



**FINANSTILSYNET**  
THE FINANCIAL SUPERVISORY  
AUTHORITY OF NORWAY

Guevoura Fund Limited  
c/o SwissArb SA  
3 Place des Eaux Vives  
CH-1207 Genève  
SWITZERLAND

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 for the account of Guevoura Fund Limited (the "**Fund**") 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 the Fund. SwissArb SA ("**SwissArb**"), the Fund's investment adviser, responded to this notification on behalf of the Fund in a letter dated 6 February 2015.

Based on its review of the matter, Finanstilsynet has concluded that the sales by SwissArb on behalf of the Fund of 211,396 Shares on 3 April 2014, 416,428 Shares on 4 April 2014, 400,276 Shares on 7 April 2014, 77,224 Shares on 8 April 2014 and 159,033 Shares on 10 April 2014 were made in violation of section 3-14 of the Norwegian Securities Trading Act ("**NSTA**"). Accordingly, pursuant to NSTA section 17-2, Finanstilsynet has decided to order the Fund to surrender the gain obtained through these sales. The size of the gain to be surrendered is **NOK 142,060**.

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

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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, on 28 March 2014, the Fund acquired subscription rights for 1,150,000 Shares.<sup>1</sup> On 31 March 2014, the Fund 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 (the "**Preliminary Result Notice**") announcing preliminary results of the rights offering.

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 9 April 2014, SwissArb was informed that the Fund would receive 347,748 additional Shares in the oversubscription.

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 SwissArb, the new Shares allocated to the Fund were delivered on 14 April 2014.

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<sup>1</sup> Based on information received from SwissArb, it is Finanstilsynet's understanding that all of the Fund's transactions described in this letter were carried out by SwissArb, acting on a discretionary basis for the account of the Fund.

### The Fund's transactions

On 3 April 2014, the Fund sold 211,396 Shares, with settlement to take place on 8 April 2014 (T+3) (the "**3 April Sale**"). On 4 April 2014, the Fund sold an additional 416,428 Shares, with settlement to take place on 9 April 2014 (T+3) (the "**4 April Sale**"). On 7 April 2014, the Fund sold an additional 400,276 Shares, with settlement to take place on 10 April 2014 (T+3) (the "**7 April Sale**"). On 8 April 2014, the Fund sold an additional 77,224 Shares, with settlement to take place on 11 April 2014 (T+3) (the "**8 April Sale**" and, together with the 3 April Sale, the 4 April Sale and the 7 April Sale, the "**Initial Sales**"). Delivery by the Fund of the Shares sold as part of the Initial Sales took place on 14 April 2014, which represented a delay of between one and four business days as compared to the Fund's T+3 delivery obligation.

On 10 April 2014, the Fund sold an additional 159,033 Shares, with settlement to take place on 15 April 2014 (T+3) (the "**10 April Sale**" and, together with the Initial Sales, the "**Pre-Completion Notice Sales**"). Also on 10 April 2014, the Fund bought back 160,410 Shares (the "**Enskilda Repurchase**") and 211,396 Shares (the "**KCG Repurchase**" and, together with the Enskilda Repurchase, the "**10 April Repurchases**"), with settlement to take place on 15 April 2014 (T+3).

On 11 April 2014, after the issuance of the Completion Notice, the Fund sold 605,197 Shares, with settlement to take place on 16 April 2014 (T+3) (the "**11 April Sale**").

### **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 SwissArb**

In its letter dated 6 February 2015, SwissArb, on behalf of the Fund, acknowledges the assessments made by Finanstilsynet in the advance notification dated 26 January 2015. SwissArb further notes that it has no further comments regarding Finanstilsynet's conclusions and indicates that it will comply with an order to surrender a gain of NOK 142,060.

#### **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.

Accordingly, the Fund did not become the owner of the new Shares until 14 April 2014 and, therefore, the relevant question is whether, at the time of each of the applicable sales transactions, the Fund had satisfied the "access" condition in NSTA section 3-14. In order to satisfy this condition, the Fund would need to have established, at the respective times when the 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 the Fund, 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 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 the Fund 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, all of the Pre-Completion Notice Sales were carried out in violation of NSTA section 3-14, whereas the 11 April Sale complied with NSTA section 3-14 in that the Fund may be deemed to have had "access" to the new Shares at the time of that transaction.

#### 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. This also applies where the person to whom the gain accrues is a person other than the violator. 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 SwissArb in this matter. Finanstilsynet also notes that, although the unlawful sales were carried out by SwissArb, NSTA section 17-2 provides an express legal basis for recovering the unlawful gain from the Fund, for whose account SwissArb was trading.

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. However, to the extent the violator has carried out a subsequent transaction directly related to the unlawful sale (e.g., a repurchase of the applicable securities), it might be more appropriate to calculate the size of the unlawful gain on the basis of the price paid in that related transaction rather than the hypothetical sales price referred to above. Based on the facts of this specific matter, Finanstilsynet believes it is appropriate to take into account the purchase price paid by the Fund in both of the 10 April Repurchases when calculating the size of the unlawful gain.

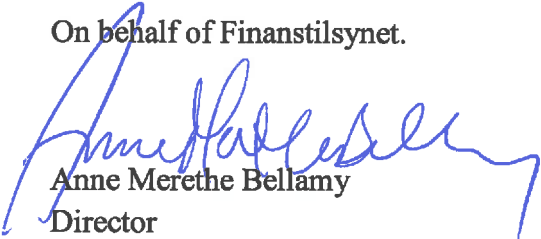
Accordingly, Finanstilsynet has concluded that the Fund's net unlawful gains in this matter should be calculated as the actual proceeds from the Pre-Completion Notice Sales, less the actual purchase price paid in the 10 April Repurchases, less the estimated alternative sales proceeds in respect of the remaining Shares. As discussed above, Finanstilsynet's conclusion in the present matter is that the Fund 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 estimated alternative sales proceeds in respect of the remaining Shares is calculated based on the hypothetical sales price that the Fund would have achieved if it had instead sold those Shares on 11 April 2014 after 12:59. The details of the calculation of the size of the Fund's gain are set forth in Finanstilsynet's advance notification.

Based on the above assessment, Finanstilsynet has decided to order the Fund to surrender a gain in the amount of NOK 142,060.

## 6. Acceptance of the surrender of gain

The Fund is hereby asked to decide whether or not it accepts Finanstilsynet's order to surrender a gain in the amount of **NOK 142,060** and to return the enclosed copy of this letter with the relevant signatures in the form below by 15 April 2015. If the Fund 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**

For Guevoura Fund Limited \*

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Name in block letters:

\_\_\_\_\_

Date:

Surrender of gain is **not accepted**

For Guevoura Fund Limited \*

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Name in block letters:

\_\_\_\_\_

Date:

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