

Orca Capital GmbH  
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85276 Pfaffenhofen/Ilm  
GERMANY

**OUR REFERENCE**  
23/3585

**YOUR REFERENCE**

**DATE**  
14.12.2023

Dear Sir,

## Decision on violation penalty

Reference is made to the Advance notification of violation penalty dated 21 September 2023 from the Financial Supervisory Authority of Norway ("Finanstilsynet"), letter dated 7 November 2023 from Advokatfirmaet Grette AS on behalf of Orca Capital GmbH ("Orca") and other correspondence.

The case concerns Orca's sale of shares in Nordic Mining ASA ("NOM") (ISIN NO0010317340) in March 2023.

Based on the information available, Finanstilsynet finds that Orca violated the Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps ("SSR"), cf. Section 3-5 of the Norwegian Securities Trading Act ("NSTA").

Against this background Finanstilsynet has decided to impose a violation penalty of NOK 800 000, cf. Sections 21-2 and 21-9 of NSTA.

### 1. Legal basis

Article 2 paragraph 1 (b) of SSR defines "short sale" in relation to a share as *"any sale of the share which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share [...] for delivery at settlement, not including:*

- (i) *a sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price;*
- (ii) *a transfer of securities under a securities lending agreement; or*
- (iii) *entry into a futures contract or other derivative contract where it is agreed to sell securities at a specified price at a future date."*

Article 12 of SSR sets out restrictions on the uncovered short sale of shares. Article 12 no 1 reads as follows:

*"A natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled:*

- a) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;*
- b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;*
- c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due".*

According to Regulation (EU) No 1129/2017 Article 3 third paragraph of the Prospectus Regulation, cf. Section 7-1 of the NSTA, *"securities shall only be admitted to trading on a regulated market (...) after prior publication of a prospectus in accordance with this Regulation."*

Pursuant to Section 21-2, cf. Section 21-5 third and fifth paragraphs of NSTA, Finanstilsynet may, in the event of a violation of rules in the SSR on reporting and uncovered short sales, impose a violation penalty on legal entities of up to NOK 43 million, or up to 10 per cent of the total annual turnover according to the last approved annual accounts. The violation penalty can be set at twice the profit achieved or loss avoided, if this results in a higher penalty.

The conditions for imposing a violation penalty are set out in Section 21-9 of NSTA. For legal entities, reference is made to the second paragraph of Section 46, first paragraph of the Public Administration Act. The named provision states that, when it is laid down in law, an administrative sanction can be imposed on an legal entity, the culpability requirement is negligence unless otherwise determined.

It follows from Section 21-14 of NSTA that when deciding whether an administrative sanction is to be imposed and in the assessment of the penalty, a number of factors may be taken into account:

1. the gravity and duration of the violation,
2. the degree of culpability of the violator,
3. the violator's financial capability, in particular overall turnover or annual income and assets,
4. profit gained or losses avoided,
5. loss inflicted on any third party as a result of the violation,
6. willingness to cooperate with the authorities,
7. previous violations,
8. conditions as mentioned in the Public Administration Act section 46 second subsection,

## 9. other relevant factors

The factors in section 21-14 are supplemented by partly overlapping factors in section 46 second subsection of the Public Administration Act, which apply to sanctions against legal entities. A factor that is mentioned in section 46, second paragraph, is whether the legal entity could have prevented the violation by means of guidelines, instructions, training, control, or other measures.

## 2. Background

### 2.1 The private placement in NOM

In a stock exchange announcement published on 2 March 2023 at 23:57:57 ("*Nordic Mining ASA: Private placement successfully placed*")<sup>1</sup>, NOM announced that it had successfully raised NOK 940 million in gross proceeds through the allocation of 1 566 666 667 new shares at a subscription price per new share of NOK 0,60. The announcement also stated the following:

*"The New Shares are expected to be tradable from 6 March 2023, but not before (i) registration of the share capital increase in the Company pertaining to the issuance of the New Shares by the NRBE [the Norwegian Register of Business Enterprises] and (ii) approval by the Financial Supervisory Authority of Norway (the "NFSA") of, and publication by the Company of, a listing prospectus (the "Prospectus"). The Prospectus is expected to be approved on or about 6th March 2023"*.

The conditions for the tradability of the shares were also set out in the subscription material (Application Agreement, section "Payment and delivery"), which *inter alia* stated that the shares *"will not be tradable on Oslo Børs until a listing prospectus (the "Listing Prospectus") has been approved by the Financial Supervisory Authority of Norway (the "NFSA") and published by the Company"*.

Furthermore, in the above mentioned stock exchange announcement and the subscription material (Term sheet, section "*Conditional allocation and settlement*"), it was stated that that settlement of the new shares was expected to take place on 7 March 2023, however subject to registration of the share capital increase pertaining to the issuance of the new shares by the Norwegian Register of Business Enterprises.

In a stock exchange announcement published on 6 March 2023 at 10:56:59 ("*Nordic Mining ASA: New share capital*")<sup>2</sup> NOM informed that the new share capital had been registered by the Norwegian Register of Business Enterprises. The company also stated the following: *"For the avoidance of doubt, the new shares will not be tradable until the publication of the prospectus, expected later today"*.

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<sup>1</sup> <https://newsweb.oslobors.no/message/584208>

<sup>2</sup> <https://newsweb.oslobors.no/message/584327>

In a stock exchange announcement on 6 March 2023 at 12:11:33<sup>3</sup>, NOM stated *inter alia* the following:

*"The prospectus for the listing of the new shares issued in the Private Placement and the conversion of the Convertible Loan, as well as the offering and listing of new shares in the contemplated Subsequent Offering, has today been approved by the Financial Supervisory Authority of Norway".*

Furthermore, in the announcement NOM stated that the prospectus would be available on the web pages of NOM and of the joint bookrunners.

Finanstilsynet has clarified that the increased share capital was registered in the Norwegian Register of Business Enterprises at 09:30 AM on 6 March.

## **2.2 Orca's sale of shares**

Orca was allocated with 3 090 949 shares in the private placement. In the Contract Note which Orca received from one of the joint bookrunners on 3 March 2023, the following was stated:

*"The new shares are expected to be tradable from 6 March 2023, but not before registration of the share capital increase by the NRBE and approval by the NFSA and approval of the Prospectus expected on or about 6th March 2023".*

On 6 March 2023, Orca sold a total of 1 763 808 shares in NOM between 09:00 and 09:27.

After the publication of the stock exchange announcement on the approval of the prospectus (6 March at 12:11:33 CET), the price of the share fell significantly. Orca made a profit compared to those investors who waited to sell until the shares were tradable.

Finanstilsynet has calculated Orca's profit by taking as a starting point the price observed in the market after the stock exchange announcement was published, which is compared with the sale price achieved by Orca. As set out in section 4.1 below, Finanstilsynet considers that the shares issued in the private placement were tradable on the stock exchange only after the publication from the company (12:11:33). Finanstilsynet considers that the time of the stock exchange announcement should be the reference point for calculation of the profit.

The volume-weighted average price (VWAP) has been used to calculate a price estimate for the trade after the announcement of the approval of the prospectus was made public. The VWAP is calculated at 0.63076. VWAP has also been calculated on the short sales that Orca carried out. The difference between these is multiplied by the number of shares sold to calculate the profit.

Based on the calculation method mentioned above, Finanstilsynet estimates that Orca obtained the following profit (in NOK) by selling the shares before 12:11:33 CET on 6 March:

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<sup>3</sup> <https://newsweb.oslobors.no/message/584333>

Investor	Number of shares	VWAP investor's short selling	VWAP after announcement	Estimated profit
Orca	1 763 808	0.72099	0.63076	159 142

### 3. Orca's comments

#### 3.1 Orca's comments of 2 May 2023

In an e-mail to Finanstilsynet 2 May 2023, Orca provided comments to Finanstilsynet's letter of 28 March 2023.

In the e-mail, Orca stated, *inter alia*, the following about the sales of shares:

*"Due to the indication that the shares will not be tradable until 06.03.2023, Orca Capital did not sell any Nordic Mining shares on 03.03.2023.*

(...)

*On 06.03.2023, a total of 1,763,808 shares were sold by a trader of Orca Capital in the period from 09:00:20 a.m. to 09:26:39 a.m. After the trader realized that the new shares were not yet tradable, he stopped selling the Nordic Mining shares. He sold the remaining Nordic Mining shares only after the announcement published at 12:11:32 p.m.*

(...)

*A meeting for the traders and settlement employees was held at Orca Capital on 20.02.2023. It was discussed at that time, the complaint of trading behavior in the Flyrs AS by your authority. The trader who sold the Nordic Mining shares did not attend this meeting because he was on vacation from 20.02.2023 to 03.03.2023.*

(...)

*Orca Capital admits that on 06.03.2023 in the time from 09:00:20 a.m. to 09:26:39 a.m. actually an uncovered short position was created. This circumstance is particularly annoying because the affected employees of Orca Capital were instructed by the management in the meeting on 20.02.2023 to make sure that these new shares are tradable before selling shares from a capital increase. However, the erroneous trading behavior is particularly annoying because it resulted in two uncovered short positions in a very short period of time. The management would also like to point out that Orca Capital has been active as a proprietary trader on a number of Stock*

*Exchanges in Europe, Australia and North America since 2009. In fact, there has been no violation of trading rules since 2009, in particular there has been no violation of short selling rules.*

*In the meantime, the managing directors have commissioned an external IT Consulting Firm to implement an additional functionality in the stock-/inventory system „Orca View“ that ensures that new shares from a capital increase are only shown as tradable stock when they are actually tradable."*

### **3.2 Orca's comments to Finanstilsynet's advance notification**

In a letter dated 7 November 2023, Advokatfirmaet Grette AS has provided comments on behalf of Orca.

In the letter, Orca states that it does not dispute that as a result of a negligent act by an employee, Orca sold shares in NOM immediately before the shares had in fact been issued and the prospectus approved, thereby violating Article 12 of the SSR.

However, Orca disagrees with Finanstilsynet's determination of the size of the penalty. In this respect, Orca states the following:

*"The FSA states that Orca acted with gross negligence and has taken this into consideration when determining the size of the penalty.*

*The Company therefore disagrees with the accusation of gross negligence. While the Company accepts responsibility for the actions of its employees, it believes that the infringement occurred despite the company having internal controls and guidelines in place that are in line with industry standards. This should be taken into account when determining the level of negligence shown by the Company and the size of the penalty.*

*Furthermore, Orca considers that the proposed violation penalty is excessive in relation to the size of the profit that was achieved by Orca and the size of the trade".*

## **4. Finanstilsynet's assessment**

### **4.1 The conditions for imposing a violation penalty**

#### The objective conditions

According to SSR Article 12 no. 1, a natural or legal person may carry out a short sale of a share that is listed on a trading venue if the conditions in points a) to c) is fulfilled. If any of the conditions are not met, the short sale is prohibited.

Initially, a decision must be made as to whether there was a short sale.

As mentioned above, in Article 2 no. 1 b) of SSR "short sale" is defined as any sale of a share which the seller does not "own" at the time the sale agreement is entered into.

When assessing whether there is a short sale, it is necessary to identify the point in time when the seller "owns" the shares. Sales made prior to this stage are considered short sales.

According to Article 2 no. 2 of SSR, the Commission is empowered to adopt supplementary legal acts (level 2) which clarify the definitions laid down in no. 1 of the same article, in particular with regard to when a natural or legal person is considered to own a financial instrument according to the definition of short sale in the aforementioned article no. 1 letter b).

It follows from the level 2 regulation to SSR (Commission Delegated Regulation No 918/2012 Article 3 no. 1, cf. the Norwegian Securities Trading Regulations Section 3-7) that "ownership" is based on rules that apply to short sales of the relevant share. It appears from point 3 of the preamble that *"The specifications are chosen to ensure that Regulation (EU) No 236/2012 has the intended effect in a consistent manner despite the divergent approach of the laws of the Member States."* The preamble further states that the concept of ownership is not harmonized in the EU/EEA, but that the provisions on ownership in SSR are intended to apply only to short sales.

Finanstilsynet therefore has the view that the content of the term "owner" in SSR article 2 no. 1 b) must be determined on the basis of a purpose-oriented interpretation. The aim of the regulations is to reduce the risk of settlement failure and volatility, cf. point 18 in the preamble of SSR. This is also in accordance with the principle of interpretation that was laid down and communicated in connection with the SSR decisions in the Flyr cases from May this year. The decisions concerned – as in this case – violation penalties after uncovered short selling.

The starting point for the assessment in connection with new issues of shares will be that the shares "exist" at the time of the sale. Finanstilsynet considers that the shares do not "exist" until the registration in the Register of Business Enterprises has taken place. However, the registration of the capital increase is not necessarily sufficient. In the Flyr case - where Finanstilsynet considered the underwriters as owners from registration in the Register of Business Enterprises - Finanstilsynet stated:

*"Various circumstances may indicate that an investor becomes "owner" of the shares as defined in SSR at a later time than the time of registration".*

In this case, it was a condition for the tradability of the new shares that the prospectus was published.

Finanstilsynet considers that the investors cannot be considered "owners" of the new shares before the prospectus was published. In this case, the shares were not only sold before the prospectus was published, but also before the capital increase was registered in the Register of Business Enterprises. There is little doubt that the sale of these shares must be regarded as short selling.

When assessing whether the short selling was "*uncovered*" according to SSR Article 12, Finanstilsynet's starting point is that the regular settlement for shares traded on Euronext Expand Oslo is T+2.

Based on the information submitted by Orca, Finanstilsynet considers that there were no agreements in place or any other measures which, at the time of entering into the sales agreement, could provide sufficient coverage for the NOM shares to be delivered on time.

It follows implicitly that Finanstilsynet does not regard that NOM's information to the market participants on expectations of delivery, can constitute an "*absolutely enforceable claim...*" pursuant to SSR Article 12 no. 1(b) of SSR or that Orca had a "*reasonable expectation that settlement can be effected when it is due...*" according to SSR Article 12 no. 1(c) of SSR.

Finanstilsynet therefore considers that the conditions in SSR article 12 a) to c) were not met. Consequently, the sales must be considered uncovered short sales in violation of Article 12.

In its comments to Finanstilsynet, Orca also admits that the selling implied uncovered short selling.

Finanstilsynet's assessment is therefore that the conditions in SSR Article 12 a) to c) were not met at the time of the sale. Consequently, the sales must be considered uncovered short sales in violation of Article 12.

The objective description of a violation of SSR Article 12 is fulfilled.

#### The subjective conditions

When a violation penalty is imposed on a legal entity, the requirement is that the person or persons who have acted on behalf of the entity have shown negligence, cf. Section 46 first paragraph of the Public Administration Act. Negligence may be constituted by anonymous and cumulative errors. The culpability requirement may be met regardless of whether there is negligence or a qualified degree of culpability (gross negligence or intent). The degree of guilt may, however, be taken into consideration when assessing the size of the violation penalty, cfr. Section 4.2 below.

Finanstilsynet considers that it was clearly communicated to the market in a stock exchange announcement from the issuer that the shares would only be tradable following the registration of the increased share capital in the Register of Business Enterprises and approval and publication of the prospectus. The information provided to Orca by one of the joint book runners also contained this information. In its comments to Finanstilsynet, Orca admits having been informed that the shares would only become tradable upon the abovementioned conditions.

The starting point of Finanstilsynet's culpability assessment is that Orca is a professional operator in the securities market. It must be expected from such an investor and persons conducting transaction on its behalf, to obtain knowledge about factual circumstances concerning the tradability of the

shares when subscribing shares in a private placement. Professional investors must, as a minimum, familiarize themselves with information from the issuer communicated to the market and to the investor. Furthermore, it is expected that the same persons are acquainted with the rules and regulations that apply to their activity.

It is the company's responsibility to make sure that they have in place adequate internal routines and that persons conducting transactions on their behalf receive proper training, and are fit and proper to carry out the tasks they are assigned. It is also expected that the company's organisation is structured so that relevant information reaches the persons responsible for the trading activities. In case any employees do not attend meetings where such information is shared, the company must ensure that these employees are informed at a later stage.

In addition to this general starting point, Finanstilsynet considers that account must be taken of specific circumstances in the case. The fact that 1 566 666 667 shares were issued in the private placement suggests that investors had to understand that there would be significant selling pressure – with potentially considerable price decrease – when the new shares were tradable. This implies that investors who wanted to sell the new shares should have been specially vigilant to the fact that the new shares actually were tradable when placing a sales order. In this case, Orca sold the shares even before the registration in the Register of Business Enterprises.

In Finanstilsynet's assessment, Orca's conduct deviates significantly from the normal prudent course of action for a professional investor in the securities market.

On this basis, Finanstilsynet considers that one or several persons acting on behalf of Orca has acted negligently, or by anonymous and/or cumulative errors. In Finanstilsynet's opinion, the behaviour constitutes gross negligence.

Finanstilsynet therefore considers that the subjective conditions for a violation penalty for a breach of SSR Article 12 has been met.

Finanstilsynet's preliminary assessment is that both the objective and subjective conditions for violation penalties have been met.

#### **4.2 Assessment of whether a violation penalty shall be imposed and the size of the penalty**

NSTA Section 21-14 and the Public Administration Act Section 46 second subsection provide a number of various factors that may be taken into consideration when assessing whether a violation penalty shall be imposed and the size of the penalty. The overview of factors is non-exhaustive. Under any circumstances, the assessment must be made based on an overall evaluation in the specific case.

When assessing whether a violation penalty should be imposed, cf. NSTA Section 21-14, Finanstilsynet believes that the size of the trade and the degree of negligence indicate that a violation penalty is a proportionate and adequate response. Finanstilsynet has also put emphasis on the fact that selling of shares issued in a private placement carried out before the shares were legally tradable may undermine confidence in the integrity of the securities markets. In this context, Finanstilsynet refers to the purpose of the Act to facilitate safe, orderly and efficient trading in financial instruments and investor protection, cf. NSTA Section 1-1.

It cannot be considered disproportionate that a violation penalty is imposed in this case. Finanstilsynet's conclusion is therefore that a violation penalty should be imposed.

With regard to the assessment criteria in NSTA Section 21-14, Finanstilsynet takes into consideration that Orca obtained a profit, cf. the calculation above.

In its assessment, Finanstilsynet has taken into account the size of the transaction. In addition, Finanstilsynet has emphasized that such behaviour may undermine confidence in the securities market.

Furthermore, Finanstilsynet has taken into consideration that gross negligence was shown in connection with the uncovered short sales.

It is also emphasized that Orca, as a professional operator, must be expected to prevent such violations through internal routines, guidelines or other relevant measures. Finanstilsynet has put emphasis on the fact that Orca as early as 8 May 2023 was imposed a violation penalty of NOK 500 000 for breaching the prohibition against uncovered short sales in SSR Article 12. This seems to illustrate that the company had not taken necessary measures to prevent violations of SSR.

Finally, emphasis is placed on Orca's financial strength. Finanstilsynet does not have a detailed overview of Orca's financial situation. However, taking into consideration that Orca was approached in the private placement as well as the number of allocated shares, it is assumed that Orca has a considerable financial strength.

As regards Orca's statement that the proposed violation penalty is excessive in relation to size of the profit which Orca obtained, Finanstilsynet underlines that the profit obtained is only one of a number of factors which Finanstilsynet has taken into consideration in its assessment. Neither does Finanstilsynet agree with Orca that the size of the violation penalty is excessive in relation to the size of trade, with reference to all the above mentioned factors Finanstilsynet has taken into consideration in the assessment.

Finanstilsynet's assessment, based on the above and an overall evaluation of all relevant factors, is that the violation penalty should be set at NOK 800 000.

## **5. Decision on violation penalty**

Based on the circumstances above, Finanstilsynet has decided to impose a violation penalty of NOK 800 000 on Orca Capital GmbH for breaching the prohibition against uncovered short sales in SSR Article 12, cf. NSTA Section 3-5.

The basis for imposing a violation penalty is NSTA Section 21-2 first paragraph.

This administrative decision can be appealed within 3 weeks after receipt. An appeal shall be sent to Finanstilsynet. The appellate instance is the Ministry of Finance. Sections 18 and 19 of the Public Administration Act, on the parties' right to become acquainted with the case documents, apply.

Violation penalties are collected by the Tax Administration at the Norwegian National Collection Agency. If the administrative decision is not appealed, the Norwegian National Collection Agency will send a claim for payment immediately after the deadline for an appeal has expired. If the decision is appealed, the claim is sent after the appeal has been decided by the Ministry of Finance. The Norwegian National Collection Agency's deadline for payment is 3 weeks after the invoice has been sent.

On behalf of Finanstilsynet

Anne Merethe Bellamy  
Director

Thomas Borchgrevink  
Head of Section

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