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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 and reply from Advokatfirmaet Wiersholm AS on behalf of Whitebox Advisors LLC ("Whitebox") dated 23 November 2021.

Based on the information available to Finanstilsynet, it is our conclusion that Whitebox 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 100 000.

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 favorable 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:

- a) the preventive effect of the sanction

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 (l)

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/>

- 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, Whitebox sold 6 266 317 shares in Norwegian Air Shuttle ASA ("NAS") (ISIN NO0010196140) on 18 May 2020. Whitebox did not own shares in NAS at the time these shares were sold. Consequently, the sale resulted in Whitebox 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 relevant notification threshold on the 20 May 2020.

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 6 266 317 shares thus led to Whitebox holding a net short position in NAS of 3.83% at the end of 18 May 2020.

Whitebox Advisors was allocated 6 266 317 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. Whitebox was not the owner of any shares in NAS on 18 May 2020. Therefore, Finanstilsynet also perceives the sale as an uncovered short sale.

4. Position holder's statements

Whitebox has in the reply dated 28 May 2021, acknowledged that the net short positions were not reported to Finanstilsynet and agrees with Finanstilsynets factual background in the matter.

Furthermore, Whitebox specifies that "*... in assessing whether the Company was long or short, assumed that the evaluation related to this particular issue would be the same under US rules and Norwegian rules.*"

Relating to the issuing of the shares, Whitebox states that "*In this particular case, the position was deemed long because the Company had received its allocation of syndicated shares and had no reason to believe that it would not come into possession of shares as a result of the allocation.*"

The Company treated these as “when issued” and deemed itself long the shares. The communication on delivery was consistent during the placement to take place “on or about” 20th of May 2020. If the timing had changed during the offer period, or in connection with the allocation, suggesting a later point in time, the Company may have made a different evaluation, but under the circumstances, the Company reasonably deemed the delivery to occur on the 20th of May, fulfilling the condition on delivery. Consequently, the position was marked long in the Company's books, and therefore no filing was made.

The Company has now learned that Norwegian law may have a different interpretation as to when a position is to be deemed long, and that the share increase will need to be registered in the Norwegian Company Register before the subscriber of the shares will be deemed to be long.” Whitebox stands for the valuation that the position was correctly marked long, and did not evaluate whether the allocation, and expected delivery represented coverage of the alleged short position.

Whitebox has in the reply to the advance notification, dated 23 November 2021 repeated that the Norwegian regulation is interpreted differently than in USA and is prepared to accept a fine. Furthermore, Whitebox states that *“The advance notification however also states that Finanstilsynet regards the trades as uncovered short position. We appreciate that this finding has had no influence on the evaluation of whether or not a fine should be imposed, nor on the size of the fine. However, we would in any event ask Finanstilsynet to reconsider this part of the evaluation, particularly in light of Regulation (EU) No 236/2012 article 12 no 1 (c), and the factual situation giving the Company a reasonable expectation that the shares would be available for delivery on the settlement date in the 18th May-transaction.”*

Whitebox further underlines that they take this matter seriously, they have updated their routines and has engaged an independent compliance consultant to file positions reports globally on its behalf.

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

It is Finanstilsynet's opinion that Whitebox'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 6 266 317 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 Whitebox did not

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

fulfil the requirements under NSTA section 3-14, cf. Articles 5 and 9 of the SSR. Accordingly, Finanstilsynet finds that the objective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty on Whitebox 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.

Whitebox 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' 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 (...)."* This is also specified in Whitebox's allocation letter from DNB that was enclosed to Wiersholm's answer in email to Finanstilsynet dated 28 May 2021: *"It is expected that the Offer Shares will be tradeable on Oslo Stock Exchange on 20 May 2020, subject to timely satisfaction of the conditions for completion of the Offering set out in the Prospectus and registration of the share capital increase with the Norwegian Register of Business Enterprises."* On this background it is Finanstilsynet's assessment that Whitebox should have had knowledge that the allocated shares were not tradable before the shares had been registered with the Norwegian Register of Business Enterprises and thus not the owner of the 6 266 317 allocated shares in NAS on 18 May 2020. Therefore, Finanstilsynet also concludes that the net short sale of 18 May 2020 as an uncovered short sale.

In Finanstilsynet's view, one or more persons acting on behalf of Whitebox 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. Further, although Whitebox has taken actions to prevent further events, Whitebox did fail to ensure such compliance in advance. 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 the net short position with

position date 18 May 2020, were above the 0,5% threshold, and thus that these infringements effectively obstructed the 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 considering 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 Whitebox.

On the basis of the above, Finanstilsynet will impose a violation penalty on Whitebox Advisors LLC of the amount of NOK 100,000 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
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Madeleine Marie Melgård
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This document has been electronically approved and does not require handwritten signatures.