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SIX Swiss Exchange: Yes to Attorney Work Product Privilege in Investigations by the SIX and Yes to Substantial Fines for Breaches of the SIX Listing Rules. The Good News and the Bad News about a Recent Decision by the Sanction Commission of the SIX Swiss Exchange (SaKo 2012-AHP-II/11).

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SIX Sanction Commission Recognises Attorney Work Product Privilege and Imposes Record-Setting Fine

The Sanction Commission of the SIX Swiss Exchange («SIX») made it clear that the issuer's duty under art. 6 of the SIX Listing Rules to hand over any «relevant documentation» in connection with a SIX investigation does not extend to attorney work product. The Sanction Commission showed its teeth, however, by imposing a record-setting CHF 2 million fine for a single breach of the Listing Rules (delayed *ad hoc* disclosure). – Issuers should be forewarned that turning a blind eye on the Listing Rules may result in a bigger hit to their wallets.

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Background

After a Swiss issuer made a late disclosure of a profit warning, the SIX Exchange Regulation («SER»), the division within the SIX responsible for investigating violations of the Listing Rules, opened a proceeding concerning a potential breach of the *ad hoc* disclosure obligation. In the course of the proceeding, the SER learned that a Swiss law firm had prepared a confidential report for the issuer's Board of Directors. The law firm had been asked to conduct an internal investigation into irregularities concerning the profit warning, and its report contained the results of the investigation, along with legal analysis and recommendations. Although the report was presented to the issuer's Board of Directors, CEO and CFO, it remained within the law firm's possession. The SER sought production of said report from the issuer based on art. 6(1) and (5) Listing Rules, according to which:

> *«[1] [The SER] may demand that issuers [...] provide all the information that is necessary [...] to investigate any breaches. Issuers [...] may be required to present relevant documentation to this end.»*
>
> *«[5] Those concerned are obliged to cooperate.»*

In the instant case, the issuer, while otherwise cooperating with the SER, and having conceded wrongdoing with regard to the delayed profit warning, refused to hand over the law firm's report to the SER. The SER considered this a further breach of the Listing Rules and the SER's sanction proposal (*Sanktionsantrag*) envisioned a CHF 1.75 million fine for the two alleged breaches of the Listing Rules (*ad hoc* disclosure obligation, art. 53; duty to provide information, art. 6).

The Sanction Commission's Ruling (SaKo 2012-AHP-II/11)

The Sanction Commission, in its ruling of 28 June 2012, confirmed the issuer's breach of the *ad hoc* disclosure obligation. That conclusion was no surprise given the issuer's prior admission regarding its failure to disclose the profit warning in a timely manner.

With regard to the second alleged breach, the Sanction Commission left no doubt that the issuer's refusal to produce attorney work product cannot constitute a breach of art. 6 Listing Rules. *First*, the Sanction Commission pointed out that the report itself was actually in the sole possession of the law firm. Accordingly, the issuer would not have been in the position to provide the SER with the report. *Second*, in light of the fundamental importance of the attorney-client privilege in general, and citing Swiss Supreme Court precedent addressing that privilege (BGE 112 Ib 606/607), the Sanction Commission held that the attorney work product privilege sets a limitation on art. 6 Listing Rules. Put differently: While the privilege's application may be an obstacle to the SER's truth-finding efforts, the SER's interests are outweighed by the interest in protecting the close relationship between

client and external legal counsel. *Finally*, the Sanction Commission concluded that the nature of the Listing Rules (whether contractual charter or legal statute), which is itself the subject of a controversy amongst legal commentators, had no relevance in the present case.

As to the sanction for breach of the *ad hoc* disclosure obligation, the Sanction Commission took advantage of the sanction regime, which, after its revision in January 2009, permits fines of up to CHF 10 million in cases involving wrongful intent, and imposed a hefty fine of CHF 2 million, thus going beyond the SER's sanction proposal.

Implications

Application of Attorney Work Product Privilege

In true Swiss fashion, the Sanction Commission made an understatement in the SIX's press release on the case by characterising its conclusion regarding the attorney work product privilege issue as «a minor point». A review of the Sanction Commission's rulings over the last few years reveals that only a few have had such a practical implication for Swiss issuers as the present one likely will.

In contrast to explicit statutory provisions under federal procedure laws (*e.g.*, art. 160(1)(b) Swiss Code of Civil Procedure (*ZPO*); art. 265(2)(b) Swiss Code of Criminal Procedure (*StPO*)), the Listing Rules do not address the question as to whether the attorney work product privilege would apply. The Sanction Commission shed light for the first time on this point. The clarification from the Sanction Commission should help encourage full and frank communications between issuers and their external lawyers for purposes of obtaining legal advice. This is critical, as providing legal advice on potential (or obvious) irregularities requires a thorough understanding of all pertinent information from the client, including the uncomfortable truth. Absent any protections from disclosure, issuers may decide to hold back information from their lawyers, thereby limiting the value of any legal advice received.

The actual location of the attorney work product in question (such as presentations, memos, e-mails, notes, etc.) is irrelevant. From the perspective of mandate law, it actually would have been in the issuer's power to get its hands on the report. Alternatively, the issuer could have instructed the law firm to pass the report on to the SER. Therefore, the Sanction Commission's ruling is to be understood such that there is no breach of art. 6 Listing Rules when an issuer refuses to disclose, or when it refuses to direct the disclosure of, attorney work product. Conversely, the Listing Rules do not permit the SER to seek production directly from the lawyers; and lawyers who nevertheless make such disclosures to the SER (without client approval) are in breach of their mandate, Swiss Attorney Law (art. 13 Swiss Attorney Law) and Swiss criminal law (art. 321 Swiss Penal Code).

One could even argue that the issuer's failure to comply with art. 6 Listing Rules would in any event not be sanctionable in light of art. 6 of the European Convention on Human Rights (*EMRK*), regardless of whether attorney work product was involved or not. Prior cases from the European Court of Human Rights suggest that the maxim of *Nemo Tenetur* (none is bound to incriminate or accuse himself) also applies in a self-regulatory context, provided that the legal entity was «substantially affected» (potential fines exceeding EUR 50,000 meet that test) by an order to produce a document in the context of an underlying breach (*e.g.*, *ad hoc* rules). Interestingly, the Sanction Commission used the term «*Nemo Tenetur*» in its ruling but, perhaps wary of further watering down the duties under art. 6 Listing Rules, without eventually applying this maxim to the case. Time will tell whether the Sanction Commission is willing to cross that bridge in one of its future rulings.

Against that backdrop, while a cooperative approach when being investigated by the SER may be good advice, issuers should proceed with caution if asked by the SER to hand over «every relevant document».

Sanction Proposal Really not Binding

Under art. 4.4(4) of the SIX Rules of Procedure (*Verfahrensordnung*), the Sanction Commission is not bound by the sanction proposal submitted by the SER. In the past, issuers nevertheless had a certain comfort based on precedents that the Sanction Commission would not impose a large fine, and by no means issue a fine significantly higher than the one proposed by the SER. In the instant case, the Sanction Commission imposed a record-setting CHF 2 million fine (for a single breach), which went considerably beyond the SER's proposal (CHF 1.75 million for two breaches). Prior to that, the highest fine issued was CHF 100,000!

Issuers should be aware that both the SER and the Sanction Commission are setting new standards in terms of sanctioning. Whenever material breaches of the Listing Rules (in particular rules on periodic reporting, *ad hoc* disclosure or management transactions) are involved, issuers should consider themselves forewarned that the bill from the SIX could be painful.

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