec. 23 above), only the obligations set forth by the Company were relevant. According to the articles of association of X, any shareholder shall notify the Company of the percentage of the shares outstanding he holds, directly or indirectly, if such aggregate ownership reaches, exceeds or falls below certain thresholds, (amongst others) the threshold of 66 2/3%, e.g. as a result of an acquisition or disposal of shares (Art. [■] of the articles of association). The notification required should be effected as soon as possible but not later than two business days after the change of ownership (Art. [■] of the articles of association).

35. As mentioned above (sec. 32 et seq. above), due to contradicting statements of the Company, it remains unclear, at which point in time the Company (through one of its governing bodies) achieved knowledge about the Transaction. Following the Company's statement that the Company itself was not involved in the Transaction (see sec. 33 above; regarding the contrary statements of the Company in that matter see sec. 38 below), it is to examine at which point of time the Company – at the latest – learned about the Change in Shareholdings. It is certain that at least two persons holding positions as a governing body in the Company – [manager 1] and [manager 2] – were involved in the closing of the Transaction and therefore had knowledge about it. In accordance with the explanations above (sec. 31), this would actually lead to the conclusion that also the Company is deemed to have knowledge of the Transaction. The Company disputes this arguing that the persons mentioned were involved in the Transac-

tion not as representatives of X but as representatives of A, the seller (Second Response Letter, answer 3: „[manager 1] participated in the closing as representative of A and not as representative of the Issuer, who was not involved in the transaction“, and answer 4: „[manager 2] was involved in the negotiations […] in his role as head of A“). Herewith, the Company seems to refer to the legal independence of legal entities and their governing bodies independent of existing personnel interrelations (at least [manager 1] is a so-called *Doppelorgan*) and seems to submit accordingly that actual (undisputed) knowledge of a person acting as governing body of several legal entities is not automatically imputed to all these legal entities.

36. It needs not be decided here whether these statements are correct: even if the view of the Company could be followed and the involvement of [manager 1] and [manager 2] in the Transaction would not lead to an imputation of knowledge to X from the beginning of the Transaction, the Company has learned about the Transaction with the receipt of the fax by C Fund on December 19, 2012 at 6.18 p.m. at the very latest (see sec. 34 above). With that fax, the buyer notified the Company about its acquisition as requested by X's articles of association (Art. [■] et seq.). From this moment on, the Issuer was informed about the transfer of the majority stake and the identity of the acquirer, C Fund. The fact that X was not necessarily informed on the identity of the seller is irrelevant since X must have had concluded that this was A. The remaining time in the evening and the next early morning was sufficient to prepare an ad hoc notice in particular in this specific case due to the personnel affiliations: [manager 1] and [manager 2] had the duty to organize such preparation in due time (see N. 99 et seq. Com. DAH). A and B were able to prepare and timely convey ad hoc notices, the same must be true for X. Due to the specific constellation at hand, in particular the personnel affiliations mentioned above, a coordination of the timing of dissemination of the news between the companies involved would have been appropriate.

37. The fact that the closing of the Transaction has apparently only been completed on the following day, December 20, 2012, in the morning (see sec. 33 above) is irrelevant in this regard. While this might be an argument from a strictly corporate law perspective, whether or not an information is potentially price-sensitive does not depend on the fulfilling of each remaining step of a transaction closing, but rather once the parties have reached a meeting of the minds on conclusion of the deal. Irrelevant for the case at hand is further that the respective notification of A about its disposal to the person responsible for ad hoc publicity within the Company apparently only occurred on December 20, 2012, in the morning (see sec. 34 above): deciding at hand is the moment in which the Company at the very latest learned about the Transaction and not the moment in which the person responsible for ad hoc publicity within the Company learned about it. Companies have to organize themselves in such way that the relevant information is promptly transferred to the responsible person(s) (see N. 99 et seq. Com. DAH).

38. However, if in contrary the Company's first statements regarding its involvement in the Transaction is followed (see sec. 33 above; First Response Letter, answer 3: "For confidentiality reasons, X had limited the number of persons involved in the preparation of the transaction to a minimum.") and consequently an involvement – not as a party, but in any other way – is admitted, the Company had knowledge about the Transaction from its beginning. It can be assumed that the parties to the Transaction were entitled to make use of the possibility of postponement of disclosure pursuant to Art. 54 LR (see N. 37 in connection with

N. 180 et seq. Com. DAH for the postponement of disclosure). However, the parties (including the Company) ended the postponement of disclosure in the evening of December 19, 2012 (or at the latest in the very early morning December 20, 2012), when A prepared its own ad hoc notice (the A-Ad hoc notice was distributed on December 20, 2012, at 7.02 a.m.) – it can be assumed that a further postponement of disclosure would not have been permissible as there was no further preponderant interest on confidentiality. As mentioned above (sec. 33), it is irrelevant in this regard that the Transaction apparently was only fully completed on December 20, 2012, later in the morning. Irrelevant is further that the respective notification of A about its disposal to the person responsible for ad hoc publicity within the Company apparently only occurred on December 20, 2012, in the morning (see sec. 34 above): companies have to organize themselves in such way that the relevant information is promptly transferred to the responsible person(s) (see N. 99 et seq. Com. DAH). Accordingly, [manager 1] and [manager 2] had the obligation to organize the preparation of an ad hoc notice in due time. In this specific case, a coordination of the timing of dissemination of the news between the companies involved in the Transaction would have been appropriate (see sec. 36 above).

39. In summary, it can be stated that independent from the question whether the Company was involved in the Transaction or not, it is deemed to have knowledge about the Transaction and thus the Change in Shareholdings in terms of Art. 53 para. 2 LR and Art. 5 DAH in the evening of December 19, 2012.

40. Regarding the modalities of disclosure, ad hoc notices must be distributed in accordance with Art. 7 et seq. DAH (distribution to SER, at least two electronic information systems widely used by professional market participants, at least two Swiss newspapers of national importance as well as via the so-called push-system and pull-system). Pursuant to Art. 53 para. 2 LR and Art. 5 DAH, the issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact. However, ad hoc notices should, whenever possible, be published 90 minutes before the start of trading or after the close of trading (Art. 11 DAH; see amongst others the decision of the Sanction Commission dated April 16, 2009 [SaKo 2009-AHP/MP-II/08]). For the case of an intended publication during trading hours or less than 90 minutes before the start of trading, Art. 12 para. 2 DAH provides that the notice must be sent to SER at least 90 minutes prior to the scheduled time of publication.

41. In the case at hand, there are no indications that the publication of the X-Ad hoc notice has not been in line with the required modalities regarding distribution (Art. 7 et seq. DAH). However, the X-Ad hoc notice was only sent on December 20, 2012, at 8.52 a.m., even though Art. 53 para. 2 LR and Art. 5 DAH request a publication as soon as the issuer has knowledge about the main points of the fact in question. A publication 90 minutes before the start of trading as requested by Art. 11 DAH would have been possible in the case at hand: the Company had at the latest knowledge about the Transaction in the evening of December 19, 2012 (see sec. 39 above). The preparation of an ad hoc notice in the matter at hand, the Change in Shareholdings, is not complicated and time-consuming. As A (and also B) showed, a distribution even 120 minutes before the start of trading on December 20, 2012, was easily possible.

42. There are no indications at hand that X intended from the beginning to distribute its ad hoc notice only at 8.52 a.m. If this had been the case, X would have had to contact SER 90 minutes prior to the planned time of publication (Art. 12 para 2 DAH). It was rather SER that contacted the Company by telephone (in vain) and subsequently by email mentioning the A-Ad hoc notice and asking for X's reaction. Thus, it is not unlikely that without the contacting of SER, the Company would have published a press release about the Change in Shareholdings only (much) later: the Company stated that it generally publishes changes in significant shareholdings of which it is notified by the shareholders in a press release, routinely the same day after the reception of the notification by close of business (Second Response Letter, answer 5). This approach is unproblematic in cases the change in significant shareholdings is not price-sensitive; however, in the case at hand, a prompt reaction was required. This was even more pertinent as A and B already have publicly announced the sale of their shares and thus an incomplete information of the capital market was imminent (as shown above in sec. 28 et seq., the publications by A and B do not release the Company to publish its own ad hoc notice as the recipients of the notices are not the same).

43. In summary it can be stated that **the publication of the X-Ad hoc notice was in breach with Art. 53 para. 1 and 2 LR in connection with Art. 5 et seq. DAH**.

2.3 Determination of sanction

44. Art. 61 para. 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 into account the impact of the sanction on the party concerned.

2.3.1 Severity of the breach

45. The Company violated the rules on ad hoc publicity pursuant to Art. 53 LR in connection with Art. 5 et seq. DAH by publishing the X-Ad hoc Notice too late (see sec. 40 et seq. above).

46. The distribution was particularly critical in terms of time because of the publication of the A-Ad hoc notice and the B-Ad hoc notice already at 7 a.m. (see sec. 4 et seq. above): a selective information of the capital market was imminent. However, it can be hold in favor of the Company, that it reacted fast after SER's contacting in the morning and distributed its ad hoc notice within approximately 30 minutes. Mainly due to the fact that the current and prospective investors of X were informed prior to the start of trading, the severity of the breach of Art. 53 LR in connection with Art. 5 et seq. DAH is to be defined as a **minor breach**.

2.3.2 Degree of fault

47. A sanction under Art. 61 LR may be imposed if a company is held to be in breach of the provisions of the LR, whether such breach was committed intentionally or through negligence.

48. 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 conditional intent if it did not directly intend to breach its regulatory duties, but at the very least is alerted to the possibility of a breach occurring, and accepts the risk that such a breach may occur. An issuer is generally deemed to have acted negligently if, through culpable carelessness, it has failed to consider or take account of the consequences of its actions. The essential condition for a breach of the duty of care to apply is the foreseeability of the outcome. The main elements of the sequence of events leading to the outcome must be foreseeable (sanction notice of SER dated February 4, 2013 [SER-MT II/12-AHP I/12-Listing I/12], sec. 102]).

49. By reason of their duty of care, all issuers are expected to familiarize themselves with stock exchange rules, any relevant commentaries, and the established practices of the judicial bodies and SER and to act in accordance with such rules, commentaries and practices. Companies also have the option to contact SER staff if they have any questions. Any breach of the rules and regulations must normally raise a presumption of negligence on the part of the issuer in failing to discharge its duty.

50. At hand, there is no evidence to suggest that the Issuer breached the rules by acting with intent or conditional intent. However, issuers are required to ensure under Art. 53 LR that they comply with their obligation to timely disclose information to current and prospective market participants and SER by reason of their duty of care (see sec. 49 above). The Issuer failed to do so, which has been shown (see sec. 40 et seq. above). Although the Company learned about the Transaction in the evening of December 19, 2012 or the early morning of December 20, 2012 at the very latest (see sec. 43 above), the person in charge of ad hoc publicity was informed about the Transaction and the according obligation to publish an ad hoc notice apparently only in the morning of December 20, 2012, when she or he was contacted by SER (see sec. 42 above). The Company, thus, failed to take the necessary organizational measures to arrange the flow of information within the Company in due matter and time. This is not comprehensible, as the example of changes in significant shareholdings being subject to the obligation on ad hoc publicity in particular cases is explicitly stated in the Com. DAH (N. 46 and 56) and the case at hand – the transition of at least 66 2/3% of the shareholdings – did obviously fall within this category (see sec. 30 above).

51. The failure of the Issuer is even less comprehensible as the awareness about the ad hoc publicity obligation and the respective flow of information was existent within A, which was closely affiliated to the Issuer until the Transaction (and still was connected via its wholly-owned subsidiary providing management functions for the Company). A (as well as B) were able to timely prepare and distribute ad hoc notices – considering the personnel interrelations between the companies and the respective importance for the companies, the failure of the Issuer weighs even more. This behavior of X is therefore to be qualified as **gross negligence**.

2.3.3 Impact of the sanction

52. In assessing the impact of the sanction, due consideration must be given, in particular, to the company's financial resources. The same fine is likely to impact

more heavily on companies with limited economic resources than those with greater financial capacity. Among other things, financial ratios may be used to determine financial capacity, earnings before interest and taxes (EBIT), net earnings, cash flow generated from operations, cash and cash equivalents, or shareholders' equity (decisions of the Sanction Commission, dated December 8, 2011 [SaKo 2011-AhP-I/11], sec. 37; dated June 28, 2012 [SaKo 2011-AHP-II/11], sec. 63 et seq.).

53. At hand, the Issuer's balance sheet total amounted to USD [amount] mio. as of December 31, 2012 (USD [amount] mio. as of December 31, 2011; consolidated statement). For the business year 2012, the Company reported a net profit of USD [amount] mio. (net loss of USD [amount] mio. for the business year 2011). The market capitalization as of December 31, 2012 amounted to approx. USD [amount] mio.

54. Compared to the other listed companies at SIX, the Issuer qualifies as a company of small to medium size. Accordingly, the impact of a sanction on the Company can be described as **high to medium**.

2.3.4 Sanction

55. Possible sanctions include (amongst others) a reprimand or fine, where in cases of negligence a ceiling of CHF 1,000,000 applies (Art. 61 para. 1 LR). 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 para. 2 LR).

56. Taking into consideration the severity of the breach – which was low (see sec. 45 et seq. above) –, the degree of fault – gross negligence (see sec. 47 et seq. above) – and the impact of the sanction – high to medium (see sec. 52 et seq. above) –, a fine of CHF 20,000 seems appropriate.

57. In imposing the sanction, any prior sanctions in the last three years must also be taken into account (Art. 2.6 para. 4 RP). At hand, no sanctions were imposed against the Company in this period.

58. In view of the breach of the LR and the DAH and having regard to the totality of the circumstances, SER imposes **a fine of CHF 20,000** against the Company in accordance with Art. 61 para. 1 sec. 2 LR.

59. As provided in Art. 6.2 para. 5 RP, the conclusion of the investigation with a legally enforceable sanction notice will be made public. Furthermore, the sanction notice will be made available on the SER website in anonymised form (Art. 6.2 para. 6 RP).

2.3.5 Costs

60. In accordance with Art. 2.9 para. 1 lit. a RP, the Company is ordered to pay the costs of the proceedings; the accrued costs of SER amount to CHF [■].

3. Sanction Notice

SIX Exchange Regulation hereby issues the following Sanction Notice:

1. **It is held that X Ltd. has breached its obligations on ad hoc publicity under Art. 53 para. 1 and 2 LR in conjunction with Art. 5 et seq. DAH by publishing the change in significant shareholdings on December 20, 2012, only at 8.52 a.m. CET.**
2. **X Ltd. is ordered to pay a fine of CHF 20,000.**
3. **X Ltd. is ordered to pay costs of CHF [■].**
4. **The conclusion of the investigation with a legally enforceable Sanction Notice will be made public (Art. 6.2 para. 5 RP). Furthermore, the Sanction Notice will be made available on the SER website in anonymised form (Art. 6.2 para. 6 RP).**

An appeal against this Sanction Notice may be lodged with the Sanction Commission of SIX Swiss Exchange Ltd within ten trading days of the date on which the Sanction Notice is served on the issuer (Art. 5.2 para. 1 RP).

Zurich, October 11, 2013

SIX Swiss Exchange Ltd

SIX Exchange Regulation