



Credit Suisse Securities (Europe) Limited  
One Cabot Square  
London E14 4QJ  
UNITED KINGDOM

OUR REFERENCE  
14/5960

YOUR REFERENCE

DATE  
09.03.2015

Dear Sir/Madam

## Decision regarding surrender of gain

### 1. Introduction

Reference is made to prior correspondence in relation to certain sales by Credit Suisse Securities (Europe) Limited ("CSSEL") of shares in DiaGenic ASA (the "**Company**"), ISIN NO0010081235 (the "**Shares**"). On 26 January 2015, The Financial Supervisory Authority of Norway ("**Finanstilsynet**") issued an advance notification of surrender of gain to CSSEL. CSSEL responded to this notification in a letter dated 23 February 2015.

Based on its review of the matter, Finanstilsynet has concluded that CSSEL has violated section 3-14 of the Norwegian Securities Trading Act ("**NSTA**") by its sales of 624,382 Shares and 188,000 Shares on 4 April 2014 and 7 April 2014, respectively. Accordingly, pursuant to NSTA section 17-2, Finanstilsynet has decided to order CSSEL to surrender the gain obtained through these sales. The size of the gain to be surrendered is **NOK 117,211**.

The factual background, legal basis and Finanstilsynet's assessment of the matter are set out below in sections 2, 3 and 5, respectively.

### 2. Factual background

#### The rights issue

On 14 March 2014, the Company published a prospectus (the "**Prospectus**") relating to the issue of tradable subscription rights for new Shares to be issued following the expiration of the subscription period. The front cover of the Prospectus states that the new Shares "*are expected to be delivered to the subscribers in the Rights Issue on or about 9 April 2014 and be listed and tradable on Oslo Børs on or about 9 April 2014*". The Prospectus also states that the payment date for the new Shares

will be 7 April 2014. Paragraph 5.2.13 of the Prospectus, entitled "*Delivery and trading of the New Shares*", reads (in full):

*"Following sufficient payment of New Shares subscribed in the Rights Issue, the Company expects to register the share capital increase pursuant to the Rights Issue in the Norwegian Register of Business Enterprises on or about 9 April 2014 (and no later than 9 July 2014), provided that full payment for the allocated shares has been received by the Company. As soon as practically possible thereafter, the allocated and paid New Shares will be transferred to the subscribers' VPS accounts.*

*The New Shares may not be traded before registration of the share capital increase with the Norwegian Register of Business Enterprises and deliver [sic] of the New Shares to the subscribers VPS-accounts. The first day of trading on Oslo Børs is expected to be on or about 9 April 2014."*

During the subscription period, CSSEL acquired subscription rights for 624,382 Shares. On 31 March 2014, CSSEL exercised all of those subscription rights and also applied for additional oversubscription Shares. On 1 April 2014 (at 08:00), the Company issued a public notice announcing preliminary results of the rights offering. The notice states that the allocation of new Shares "*is expected to take place on or about 4 April 2014, with payment for the allocated shares on 7 April 2014*".

On 4 April 2014, CSSEL was notified that it would receive all of the 624,382 Shares for which it had exercised subscription rights, as well as an additional 188,805 oversubscription Shares. Also on 4 April 2014 (at 16:09), the Company issued a public notice (the "**Final Result Notice**") announcing the final results of the rights offering. The Final Result Notice states that the completion of the rights offering and the registration and listing of the new Shares "*is expected on or about 10 April 2014*" and that the new Shares "*may not be transferred or traded before they are fully paid and the share capital increase has been registered with the Norwegian Register of Business Enterprises and the new shares registered in the VPS*". Furthermore, the Final Result Notice states that the payment date for the new Shares will be 8 April 2014.

On 11 April 2014 (at 12:59), the Company issued a public notice (the "**Completion Notice**") announcing that the share capital increase has been registered with the Norwegian Register of Business Enterprises and that the new Shares will be listed immediately on Oslo Børs. According to CSSEL, the new Shares allocated to CSSEL were delivered into the CSSEL custody account on 14 April 2014.

#### CSSEL's sales transactions

On 4 April 2014, CSSEL sold 624,382 Shares, with settlement to take place on 9 April 2014 (T+3) (the "**4 April Sale**"). On 7 April 2014, CSSEL sold an additional 188,000 Shares, with settlement to take place on 10 April 2014 (T+3) (the "**7 April Sale**" and, together with the 4 April Sale, the "**CSSEL Sales**").

Delivery by CSSEL of all of the 812,382 Shares sold as part of the CSSEL Sales took place on 14 April 2014, which represented a delay of two business days and three business days with respect to the 7 April Sale and the 4 April Sale, respectively, as compared to CSSEL's T+3 delivery obligation.

### **3. Legal basis**

Section 3-14 ("*Sale of financial instruments not owned by the seller*") of the Norwegian Securities Trading Act ("NSTA") reads (in full):

*"Where the seller of financial instruments as mentioned in section 2-2 subsection (1) nos. 1 to 3 is not the owner thereof, the seller must have access to the financial instruments to ensure timely delivery on the agreement date."*

In relation to issuances of new shares, Finanstilsynet has taken the position that the subscriber does not become the owner of the shares until the shares have been delivered into the subscriber's account in the Norwegian Central Securities Depository ("VPS"). Accordingly, under NSTA section 3-14, the subscriber is not allowed to sell such shares before they have been received into the relevant VPS account unless the subscriber has access to the shares to ensure timely delivery on the agreement date. The preparatory works to NSTA section 3-14 state that, in order to satisfy that condition, the crucial point is that the seller in some way has established an assured access to the financial instruments at the time of the agreement. Such access may be established by, e.g., entering into a loan agreement for the requisite number of financial instruments, which can be drawn upon by the settlement date.

Pursuant to NSTA section 17-2, Finanstilsynet may order the surrender of all or part of unlawful gain obtained by negligent or wilful violation of NSTA section 3-14 by the party to whom such gain has accrued. This also applies where the person to whom the gain accrues is a person other than the violator. If the size of the gain cannot be established, the amount shall be fixed on a discretionary basis.

### **4. Statements by CSSEL**

In its letter dated 23 February 2015, CSSEL states that it believes it acted in good faith and on the basis that at the relevant time, it was the owner of the Shares and was therefore entitled to deal with those Shares as owner. On that basis, CSSEL notes Finanstilsynet's preliminary assessment of the matter, as set forth in Finanstilsynet's advance notification dated 26 January 2015, but believes it acted in accordance with NSTA section 3-14 and that surrender of gain in accordance with NSTA section 17-2 does not apply. CSSEL does not make any comments with respect to Finanstilsynet's description of the factual background or Finanstilsynet's calculation of the size of the gain.

## 5. Finanstilsynet's assessment

### Violation of NSTA section 3-14

As noted in section 3 above, Finanstilsynet has taken the position that a subscriber does not become the owner of shares for purposes of NSTA section 3-14 until the shares have been delivered into the subscriber's VPS account. In Finanstilsynet's view, neither any representations by the issuer to the subscriber nor any terms of the subscription (as agreed between the issuer and the subscriber) can, for purposes of NSTA section 3-14, be sufficient to form a basis for deeming the subscriber to be the owner of the as yet unissued shares before such delivery has taken place. However, such representations or terms may nevertheless be relevant to the determination of whether the "access" condition in NSTA section 3-14 has been satisfied at an earlier point in time.

Consistent with its general view outlined above, Finanstilsynet cannot accept CSSEL's argument that it became the owner of the new Shares immediately upon allocation. Accordingly, the relevant question is whether, at the time of the 4 April Sale and/or the 7 April Sale, CSSEL had satisfied the "access" condition in NSTA section 3-14. In order to satisfy this condition, CSSEL would need to have established, at the respective times when the CSSEL Sales were made, an assured access to the new Shares that would ensure timely delivery of a sufficient number of Shares on the relevant settlement date.

The information in the Prospectus and the Final Result Notice regarding the timetable for completion and related matters is summarized in section 2 above. Finanstilsynet notes that statements in both documents with respect to relevant dates are consistently caveated with language that indicates uncertainty, in particular the terms "*expected*" and "*on or about*". Furthermore, paragraph 5.2.13 of the Prospectus, as quoted above, expressly refers to 9 July 2014 as an absolute deadline for completion. In Finanstilsynet's view, this strongly suggests that the right of the subscribers, including CSSEL, to receive the newly issued Shares in the rights issue did not qualify as "access" to the new Shares for purposes of NSTA section 3-14 at the respective times of the CSSEL Sales. This view is further bolstered by the fact that both the Prospectus and the Final Result Notice set forth express restrictions on trading of the new Shares before the share capital increase has been registered and the new Shares have been delivered.

Based on an overall evaluation of the facts of this specific matter, Finanstilsynet has concluded that the earliest time at which CSSEL may be deemed to have had "access" to the new Shares for purposes of NSTA section 3-14 was on 11 April 2014, immediately after the issuance of the Completion Notice, in which the Company announced that the share capital increase had been registered with the Norwegian Register of Business Enterprises and that the new Shares would be listed immediately on Oslo Børs. Accordingly, both the 4 April Sale and the 7 April Sale were carried out in violation of NSTA section 3-14.

### Surrender of gain

Pursuant to NSTA section 17-2, Finanstilsynet may order the surrender of all or part of unlawful gain obtained by a violation of NSTA section 3-14 to the extent the violation was negligent or

wilful. Based on the facts of the case and the nature of the violation, Finanstilsynet has concluded that the culpability condition in NSTA section 17-2 is satisfied with respect to CSSEL in this matter.

In relation to violations of NSTA section 3-14, the size of the unlawful gain will typically be equal to the difference between the actual sales proceeds received in the unlawful sale and the estimated proceeds that would have been received if the violator had instead sold the applicable securities on the first day on which it would have been lawful under NSTA section 3-14 to do so, based on the hypothetical sales price that the violator would have achieved on that day.

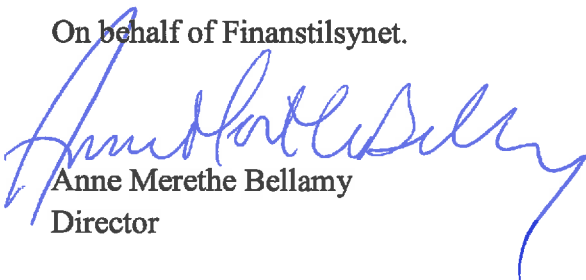
As discussed above, Finanstilsynet's conclusion in the present matter is that CSSEL was not allowed under NSTA section 3-14 to sell the new Shares until, at the earliest, immediately after the issuance of the Completion Notice, which occurred at 12:59 on 11 April 2014. Accordingly, the size of CSSEL's gain equals the difference between the actual sales proceeds received by CSSEL in the CSSEL Sales and the estimated proceeds that CSSEL would have received if it had instead sold all of those Shares on 11 April 2014 after 12:59. The details of the calculation of the size of CSSEL's gain are set forth in Finanstilsynet's advance notification.

Based on the above assessment, Finanstilsynet has decided to order CSSEL to surrender a gain in the amount of NOK 117,211.

#### **6. Acceptance of the surrender of gain**

CSSEL is hereby asked to decide whether or not it accepts Finanstilsynet's order to surrender a gain in the amount of NOK 117,211 and to return the enclosed copy of this letter with the relevant signatures in the form below by 15 April 2015. If CSSEL accepts Finanstilsynet's decision, a new letter stating the time limit for the payment along with relevant payment information will be issued.

On behalf of Finanstilsynet.

  
Anne Merethe Bellamy  
Director

  
Geir Holen  
Head of section

Surrender of gain is **accepted**

Surrender of gain is **not accepted**

For Credit Suisse Securities (Europe) Limited \*

For Credit Suisse Securities (Europe) Limited \*

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Name in block letters:

Name in block letters:

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Date:

Date:

\* Proof of the authority of the signatory to commit the company must be enclosed