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**Event advertising**

# The CEO’s sentence must be announced

Par Célian Hirsch le 6 January 2025

Following a merger, the acquiring company may be condemned by the SIX for a violation committed by the transferring company. In addition, the CEO’s conviction must be announced, even if it concerns acts committed within another company (award (final) by the SIX Court of Arbitration of August 26, 2024).

A managing director and CEO of a company listed on the SIX is convicted of professional fraud and disloyal management within another company. The listed company merges with another company (acquiring company). The SIX Sanction Commission fines the acquiring company CHF 150,000 for late publication of this event within the meaning of art. 53 of the Listing Rules (LR) (event-driven publicity, cf. Bahar, cdbf.ch/1183/).

The company is contesting this fine before the SIX arbitration tribunal, and is raising several objections.

Firstly, the company argues that public-law obligations would only be taken over following a merger if expressly provided for by law. The CR is a public-law obligation, and the transferring company’s assumption of the fine imposed by the SIX is not provided for by law.

The Arbitral Tribunal disagrees with this assessment. Although art. 22 of the Merger Act (legal effects of the merger) refers only to the assumption of “all assets and liabilities of the transferring company”, the Federal Council’s Message shows that this also includes potential or latent liabilities (FF 2000 4075). This is the case with the fine, which was only imposed after the merger. Furthermore, the Federal Court did not settle the question of the nature of the CR. Although the regulation constitutes delegated public law, the penalty for violating it must be qualified as contractual (cf. TAF, B-2233/2020 c. 2.4.6.2). In any case, this question is not decisive, as the potential obligations have indeed been taken over by the acquiring company.

Secondly, the company argues that the fine is a criminal sanction within the meaning of the ECHR. The Arbitral Tribunal briefly rejects this claim, as it considers the fine to be contractual.

Thirdly, the company argues that the criminal conviction concerns facts relating to another company. However, art. 53 para. 1 of the Swiss Code of Obligations stipulates that “[t]he issuer shall inform the market of price-sensitive facts that have occurred within its sphere of activity”. Furthermore, the conviction would have had no effect on the issuer’s business, and could therefore not be qualified as having an influence on its share price.

The Arbitral Tribunal emphasized that the condition “within its sphere of activity” concerns events that have an effect within the issuer. This is clearly the case with the criminal conviction of an executive officer for financial offences committed against his employer, especially as he is the founder, managing director and CEO of the transferring company. In addition, the announcement of an executive’s criminal conviction is objectively likely to undermine investor confidence in the company. The conviction should therefore have been announced at the latest when it came into force.

Furthermore, the company argued that the protection of the CEO’s data and personality prevented it from making an announcement. On the contrary, the Arbitral Tribunal held that there were overriding public interests in such an announcement, which outweighed the need to protect the convicted person.

Fourthly, the company argues that the contractual penalty was not validly agreed, as its amount was neither fixed nor determinable.

The Arbitral Tribunal considers that the mechanism agreed by the parties, i.e. the setting of a fine by the Sanction Commission in respect of the breach, corresponds to a valid determination of the contractual penalty. It accepts that the Listing Rules are “ *take it or leave it* ”, but the company was not obliged to be listed on the SIX, and was also free to list its shares on any other stock exchange (Swiss or foreign).

Finally, despite the company’s various grievances, the arbitral tribunal confirmed the amount of both the fine and the costs of the proceedings.

The legal regime governing event-driven announcements may be revised in the future. In June 2024, the Federal Council proposed amending the Swiss Federal Law on Investment Firms (LIMF), so that the obligation of event-driven disclosure would henceforth be laid down in law (art. 37b*AP-LIMF* ). FINMA would be responsible for monitoring compliance, and would be able to take action in the event of any breach (art. 145 AP-LIMF). In addition, the FDF could impose a criminal fine (art. 149a*AP-LIMF* ), which in our view would imply the application of the safeguards set out in art. 6 ECHR. Opinions on this consultation are available here.

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