



This letter is only sent by email to: [REDACTED]

OUR REFERENCE
20/11033

YOUR REFERENCE

DATE
20.01.2021

DECISION REGARDING VIOLATION PENALTY

1. Introduction

Reference is made to previous correspondence, including the advance notification from The Financial Supervisory Authority of Norway's ("Finanstilsynet") dated 26 November 2020 ("Advance Notification") and to the reply by [REDACTED] ("Position holder") in the email of 4 December 2020. Reference is also made to Finanstilsynet's letter dated 5 October 2020 and to the reply by Position holder in the email of 8 October 2020.

Based on the information available to Finanstilsynet, it is concluded that Position holder has violated the notification requirement under section 3-14 of the Norwegian Securities Trading Act ("NSTA"), cf. Regulation (EU) No 236/2012 ("SSR") Article 5 cf. Article 9, by not notifying Finanstilsynet of the relevant net short positions (see section 3) correctly and/or within the deadline in accordance with the SSR. Finanstilsynet has concluded to issue a violation penalty to Position holder in this matter, pursuant to NSTA section 21-4 subsection (1) cf. section 3-14 (see section 6 for further details).

2. Legal Basis

A natural or legal person who *has* a net short position (a "position holder"), in relation to the issued share capital of a company whose shares are admitted to trading on a trading venue¹ and for which Finanstilsynet is the relevant competent authority ("RCA"), shall in accordance with NSTA section 3-14 cf. SSR Article 5 and Article 9, notify Finanstilsynet of the net short position. The notification obligation will apply if a net short position *reaches, exceeds or falls below* a percentage that equals

¹ A "trading venue" means a regulated market or a multilateral trading facility within the meaning of point (14) and (15) of Article 4(1) of Directive 2004/39/EC, cf. SSR Article 2 (1) litra (l).

0,1%² of the issued share capital and each 0,1% above that. Net short positions reported to Finanstilsynet shall be disclosed to the public if the position reaches or falls below 0,5 % of a company's issued share capital and each 0,1 % above that, cf. SSR Article 6.

Notification to Finanstilsynet shall be made in the manner and within the deadline in accordance with SSR Article 9 cf. commission delegated regulation 2012/826 ("2012/826") whereas the relevant time for calculation of a net short position shall be at midnight at the end of the trading day, and the notification must be submitted to Finanstilsynet no later than at 15.30 CET on the following trading day.

The notification shall set out the size of the relevant net short position in percentage and the equivalent share amount, cf. SSR Article 9 subsection (1) cf. 2012/826 Article 2 and table 1 in annex 1. The position holder is responsible for ensuring that the notification is complete, correct and accurate, and as stated in SSR Article 9 cf. 2012/826 Article 2 subsection (3) if a submitted notification contains error(s) the position holder shall, when becoming aware of the error, cancel the notification and submit a new notification. A notification of a net short position is not regarded as submitted before it is complete and/or error(s) are corrected.

The NSTA section 21-4 subsection (1) empowers Finanstilsynet to impose a violation penalty for wilful or negligent violation of the obligation to notify Finanstilsynet about net short positions in accordance with NSTA section 3-14, cf. SSR Article 5 cf. Article 9. Where the position holder is a legal person, the subjective condition of wilful or negligent violation implies a requirement that one or more natural persons acting on behalf of the legal person, have shown the necessary degree of subjective guilt.

When *assessing the size* of the violation penalty, NSTA section 21-4 subsection (5) prescribes that emphasis shall in particular be placed on the scale and effects of the violation, as well as the degree of fault that is found. Article 41 of the SSR states that penalties and administrative measures applicable to infringements of the SSR shall be effective, proportionate and dissuasive. Further, section 46 of the Norwegian Public Administration Act ("NPA Act") prescribes that Finanstilsynet may have regard to the following circumstances (among others) when deciding *whether* an administrative sanction shall be imposed on an enterprise and in the individual assessment of the size of the sanction:

- a) the preventive effect of the sanction
- b) the gravity of the breach, and whether any person acting on behalf of the enterprise is at fault
- c) whether the enterprise could have prevented the offence through guidelines, instructions, training, controls or other measures
- d) whether the breach was committed in order to promote the interests of the enterprise
- e) whether the enterprise has or could have obtained any advantage by the offence
- f) whether there is any repetition

² The notification threshold has been temporarily lowered from 0,2% to 0,1% as of March 16, 2020. See the latest decision of December 17, 2020 with links to previous decisions: <https://www.finanstilsynet.no/en/news-archive/news/2020/short-sale-decision-by-the-efsa-surveillance-authority-esa-and-the-european-securities-and-markets/>

- g) the economic capacity of the enterprise
- h) whether other sanctions have been imposed on the enterprise or any person acting on behalf of the enterprise as a consequence of the breach, including whether an administrative sanction or criminal penalty has been imposed on any natural person
- i) whether any treaty with a foreign state or international organisation presumes the use of administrative corporate sanctions or corporate criminal penalties.

3. Factual background

The violation penalty concerns late reporting of the following net short positions (together referred to as the "Relevant Net Short Positions"):

Issuer	Position	Position date	Reported*
	0.3 %		
	0.67 %		
	0.6 %		
	0.69 %		
	0.68 %		
	0.1 %		

* Date and time of the filing in Finanstilsynet's Short Sale Register.

** According to Position holder, the correct position date on this position was [REDACTED] (see section 4).

*** According to Position holder, the correct position date on this position was [REDACTED]. Also, this position was reported using a wrong ISIN (see section 4).

4. Position holder's statements

Position holder's statements were provided to Finanstilsynet in emails dated 8 October 2020 and 4 December 2020. The Position holder did not contest or object to the factual basis upon which the Advance Notification was sent.

The Position holder presents in the email of 4 December 2020 several elements. Position holder highlights that they have a high short selling disclosure activity, and the reporting process of net short positions across Europe is a largely manual process, and the Position holder has never received a fine, penalty or sanction on this matter in the past. The Position holder states that at the end of 2019, the Position holder had "deployed an upgrade to internal systems that calculated short exposure figures that the Operations team relies on to declare our net short positions." and unfortunately the upgrade caused temporary issues that contributed to late reporting of certain of the Relevant Net Short Positions. The position holder also states that the COVID 19 breakout may had an effect on the delays of the reporting of the Relevant Net Short Positions as adjusting to remote work firmwide had not been without its challenges.

Net short positions in [REDACTED]

and [REDACTED]

Position holder has in the email dated 8 October 2020 and 4 December 2020, acknowledged that these positions were reported to Finanstilsynet after the notification deadline in NSTA section 3-14 cf. SSR Article 9 subsection (2).

Position holder has in the email of 8 October 2020 stated that the late reporting was caused by a new internal IT project that was implemented to improve Position holder's internal short sale system. However, the project introduced some issues that caused these positions to be reported after the deadlines. Position holder highlighted in the email of 4 December 2020 that after internal investigation, changes have been made to the internal short sale alert system and Position holder are now satisfied that all alerts are generated properly.

Net short position in [REDACTED]

In the email of 4 December 2020, the Position holder acknowledges that this net short position was reported incorrectly. In the email of 8 October 2020 Position holder asks whether there is a "typo" in Finanstilsynet's letter of 5 October 2020 whereas Finanstilsynet has described that the abovementioned position is registered in the Short Sale Register with position date [REDACTED]. Finanstilsynet may confirm that this is not a "typo" as the position is still registered in the Short Sale Register with position date [REDACTED]. From Position holder's email of 8 October 2020, Finanstilsynet understands that this position was reported incorrectly by Position holder using the wrong position date of [REDACTED] while the correct position date was [REDACTED].

In the email of 4 December 2020, Position holder declares that after reviewing the Advance Notification, there have been done internal investigations. Position holder states that on the [REDACTED] the net short position was reported incorrectly with position date [REDACTED]. Position holder further states that "*The website updated but as this declaration was made with a Position Date of February instead of March, it did not appear at the top of the list, as would have been expected.*". The Position holder therefore assumed that the position had not been saved and reported the position again, this time with the correct position date [REDACTED].

Net short position in [REDACTED]

The Position holder has in the email of 8 October 2020 stated that the notification made on [REDACTED] regarding a net short position in [REDACTED], with reported position date [REDACTED], "*was erroneous*". The person reporting on behalf of Position holder was supposed to report a position with position date [REDACTED] in another issuer - [REDACTED], but due to human error, a confusion because of the similar company names, the position was incorrectly reported on [REDACTED] instead. In the email of 4 December 2020, Position holder acknowledges not having any further comments to this wrongly reported net short position. Position holder has in the emails dated 8 October 2020 and 4 December 2020 highlighted that after this incident, it has modified its procedures and require operations to report based on the exact ISIN and not company name.

5. Finanstilsynet's assessment

5.1 Infringement of the SSR

It is Finanstilsynet's assessment that Position holder's failure to notify Finanstilsynet within the deadline and/or not cancel and/or correct incorrect notifications within the same deadline, constitutes clear violations of the reporting requirements under NSTA section 3-14, cf. Articles 5 and 9 of the

SSR. The Relevant Net Short Positions were subject to the notification requirement in SSR Article 5 and the notifications were either submitted after or mistakes not corrected within the deadline in SSR Article 9 subsection (2). A notification of net short position is not regarded as submitted before it is complete and/or errors are corrected, hereunder must cancellations be submitted within the same deadline. On this background it is Finanstilsynet's assessment that the provided notifications did not fulfil the requirements under NSTA section 3-14, cf. Articles 5 and 9 of the SSR. Accordingly, Finanstilsynet finds that the objective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty on position holder are met.

When assessing whether the subjective conditions are met, Finanstilsynet has taken into account Position holder's statements in the email of 8 October 2020 and 4 December 2020, hereunder the statement that the delays in the reporting of net short positions in [REDACTED] and [REDACTED] inter alia occurred because of changes on Positions holders internal IT systems for reporting and that the position in [REDACTED] and [REDACTED] was incorrectly registered.

Finanstilsynet has no reason to doubt the Position holder's statements, hereunder that it had challenges with a new IT-project and that human errors caused a position to be reported using a wrong ISIN. It is however our view that persons acting on behalf of Position holder has acted negligent. It is the Position holder's responsibility to ensure, in advance of taking net short positions covered by the notification obligation, to have in place appropriate procedures and/or systems in order to proactively identify the notification obligation under the SSR, hereunder what shares that are subject to the obligation, and to make sure such procedures are satisfied in a timely and complete manner. This means inter alia that the procedures and/or systems must be prepared to at any given time identify shares and positions which are subject to the reporting obligation, and that both the design of and compliance with the procedures and/or the system, among other things takes into account that human errors may occur and must be corrected and/or that additional measures/controls should be implemented when making IT-changes at the same time as the position holder makes trades and the reporting obligation arises. Even though that the Position holder made changes on its internal IT systems that are used to calculate net short exposure and to declare its net short positions, it is Finanstilsynet's assessment that the reasons for the delays stated by the Position holder do not excuse the delays and that the Position holder had not taken the necessary precautions to ensure that the notification obligations could be met before making the trades. Further, although Position holder's reporting system has been improved to prevent further events, Position holder did fail to ensure such compliance in advance.

On this background Finanstilsynet finds that both the objective and subjective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty, are met.

5.2 Assessment of whether a violation penalty should be imposed

Finanstilsynet finds that several of the identified violations are manifest and severe and thus deems it necessary to impose a violation penalty under section 21-4 of the NSTA.

In determining whether to impose a penalty, Finanstilsynet has made an overall assessment of the individual circumstances in the case. Finanstilsynet places in particular emphasis on the fact the case involves several late reported notifications, and that the Position holder who is responsible for the delayed notifications is a legal person. Finanstilsynet considers it to be aggravating that the late reported positions [REDACTED] and [REDACTED] were all above the 0,5% threshold, and thus that the infringement effectively obstructed the positions to be disclosed to the market in time in accordance with NSTA section 3-14 cf. SSR Article 6. Compliance with the SSR is imperative to ensure information to the market on significant net short positions. Such information enables investors to make well-considered investment decisions, which in turn is of importance for confidence in the market.

Based on the above, it is the opinion of Finanstilsynet that a decision to impose a violation penalty in regard to the abovementioned violations of the SSR, will not be disproportionate in this case.

5.3 Assessment of the size of the violation penalty

In accordance with NSTA section 21-4 subsection (5), certain circumstances *shall* be taken into account when determining the size of the violation penalty, hereby the scale and effects of the violation(s), as well as the degree of fault found. Reference is also made to the principles for sanctions under the SSR article 41, and the NPA Act section 46 which supplements the sector legislation and prescribes certain circumstances that Finanstilsynet may have regard to in addition to the circumstances prescribed in the NSTA (for further details see section 2 (*Legal basis*) above).

When assessing the size of the violation penalty, Finanstilsynet has made an overall assessment of the individual circumstances in the case and has in particular emphasized that Position holder is a legal person, the length of the delays, the size of the positions and that four of the relevant infringements are considered severe as they pertain net short positions not having been reported within the time limit and that the delay also resulted in the positions not being made publicly available in time. Finanstilsynet has also taken into consideration that the relevant infringements have been found to be negligent on the part of the Position holder cf. section 5. 1 above.

The size of the violation penalty is furthermore consistent with the level of previous penalties set by Finanstilsynet for comparable violations of the notification requirements.

6. Finanstilsynet's decision

Based on the facts described above and in accordance with the NSTA section 21-4 subsection (1) and (5) cf. SSR Articles 5, 6 and 9, Finanstilsynet has made the following decision regarding a violation penalty:

[REDACTED] *is ordered to pay a violation penalty of NOK 40 000 (forty thousand Norwegian kroner) to the Norwegian Treasury.*

Pursuant to section 28 of the NPA Act, this administrative decision may be appealed to the Ministry of Finance. An appeal must be submitted within three weeks of the date on which notification of the administrative decision has reached the party concerned. The appeal must be sent to Finanstilsynet.

An invoice for payment of the violation penalty will be sent separately from The Norwegian National Collection Agency after the deadline for appeal has expired.

On behalf of Finanstilsynet

Knut Haugan
Head of Section

Madeleine Marie Melgård
Higher Executive Officer

This document has been electronically approved and does not require handwritten signatures.