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**OUR REFERENCE**  
21/7588

**YOUR REFERENCE**

**DATE**  
07.02.2022

## 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 12 November 2021, the reply by SIR Capital Management, L.P. ("Position holder") in the letter of 18 November 2021.

Based on the information available to Finanstilsynet, it is our opinion that the Position holder has violated the notification requirement under section 3-14 of the Norwegian Securities Trading Act ("NSTA") (as it was phrased before 1 March 2021), cf. Regulation (EU) No 236/2012 ("SSR") Article 5 cf. Article 9, by not notifying Finanstilsynet about the relevant net short positions (see section 3) within the time limit in accordance with the SSR. On this background Finanstilsynet has decided to impose a violation penalty of NOK 70,000.

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 is set out in the Norwegian Securities Trading act (NSTA) section 3-14, cf. Regulation (EU) No 236/2012 (SSR).

A natural or legal person who *has* a net short position (a "position holder") in relation to the issued share capital of a company whose shares are admitted to trading on a trading venue<sup>1</sup> and for which Finanstilsynet is the relevant competent authority, shall in accordance with NSTA section 3-14 cf.

<sup>1</sup> 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)

SSR Article 5 and Article 9, notify Finanstilsynet of certain net short positions. The notification obligation will apply if a net short position reaches or falls below "*a percentage that equals 0,2%<sup>2</sup> of the issued share capital and each 0,1% above that*". Net short positions reported to Finanstilsynet shall be disclosed to the public if the position reaches or falls below 0,5 % of a company's issued share capital and each 0,1 % above that, cf. SSR Article 6.

The notification shall set out the size of the relevant net short position in percentage and the equivalent share amount, cf. SSR Article 9 subsection (1), cf. the Commission delegated regulation No 2012/826 ("2012/826") Article 2 and table 1 in annex 1. The position holder is responsible for ensuring that the notification is complete, correct and accurate. A notification of a net short position is not regarded as submitted before it is complete and/or error(s) are corrected.

In accordance with SSR Article 9 (2), the relevant time for calculation of a net short position, and the time for notification, shall be calculated according to the time in the Member State of the relevant competent authority to whom the relevant position must be notified.

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 cf. 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
- 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 notification threshold was temporarily lowered to 0,1% from March 16, 2020 to March 19, 2021. See the latest decision of December 17, 2020 with links to previous decisions: <https://www.finanstilsynet.no/en/news-archive/news/2020/short-sale-decision-by-the-efta-surveillance-authority-esa-and-the-european-securities-and-markets/>

- 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

The violation penalty concerns late reporting of the following net short positions (together referred to as the "Relevant Net Short Positions"):

Issuer	Position	Position date*	Reported **
TGS ASA	0,225%	08.10.2020	09.10.2020, 21:44 CET
TGS ASA	0,312%	13.10.2020	14.10.2020, 17:01 CET
TGS ASA	0,408%	20.10.2020	21.10.2020, 19:40 CET
TGS ASA	0,466%	02.12.2020	08.12.2020, 16:43 CET
TGS ASA	0,382%	11.01.2021	12.01.2021, 22:23 CET
TGS ASA	0,27%	28.01.2021	02.02.2021, 23:01 CET

\* Date filled in as position date in Finanstilsynet's Short Sale Register.

\*\* Date and time of the filing in Finanstilsynet's Short Sale Register.

### 4. Position holder's statements

Position holder has in email dated 1 October 2021, acknowledged that the Relevant Net Short Positions were reported to Finanstilsynet after the notification time limit in NSTA section 3-14 cf. SSR article 9 subsection (2).

Furthermore, Position holder has stated that *"It seems to us that time difference between Oslo and NY played a big factor as well as weekend days and holidays in the US (NY). We will make sure to report in a more timely fashion based on Oslo time in the future."*

In reply to the advance notification dated 18 November 2021, Position holder states that they have reported based on the legal requirement as presented in English language on Finanstilsynets webpage. Position holder states that the language on the webpage is unclear or not representing well the applicable requirements. Firstly, Position holder states that it is not specified that the position date is at 23:59 CET, just 23:59. Position holder has understood this as of ET time, which bring the position date on CET to the following day due to time difference:

Issuer	Position	Position date reported to Finanstilsynet*	Corrected position date**
TGS ASA	0,225%	08.10.2020	09.10.2020
TGS ASA	0,312%	13.10.2020	14.10.2020
TGS ASA	0,408%	20.10.2020	21.10.2020
TGS ASA	0,466%	02.12.2020	03.12.2020
TGS ASA	0,382%	11.01.2021	12.01.2021
TGS ASA	0,27%	28.01.2021	29.01.2021

\* Date filled in as position date in Finanstilsynet's Short Sale Register.

\*\* According to Position holder, this is the correct position date when position is calculated at 23:59 CET.

Secondly, Position holder points out that Finanstilsynets webpage states that what triggers reporting is "Net Short positions larger than or equal to 0.2% and any change in 0.1% increments (i.e. 0.3%, 0.4% etc)." Position holder states that this is misleading, and states that they have reported when exposure goes higher or below by 0,1%. Furthermore, they state the following:

*"i. The 13.10.20 reporting of 0.312% was not above 0.1% increment of the original reporting 0.225% on 8.10.20*

*ii. The 2.12.20 reporting of 0.466% was not above 0.1% increment of the previous reporting 0.408% on 20.10.20*

*iii. The 11.1.21 reporting of 0.382% was not above 0.1% increment of the previous reporting 0.408% on 20.10.20"*

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

Finanstilsynet finds that Position holder violated the NSTA section 3-14, as it was phrased before 1 March 2021, by not notifying Finanstilsynet about the Relevant Net Short Positions within the time limit in accordance with the SSR.

The Relevant Net Short Positions were subject to the notification requirement in SSR Article 5 and Article 9 subsection (2), and all of the notifications were either submitted after or mistakes not corrected within the deadline in SSR Article 9 subsection (2). As stated under section 2, a notification of net short position is not regarded as submitted before it is complete and/or errors are corrected. On this background it is Finanstilsynet's assessment that the provided notifications did not 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 Position 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. This means inter alia that the procedures and/or systems must be prepared not only to identify shares which are subject to the reporting obligation, but also take into account the variations of holidays in different jurisdictions and time differences. Position holders are responsible for making sure which regulations that are applicable in advance of trading shares at a regulated market.

In reply to the advance notification dated 18 November 2021, Position holder refers to statements on Finanstilsynets web page and the section "*Frequently Asked Questions*", however, as stated on the web page, the information on the "*Frequently Asked Questions*" section is no substitute for the full legal texts. The section also contains links to SSR and other relevant legal sources.

Finanstilsynet has no reason to doubt the Position holder's statements, hereunder that the positions are reported after the deadline because of different in time zones and US holidays as well as misconception of the relevant time for calculation of a net short position, time of notification deadline, and when a position is subject to reporting. However, in Finanstilsynet's view, one or more persons acting on behalf of Position holder 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.

It is the Position holder's responsibility to ensure, in advance of taking net short positions covered by the notification obligation, to have in place appropriate procedures and/or systems in order to proactively identify the notification obligation under the SSR, hereunder what shares that are subject to the obligation, and to make sure such procedures are satisfied in a timely and complete manner. This means *inter alia* that the procedures and/or systems must be prepared to identify shares which are subject to the reporting obligation, and that both the design of and compliance with the procedures and/or the system, among other things takes into account that the position holder may be in one or more demanding processes at the same time as the position holder makes trades and the reporting obligation arises.

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 six late reported notifications.

Finanstilsynet finds that a violation penalty should be imposed.

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 Position holder is a legal person, the length of the delays and the size of the positions. Finanstilsynet has also taken into consideration that the relevant infringements have been found to be negligent on the part of the Position holder cf. section 5. 1 above. The size of the violation penalty is furthermore consistent with the level of previous penalties set by Finanstilsynet for comparable violations of the notification requirements.

## 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 favourable result for SIR Capital Management, L.P.

On the basis of the above, Finanstilsynet will impose a violation penalty on SIR Capital Management, L.P. of the amount of NOK 70,000 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@finanstilsynet.no](mailto:mame@finanstilsynet.no), or phone +47 22 93 98 18.

On behalf of Finanstilsynet

Thomas Borchgrevink  
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Madeleine Marie Melgård  
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*This document has been electronically approved and does not require handwritten signatures.*