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**OUR REFERENCE**  
18/10274

**YOUR REFERENCE**

**DATE**  
23.05.2019

## DECISION REGARDING VIOLATION PENALTY

Reference is made to previous correspondence, including the advance notification from The Financial Supervisory Authority of Norway ("Finanstilsynet") dated 18 March 2019 ("Advance Notification") and Alpha Blue Ocean Advisors Ltd.'s ("ABO") most recent comments in letter dated 15 April 2019.

Based on the information available, Finanstilsynet has concluded that Alpha Blue Ocean Advisors Ltd. has infringed the notification requirement under section 3-14 of the Norwegian Securities Trading Act ("NSTA") which implements Regulation (EU) No 236/2012 ("SSR") (adapted for the purpose of the EEA agreement) as Norwegian law, cf. Articles 5 and 9 of the SSR.

In the Advance Notification Finanstilsynet notified ABO that it was considering imposing a violation penalty of NOK 4,000,000.

### 1. Background

The net short positions to which this decision relates were held in the period from November 2017 to December 2018 (the "Relevant Short Positions"). According to Finanstilsynet's calculations, which have not been contested by ABO, the Relevant Short Positions should have generated in total 171 notifications to Finanstilsynet which ABO has failed to report.

The Relevant Short Positions were held in Element ASA ("Element"), Induct AS ("Induct") and Lavo.tv AS ("Lavo"). Element (formerly known as Intex Resources ASA) is listed on Oslo Stock Exchange (since 2006), while Induct and Lavo are listed on Merkur Market (since January 2016 and June 2018, respectively). Element is a project investment company in the materials sector, Induct is classified as an internet software & services company, and Lavo develops innovative mobile-applications for the TV-industry.<sup>1</sup>

<sup>1</sup> Source: The Oslo Stock Exchange ([https://www.oslobors.no/ob\\_eng/](https://www.oslobors.no/ob_eng/))

The legal basis, factual background, ABO's statements and Finanstilsynet's assessment of the case are set out below in sections 2, 3, 4 and 5, respectively.

## 2. Legal basis

A natural or legal person who has a net short position in relation to issued share capital of a company that has shares admitted to trading on a regulated market or multilateral trading facility, with Finanstilsynet as competent authority, shall notify Finanstilsynet in accordance with Article 5(1), cf. Article 9, of the SSR.<sup>2</sup> A natural or legal person shall provide notification if the position equals, exceeds or falls below the threshold of 0.2 per cent of the issued share capital of the company concerned and each 0.1 per cent above that, cf. Article 5(2). Net short positions in shares reported to Finanstilsynet shall also be publicly disclosed if they equal or exceed 0.5 per cent of the company's issued share capital and each 0.1 per cent above that, cf. Article 6. According to Article 9 of the SSR, the relevant time for calculation of a net short position is midnight at the end of the trading day. The notification of the net short position shall be made not later than at 15:30 CET on the following trading day.

Section 21-4(1) of the NSTA (in continuation of section 17-4(1) of the NSTA applicable until 1 January 2019) 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 section 3-14 of the NSTA, cf. Articles 5 and 9 of the SSR. When assessing the size of the violation penalty, section 21-4(5) prescribes that importance shall in particular be attached to the scale and effects of the breach as well as the degree of fault 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 ("NPAA") 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 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

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<sup>2</sup> The consolidated version of the SSR is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0236-20140917&from=EN>.

- g) the economic capacity of the enterprise.

### 3. Factual background

#### 3.1 Overview of the Relevant Short Positions

ABO has in total, based on Finanstilsynet's analysis, failed to submit 96 notifications of net short positions in Element, 46 notifications in Induct and 29 notifications in Lavo. Per 31 December 2018, the oldest position was 247 trading days overdue in Element, 207 days overdue in Induct and 123 days overdue in Lavo.

In total ABO has been under an obligation to report net short positions (days in the interval  $\geq 0,2\%$ ) in a total of 219 days in Element, 196 days in Induct, and 79 days in Lavo (as per 31 December 2018). Furthermore, ABO has been under an obligation to report net short positions of up to approximately 7.54% in Element, 4.97% in Induct and 2.98% in Lavo. Most of the net short positions have been above the 0.5% threshold.

#### Finanstilsynet's assessment – excerpt of positions<sup>3</sup>

##### Element

08.11.2017 ABO had a net short position of approx. 5.11%.  
 27.12.2017 ABO had a net short position of approx. 1.14%.  
 05.04.2018 ABO had a net short position of approx. 4.06%.  
 30.07.2018 ABO had a net short position of approx. 5.35%.  
 03.09.2018 ABO had a net short position of approx. 0.67%.  
 31.10.2018 ABO had a net short position of approx. 2.92%.

##### Induct

06.03.2018 ABO had a net short position of approx. 1.04%.  
 30.04.2018 ABO had a net short position of approx. 3.49%.  
 01.06.2018 ABO had a net short position of approx. 0.20%.  
 04.10.2018 ABO had a net short position of approx. 3.39%.  
 30.10.2018 ABO had a net short position of approx. 3.20%

##### Lavo

09.07.2018 ABO had a net short position of approx. 0.48%.  
 23.07.2018 ABO had a net short position of approx. 1.47%.  
 06.09.2018 ABO had a net short position of approx. 1.40%.  
 04.10.2018 ABO had a net short position of approx. 2.85%.  
 05.11.2018 ABO had a net short position of approx. 2.62 %.

<sup>3</sup> ABO has been presented with the complete list of Finanstilsynet's calculated net short positions for the period November 2017-December 2018.

### 3.2 Convertible loan facilities and share lending agreements

ABO and certain affiliates has entered into convertible loan facilities with each of Element, Induct and Lavo. Under each convertible loan facility, the lender was granted a right to convert the loan into shares. The conversion price was related to the development of the market price during a period prior to issuance of a conversion notice by the lender. In addition to these convertible loan facilities, share lending agreements relating to shares in each of Element, Induct and Lavo were entered into by ABO/affiliates. These share lending agreements have made the short selling possible.

## 4. ABO's statements

ABO's statements were provided to Finanstilsynet in letters dated 11 January 2019, 7 February 2019 and 15 April 2019. ABO did not contest or object to the factual basis upon which the Advance Notification was sent. ABO stated that the reason for not reporting was due to a misunderstanding of the reporting obligation as ABO has been under the wrong impression that the borrowed shares under the share lending agreements could count towards ABO's long positions.

ABO however strongly contested the size of the violation charge. Firstly, ABO pointed out the limited public practice related to such infringements and referred to a single penalty charge of NOK 110,000 previously imposed by Finanstilsynet. ABO also referred to the size of infringement charges imposed in other areas such as failure to disclose large shareholding and report on time financial reports for listed companies, and matters involving non-disclosure of inside information to the market, pointing out the lower sizes of such penalties.

ABO also pointed out that there is no maximum amount of the infringement penalty as required under section 44(2) of the NPAA, and thus a lack of predictability necessary to avoid violation charges being set in an arbitrary manner. Finally, ABO argued, based on recital 41 in the SSR and due to the lack of predictability, that convergence and consistency in the SSR should be taken into account when imposing violation charges.

## 5. Finanstilsynet's assessment

### 5.1 Infringement of the SSR

Finanstilsynet's assessment is that the failure to notify the Relevant Short Positions constitutes a clear breach of the requirement under NSTA section 3-14, cf. Articles 5 and 9 of the SSR. Investors, as participants in the financial markets, are expected to have knowledge of the regulations that their business is subject to and thus have put in place appropriate procedures and/or systems in advance in order to proactively identify the notification obligation under the SSR and satisfy it in a timely and complete manner. A failure to meet this standard is considered negligent under relevant Norwegian legal principles. Accordingly, Finanstilsynet finds that both the objective and subjective conditions for imposing a violation penalty on ABO are met.

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Finanstilsynet finds that the identified infringements are manifest and severe and thus deems it necessary to impose a violation penalty under Article 21-4 of the NSTA. In determining whether to impose a penalty, Finanstilsynet places emphasis on the fact that the failure to notify relates to a large amount of net short positions and that several of the Relevant Short Positions were of a significant size. Finanstilsynet considers it aggravating that most of the positions were above the 0.5% threshold, and thus that the infringements effectively have obstructed the positions to be disclosed to the market. Compliance with the SSR is imperative to ensure information to the market on significant net short positions. Such information enables the investor to make well-considered investment decisions, which in turn is of importance for confidence in the market.

## 5.2 Assessment of the size of the violation penalty

Section 21-4(5) of the NSTA prescribes certain circumstances that shall be taken into account when determining the size of the violation penalty (scale and effects of the breach as well as the degree of fault found). The Norwegian Public Administration Act supplements the sector legislation and prescribes certain circumstances that Finanstilsynet may have regard to in addition to the circumstances prescribed in the NSTA, cf. Section 2 (*Legal basis*) above.

As noted in Section 5.1 above, Finanstilsynet finds that the relevant infringements are negligent on the part of ABO. The notification requirements are a core part of the SSR, and ABO having misunderstood the notification obligation is not deemed a mitigating factor. ABO must be regarded as a professional investor, and an obligation rests on the company to make sure that the company is updated on all relevant requirements in the SSR. Finanstilsynet notes that ABO has on no accounts reached out to Finanstilsynet for guidance in respect of the relevant obligations before Finanstilsynet started investigating the matter.

Finanstilsynet finds that the relevant infringements are severe as they pertain to many positions not having been reported and that most of the positions should have been made publicly available. Finanstilsynet also places emphasis on the length of period where no single position was reported. Compliance with the reporting obligation is imperative to ensure effective monitoring and/or investigation of short selling that could create systemic risks, be abusive or create disorderly markets. Information to the market on significant net short positions is, as previously noted, of importance for investors' confidence in the market. Thus, non-reporting has adverse effects on Finanstilsynet's ability to perform effective monitoring/investigation and market participants' insights into net short positions, which in turn can have an adverse effect on the proper functioning of the financial market. In this specific case Finanstilsynet notes that the mechanism in determining the conversions price under the convertible loan facilities could have given Finanstilsynet reason to monitor any net short position by ABO.

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In determining the size of the penalty Finanstilsynet also places emphasis on the fact that Finanstilsynet's ability to discover non-reported short positions is low, and Finanstilsynet therefore finds that it is appropriate to have regard to the preventive effect of the sanction in this matter.

Finanstilsynet does not place emphasis on the case in which Finanstilsynet previously imposed a violation penalty in respect of an infringement of the SSR. It is different to the matter dealt with herein as it pertained to two net short positions that were five trading days and 23 hours late, respectively. Further, the entity notified Finanstilsynet about the late reporting on its own initiative.

The SSR was implemented in Norwegian law before section 44 of the NPAA came into force. Under the NPAA an upper limit for violation penalties must be put in place in Norwegian legislation within 1 July 2020,<sup>4</sup> and Finanstilsynet cannot see that the lack of a maximum amount prevents Finanstilsynet from imposing the penalty set out herein. A limit is proposed in the preparatory work for proposed amendments to the NSTA.<sup>5</sup>

As to the question of convergence across comparable jurisdictions, Finanstilsynet is of the opinion that the size of the violation penalty is in line with the observed practices in Europe in general.

Based on the circumstances mentioned above Finanstilsynet finds that a violation penalty of NOK 4,000,000 is necessary in order to ensure the proper functioning of the Norwegian capital markets in line with the objective of the SSR and that the size of the violation penalty is proportionate to ABO's infringements.

## 6 Finanstilsynet's decision

Based on the facts described above and pursuant to section 21-4(1) of NSTA, cf. Articles 5 and 9 of the SSR Regulation, Finanstilsynet has made the following decision regarding a violation charge:

*Alpha Blue Ocean Advisors Ltd. is ordered to pay a violation penalty of NOK 4 000,000 (four millions Norwegian kroner) to the Norwegian Treasury.*

Pursuant to section 28 of the NPAA, 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.

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<sup>4</sup> Cf. Regulation of 9 June 2017 no. 713 (FOR-2017-06-09-713). Reference is also made to the preparatory work to amendments to the NPAA, introducing the requirement for an upper limit, Prop. 62 L (2015-2016), pp. 195-196.

<sup>5</sup> Cf. Prop. 96 LS (2018-2019), chapter 7.6.5.5.

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*This document is electronically approved, and does not need a signature.*

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