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OUR REFERENCE
21/5478

YOUR REFERENCE

DATE
09.12.2021

Decision regarding violation penalty

1. Introduction

Reference is made to previous correspondence, including the advance notification from The Financial Supervisory Authority of Norway ("Finanstilsynet") dated 29 October 2021, e-mail from Finanstilsynet dated 29 November 2021 and e-mail from Polygon Global Partners LLP ("Polygon") dated 29 November 2021. Polygon has in the e-mail dated 29 November 2021 confirmed that they do not have any comments to the advance notification.

Based on the information available to Finanstilsynet, we have concluded that Polygon 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). On this background Finanstilsynet has decided to impose a violation penalty of NOK 80 000.

According to section 1 in Regulation of 24 February 2021 no. 540 regarding transitional rules on amendments to the NSTA, the rules that were regulated by the NSTA section 21-4 are still applicable on infringements that took place before 1 March 2021 unless the current rules are more favourable for the offender. In the following, Finanstilsynet will refer to the rules that were in force at the time in question. References to the NSTA section 3-14 and 21-4 refer to these provisions as they were phrased before 1 March 2021.

2. Legal Basis

The obligation to report net short positions of shares was set out in the Norwegian Securities Trading act (NSTA) section 3-14, cf. Regulation (EU) No 236/2012 (SSR).

By article 2 of SSR, short sale in relation to a share or debt instrument means any sale of the share or debt instrument 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 or debt instrument 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;

Any natural or legal person who has a net short position (a "position holder") in relation to issued share capital of a company that has shares 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 certain net short positions. The notification obligation will apply if the position holder has a relevant net short position that reaches or falls below a percentage that equals 0,2%² of the issued share capital and each 0,1% above that. The notification shall be made by filing the positions in the Norwegian Short Sale register³.

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 that the position was established or changed. The notification of the net short position shall be made not later than at 15:30 CET on the following trading day. The position holder is responsible for ensuring that the notification of net short positions is correct and complete. A notification will not be considered to have been made before it is completed and/or any errors are corrected.

Pursuant to the NSTA section 21-4 subsection 1, Finanstilsynet may impose a violation penalty on natural and/or legal persons in the event of wilful or negligent violation of the NSTA section 3-14, cf. SSR Article 5 and Article 9. Where the position holder is a legal entity, Finanstilsynet may impose a violation penalty where the violation has been committed by one or more natural persons acting on behalf of the legal entity. The requirement for subjective guilt may be fulfilled through someone acting on behalf of the legal entity having shown the necessary guilt. However, the subjective requirements can also be met by anonymous or cumulative errors.

Section 21-4 subsection 5 of the NSTA states that when the size of the violation penalty is assessed, importance shall in particular be attached to the scale and effects of the violation as well as the degree of guilt found. Article 41 of the SSR states that penalties and administrative measures applicable to infringements of the SSR shall be effective, proportionate and dissuasive.

As a supplement, the Norwegian Public Administration Act ("NPA Act") section 46 subsection 2, states that when deciding whether an administrative sanction shall be imposed on an enterprise and in the individual assessment of that sanction, attention may also be given to:

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 (I)

² The notification threshold was temporarily lowered from 0,2% to 0,1% from 16 March 2020 until 19 March 2021.

³ <https://ssr.finanstilsynet.no/>

- 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
- 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

According to information available to Finanstilsynet, Polygon sold 2 088 772 shares in Norwegian Air Shuttle ASA ("NAS") (ISIN NO0010196140) on 18 May 2020. Polygon did not own shares in NAS at the time these shares were sold. Consequently, the sale resulted in Polygon holding a net short position in NAS at the end of 18 and 19 May 2020 which reached a relevant notification threshold. Furthermore, Finanstilsynet has reason to believe that the net short position fell below the relevant notification threshold on the 20 May 2020.

Polygon had reported to the Norwegian Short Sale Register a net short position in NAS of 0,95% with position date 7 May 2020. This was a hedge to a fund whose assets are managed by Polygon. Furthermore, on the 13 May 2020, Polygon did borrow and sell a further 11,000 NAS shares, bringing its net short position to 0,96%.

On the 18 May 2020, the share capital in NAS was NOK 16 355 837,70 and the number of shares outstanding was 163 558 377. The sale of 2 088 772 shares on the 18 May thus led to Polygon holding an additional net short position in NAS of 1,277% at the end of 18 May 2020, holding a total net short position of 2,237%.

Polygon Advisors was allocated 2 088 772 shares in NAS's public offering of new shares. The new share capital was registered, and shares issued on the 20 May 2020, and these shares were not tradable before 20 May 2020. Polygon was not owner of any shares in NAS on 18 May 2020. Therefore, Finanstilsynet also concludes that the sale of 1,277% of the outstanding shares was a naked short sale.

On the 21st of May 2020, Polygon reported a net short position of 3 076 000 shares in NAS, resulting in a percentage of 0,10%. However, Polygon has identified a separate change to Polygon's net short position in NAS shares that was not reported to the Norwegian Short Sale Register for the

position date of 20 May 2020. Polygon should have made a filing when crossing the 0,1% threshold on 21 May 2021.

4. Position holder's statements

Polygon has in the email dated 17 June 2021 acknowledged that the net short position of 1,277% was not reported to Finanstilsynet and agrees with Finanstilsynet's understanding of the factual background in the matter.

Furthermore, Polygon specifies that *"Both the trading professional (having received the confirmation) and the compliance professional (and, as such, Polygon) erroneously understood (based, it appears, on the natural meaning of the phrase rather than the technical definition in the legislation) that the conditional allocation of Offering shares provided a "reasonable expectation" under the E.U. Short Selling Regulation that settlement of the Offering shares would take place on 20 May 2020, and thus the sale would be covered under such regulation. The trade was executed and the shares were in fact delivered to the buyer on a T+2 settlement basis on 20 May 2020."*

Polygon outlines that the company had net short positions in NAS, in addition to the one that arose on the 18 May 2020, these was correctly reported to the Norwegian Short Sale Register. Polygon says that *"In the period prior to 18 May 2020, a fund whose assets are managed by Polygon (the "Fund") was the holder of USD 150,000,000 Norwegian Air Shuttle ASA Senior Unsecured Convertible Bonds 2019/2024 (NO0010868284) (the "Convertible Bonds")."*

Relating to the total net short position Polygon held at the time, Polygon states that *"As reported to the Norwegian Short Sale Register, Polygon's net short position in NAS shares as of 7 May 2020 was 0.95% – entirely as a hedge to the Fund's position in the Convertible Bonds. Between 7 May 2020 and 18 May 2020, Polygon did not cross a reportable threshold, though it did borrow and sell a further 11,000 NAS shares on 13 May 2020, bringing its net short position to 0.96%."*

On 18 May 2020, as described above, Polygon entered into an agreement for the Fund to sell 2,088,772 shares in NAS on a T+2 settlement basis. Although the buyer of such shares was not due to receive them until 20 May 2020 (the date on which Polygon expected: (a) the Fund to receive the shares and (b) the shares to be admitted to trading), we now understand that due to the conditional nature of the Offering, the shares that Polygon expected to receive on 20 May 2020 did not, under the E.U. Short Selling Regulation, yet offset the shares that the Fund had agreed to sell. The agreement to sell 2,088,772 shares on 18 May 2020 therefore caused Polygon's net short position in NAS to cross through a reportable threshold (reaching 2.24% on 18 May 2020 as a result of the sale), which Polygon failed to recognize at the time.

On 20 May 2020, the following events occurred that resulted in Polygon believing that its net short position had fallen to 0.10%: (1) the Fund actually received 2,088,772 Offering shares; (2) Polygon (on behalf of the Fund) borrowed and sold short 1,500,000 NAS shares; and (3) the total number of NAS shares outstanding increased from 163,558,337 to 3,069,624,807. Based on these events, Polygon reported to the FSAN on 21 May 2020 that its net short position in NAS on 20 May 2020

was 3,076,000 shares (with reference to NAS's total of 3,069,624,807 shares outstanding), resulting in a percentage of 0.10%."

After reviewing its reported net short positions to the Norwegian Short Sale Register when receiving Finanstilsynet's letter, Polygon became aware that they have not reported the correct position in NAS with position date 20 May 2020. Polygon outlines that " On 20 May 2020, the Fund became unconditionally entitled to receive 6,363,810 newly issued NAS shares pursuant to a conversion of its Convertible Bonds (the "Conversion Shares"). The Conversion Shares were subject to a "lock-up" that restricted them from being sold for specific time periods and, as a result, had different ISIN numbers to the freely tradable NAS shares. At the time, Polygon did not include its long position in the Conversion Shares in the numerator when calculating its net short position. Having re-assessed the situation, as part of the work that Polygon has conducted following its receipt of the Notification, Polygon has determined that it should have included the Conversion Shares in its net short position calculation with effect from 20 May 2020. As a result of its long position in the Conversion Shares, Polygon in fact, had a net long position in NAS shares with effect from 20 May 2020. Consequently, Polygon should have made an "exit filing" on 21 May 2020 and should not have made any further net short position filings after that date (as it continued to have a net long position thereafter). However, Polygon only started to count a portion of the Conversion Shares in its net short position calculation once that portion of the Conversion Shares ceased to be subject to the "lock up", when the ISIN for that portion changed into the ISIN for freely tradable NAS shares. This resulted in Polygon making an "exit filing" on 16 June 2020 (which, as noted above, Polygon should not have made)."

Polygon has in reply to the advanced notification in e-mail dated 29 November 2021 confirmed that they do not have any comments to the advance notification.

5. Assessment of whether a violation penalty shall be imposed and its size

It is Finanstilsynet's opinion that Polygon's failure to notify Finanstilsynet constitutes clear violations of the reporting requirements under NSTA section 3-14, cf. Articles 5 and 9 of the SSR.

According to SSR, uncovered short sale is prohibited. The seller must have secured access to the instrument in question so that delivery can take place on the settlement day⁴. Finanstilsynet concludes that the sale of 2 088 772 NAS shares was uncovered short and in violation of the SSR Article 12. Before 1st of March 2021, Finanstilsynet did not have the authority to impose violation penalties for breaches of SSR Article 12. In assessing the violation penalty, Finanstilsynet has therefore not taken into consideration whether the net short position was uncovered or not.

The relevant net short positions were subject to the notification requirement in SSR Article 5 and Article 9 subsection (2). On this background it is Finanstilsynet's assessment that Polygon did not fulfil the requirements under NSTA section 3-14, cf. Articles 5 and 9 of the SSR. Accordingly,

⁴ Finanstilsynet refers to ESMA's Q&A question 10.6: https://www.esma.europa.eu/sites/default/files/library/esma70-145-408_qa_on_ssr.pdf

Finanstilsynet finds that the objective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty on Polygon holder are met.

When considering whether the subjective conditions for imposing a violation penalty are met, the starting point would be that a participant in the Norwegian securities market is expected to comply with the regulatory rules of that market. It will typically be expected that the Position holder establishes in advance appropriate procedures and/or systems in order to proactively identify the notification obligation under SSR and ensures that these procedures and/or systems are applied. It is not a justification that the regulations are different for other relevant competent authority's (RCA). It is position holders' responsibility to check this in advance of trading shares at a regulated market.

Polygons states that they were under the assumption that the shares allocated in the public offering was expected delivered on or about the 20 May 2020. In NAS's stock exchange notification to Oslo Stock Exchange of the final result of the public offering dated 18 May 2020 at 09:02 CET, it is specified that "*The Offer Shares may not be transferred or traded before they have been fully paid and the share capital increase pertaining to the Offering has been registered with the Norwegian Register of Business Enterprises.*" "*Completion of the Offering is expressly conditional upon completion and registration of the share capital increase pertaining to the Offering with the Norwegian Register of Business Enterprises (...).*" On this background it is Finanstilsynet's assessment is that Polygon should have been aware that the allocated shares were not tradable before the shares had been registered with the Norwegian Register of Business Enterprises and that they were not owner of the 2 088 772 allocated shares in NAS on 18 May 2020. Therefore, Finanstilsynet also concludes that the net short sale of 18 May 2020 as a naked short sale.

In Finanstilsynet's view, one or more persons acting on behalf of Polygon acted negligently, or that cumulative errors were present. Accordingly, Finanstilsynet finds that the subjective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty are met.

When assessing whether to make use of a violation penalty in this particular case, Finanstilsynet has made a concrete assessment of the individual matters of the case in accordance with the NSTA section 21-4 subsection (1) and NPA Act section 46 subsection (2). As mentioned, participants in the Norwegian securities market are expected to have established appropriate procedures and/or systems in order to proactively identify the notification obligation under SSR. Finanstilsynet places in particular emphasis on the fact the case involves two net short positions that are not reported and that the Position holder who is responsible for the notifications is a legal person. Finanstilsynet further considers it to be aggravating that Polygon already had reported a net short position that were above 0,5%, and the correct size of the net short position with position date 18 May 2020 actually were 2,237% and not 0,95% as disclosed to the market. Thus these infringements effectively obstructed the correct position to be disclosed to the market 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.

The NSTA section 21-4 subsection (5) states that when the size of a violation penalty is assessed, importance shall in particular be attached to the scale and effects of the violation as well as the degree of guilt found. In addition, the criteria specified in NPA Act section 46 subsection (2) may also be taken into consideration when assessing the size of the violation penalty, (cf. section 2 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 the net short positions were not reported, one net short position was above the 0,5% threshold and previous decisions in similar cases.

6. Finanstilsynet's decision

Finanstilsynet finds that the current provisions under the NSTA section 21-3, section 21-9 and 21-14 will not give a more favorable result for Polygon.

On the basis of the above, Finanstilsynet will impose a violation penalty on Polygon Global Partners LLP of the amount of NOK 80,000 for its violation of the NSTA section 21-4 subsection (1) and (5) (as it read before 1 March 2021) cf. SSR Articles 5, 6 and 9, and section 1 of Regulations of 24 February 2021 no. 540 on transitional rules on amendments in the NSTA. The legal basis is the NSTA section 21-4 subsection (1) (as it read before 1 March 2021).

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.

If you have any questions regarding this matter, please contact Madeleine M. Melgård by email mame@finansstilsynet.no, or phone +47 22 93 98 18.

On behalf of Finanstilsynet

Geir Holen
Deputy Director

Madeleine Marie Melgård
Higher Executive Officer

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