

## **Violation of the General Conditions of SIX Swiss Exchange and Scoach Switzerland**

### **Decision:**

In its findings, the Sanction Commission stated that the participant X violated sections 1.14 paras. 4 and 5 of the SIX Swiss Exchange General Conditions and 1.11 paras. 4 and 5 of the Scoach Switzerland General Conditions (in the version in force until March 31, 2010) in that it did not appoint a recognized external auditor for the calendar year 2009 and in that it wrote the audit report for the calendar year 2009 itself. A fine of CHF 50,000 is imposed on the participant X and the decision will be published. The costs of the procedure in the amount of CHF 10,000 are charged to X.

### **Reasons for the decision**

1. X is participant with SIX Swiss Exchange and Scoach Switzerland since [Day/Month] 2008 (at that time under the name Y). According to the General Conditions of SIX Swiss Exchange (GC SIX Swiss Exchange) and Scoach Switzerland (GC Scoach), a participant has the obligation to appoint an external auditor. This obligation is part of the GC and must be accepted by participants before starting to trade. Shortly after it commenced trading, X was specifically reminded by the SIX Exchange Regulation department Surveillance & Enforcement (SVE) that it is obliged to have an external auditor that has to present by 31 March 2010 a report for the first audit period running from [start of trading] 2008 to 31 December 2009. It is established that X did not appoint a recognized external auditor for the calendar year 2009 and that after being duly reminded to its obligations by SVE it had written itself the audit report for the period from [Day/Month] 2008 to 31 December 2009.
2. After an extension of the deadline to deliver the report until 30 June 2010 was granted and some further delay, the report was received by SVE on 25 August 2010. When controlling this report, SVE noticed that it was not made by an external auditor, but by the compliance department of X.
3. On 20 October 2010, two officers of SVE visited X to explain the importance of an audit and that the offence could lead to a sanction procedure. On 18 November 2010 SVE opened formally the sanction proceeding.
4. The participant X agreed with the findings and does not challenge the facts set out by SVE. X explained that the violation was due to not being aware of the duties in relation to these audits and further stated that it prepared an audit in a similar way as it did for other European exchanges. Since then, X took the necessary steps to re-establish full compliance with the SIX rules. Thus it is established that X has violated sections 1.14 paras. 4 and 5 of the GC SIX Swiss Exchange and 1.11 paras. 4 and 5 of the GC Scoach.
5. If a participant violates the rules and regulations, SIX Swiss Exchange / Scoach Switzerland sets sanctions ranging from a reprimand to a fine of up to CHF 10 millions. In order to determine the adequate sanction, the Sanction Commission has to take into account the gravity of the offence and the degree of fault (section 1.24 para. 3 GC SIX Swiss Exchange; section 1.20 para 3 GC Scoach). The sanction is inflicted on the participant itself since it is the party responsible and liable for the persons who act on its behalf. As stated in section 2.6 para. 4 of the Rules of procedures of SIX Exchange Regulation, previous sanctions will not be taken into account in the assessment of any subsequent sanction if three years have elapsed since the previous sanction acquired legal force.
6. Pursuant to the audit system of SIX Swiss Exchange and Scoach Switzerland, each participant has to appoint a recognized auditor to conduct an annual audit of its compliance with the rules and regulations. In a system where the exchange does not proceed itself to audit the participants, it is the external audit that contributes essentially to assure the conformity of the behaviour of the participants. This is in the common interest of the exchange and of the other market participants. Without this external and thus independent audit, there is an increased risk for non controlled trading. The breach of the unambiguous obligation to be audited according to the rules of the

exchange by an external auditor is not a small violation but a severe offence as stated in section 1.24 GC of SIX Swiss Exchange (and accordingly of Scoach Switzerland).

7. X respectively the former Y received not only the unambiguous GC but also a special information by SVE concerning all the audit obligations. X stated that it was not aware of its obligation to perform an external audit and that the correspondent letter of SVE of 28 July 2008 was not followed correctly due to in-house changes. X stated further that it prepared the audit in a similar way as it has to do for other exchanges. This statement does not eliminate or reduce the degree of fault. If a participant respectively its responsible staff does not implement the clear and unambiguous obligation to have an external auditor, the degree of fault is significant. In the present case it is to be taken into consideration that the X received not only the GC and the guidelines for the audits of participants, but also the special letter of SVE. A simple and serious reading would have prevented the wrong procedure. Thus, the degree of fault is significant.
8. In favour of X it has to be mentioned that X regretted deeply the violation and has hence fulfilled its audit obligations. Furthermore, it must be taken into consideration that no previous sanction had to be imposed on X and that there was no indication of another wrong behaviour. In its proposal for sanction, SVE considered that X saved costs by not conducting an external audit and this must have an increasing effect on a penalty. But on the one hand, an economic benefit from a non conformity with the rules is not a defined parameter for the determination of a penalty as stated in section 1.24 of the GC SIX Swiss Exchange (respectively section 1.20 of GC Scoach). Such a profit (resulting from a failure to comply with the exchange rules) could be an additional element while considering the effect of the gravity of a fault for setting a fine. Furthermore, such a profit must be significant. This is obvious not the case with X. On the other hand, the procedure did not show elements of any intention of X or its staff to get an economic profit by making itself the audit report.
9. X stated that due to holiday reasons, the report was not signed by the correct persons. That is irrelevant as even a report signed by the relevant in-house staff would not comply with the obligation to be externally audited. Moreover, the delay of sending the report to SVE is irrelevant in the present case as SVE did not make it a base of its proposal for sanction. X mentioned that a visit of SVE staff with X in 20 October 2010 (before the formal opening of the procedure) resulted in an agreement. SVE objected and stated that the visit had the purpose of drawing X's attention to the severity of the violation and its implications. Whatever the discussion was - and there is no evidence that the SVE position does not reflect the result, it is irrelevant for the determination of a sanction as the meeting took place long after the violation committed by X.
10. In view of all these considerations concerning the severity of the breach and the degree of fault and taking into consideration the fact that X was not sanctioned before and did file a comprehensive audit report for the following year, a fine has to be imposed to X. Despite the fact that the possible but minor economic benefit of the omission to conduct an external audit is not taken into consideration for the amount of a fine in the present case, an amount of CHF 50,000 is adequate.
11. According to section 6.3 para. 1 of the Rules of procedure of SIX Exchange Regulation and to section 1.24 para. 4 GC SIX Swiss Exchange (1.20 GC Scoach) the Commission has to publish sanction decisions that have acquired legal force. That applies in the present case. X will be informed before this publication takes place. Furthermore and as prescribed in section 6.3 para. 3 of the Rules of procedure of SIX Exchange Regulation, the Commission makes the full text of the legally enforceable decisions in a completely anonymised version available on the SIX Exchange Regulation Website.
12. According to the Rules of procedure of SIX Exchange Regulation, the costs of the procedure of CHF 10,000 (CHF 5,000 for SVE, CHF 5,000 for the Commission) are imposed on X.