



This letter is only sent by email to: [REDACTED]

OUR REFERENCE
20/11045

YOUR REFERENCE

DATE
21.01.2021

DECISION REGARDING VIOLATION PENALTY

1. Introduction

Reference is made to previous correspondence, including the advance notification from The Financial Supervisory Authority of Norway's ("Finanstilsynet") dated 19 November 2020 ("Advance Notification") and to the reply by [REDACTED] ("Position holder") in the email of 8 December 2020. Reference is also made to Finanstilsynet's letter dated 30 September 2020 and to the reply by Position holder in the email of 23 October 2020.

Based on the information available to Finanstilsynet, it is concluded that Position holder 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 or not correct errors in submitted notifications (see section 3) within the deadline in accordance with the SSR. Finanstilsynet has concluded to issue a violation penalty to Position holder in this matter, pursuant to NSTA section 21-4 subsection (1) cf. section 3-14 (see section 6 for further details).

2. Legal Basis

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 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 a net short position reaches, exceeds or falls below a percentage

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).

that equals 0,1%² 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.

According to SSR Article 9, the relevant time for calculation of a net short position shall be at midnight at the end of the trading day, and the notification must be submitted to Finanstilsynet no later than at 15:30 CET on the following trading day, cf. Article 9 subsection (2).

In accordance with NSTA section 3-14 cf. SSR Article 16, the obligation to report and disclose net short positions does not apply to shares of a company admitted to trading in the EEA, if the principal trading venue is located in a third country. Whether the principal trading venue is considered to be located in a third country shall be determined at least every two years and shall be reported to ESMA, that publish a list of exempted shares³ cf. SSR Article 16 subsection (2) cf. Commission implementing regulation 2012/827 ("2012/827") Article 9 to 12. Changes in the exempted shares list, shall be effective from the day following that of the publication of the list cf. 2012/827 Article 12 subsection (1).

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, and as stated in SSR Article 9 cf- 2012/826 Article 2 subsection (3) if a submitted notification contains error(s) the position holder shall, when becoming aware of the error, cancel the notification and submit a new notification. A notification of a net short position is not regarded as submitted before it is complete and/or error(s) are corrected.

The NSTA section 21-4 subsection (1) 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 NSTA section 3-14, cf. SSR Article 5 and cf. Article 9. Where the position holder is a legal person, the subjective condition of wilful or negligent violation implies a requirement that one or more natural persons acting on behalf of the legal person, have shown the necessary degree of subjective guilt.

When *assessing the size* of the violation penalty, NSTA section 21-4 subsection (5) prescribes that emphasis in particular shall be placed to the scale and effects of the violation, as well as the degree of fault that is 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 ("NPA Act") prescribes that Finanstilsynet

² The notification threshold has been temporarily lowered from 0,2% to 0,1% as of March 16, 2020. 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/>

³ ESMA's register of exempted shares; https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_shsexs

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 size 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
- 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*
	0,85%		
	0,14%		
	0,16%		
	0,79%		
	0,38%		

*Date and time of the filing in Finanstilsynet's Short sale register. Position holder also informed Finanstilsynet of the late reporting of net short positions in [REDACTED] by email of [REDACTED]

**According to Position holder, the correct position date on this position was [REDACTED]. Position holder has however not cancelled this and filed a new position, but only filed a new position and therefore in the register it appears as if there were two positions (see section 4).

4. Position holder's statements

Position holder's statements were provided to Finanstilsynet in emails dated 22 October 2020 and 8 December 2020. The Position holder did not contest or object to the factual basis upon which the Advance Notification was sent.

Net short positions in [REDACTED]

Position holder has in the email dated 22 October 2020, acknowledged that the net short positions in [REDACTED] were reported to Finanstilsynet after the notification deadline in NSTA section 3-14 cf. SSR Article 9 subsection (2). Position holder has further stated that the late reporting of the positions was caused by the fact that Position holder had been under the assumption that [REDACTED] was exempted from the ESMA SSR reporting regime. Position holder points out that [REDACTED] had been exempted

from the notification requirement under SSR Article 16 since [REDACTED] and that Position holder discovered on [REDACTED] that the exemption for [REDACTED] was no longer in place and immediately submitted a notification for the position with position date [REDACTED]. The same day Position holder also notified Finanstilsynet in an email that they had not reported net short positions in [REDACTED] and after a dialogue with Finanstilsynet on the [REDACTED] Position holder submitted another notification for a position with position date [REDACTED]. According to Position holder, they regularly checked the ESMA register also prior to this event, *"but as a result of what we learned from the [REDACTED] Notifications experience, we have revised our process for monitoring the Register and now check it for updates on a daily basis"*.

Net short positions in [REDACTED] and [REDACTED]
Regarding the positions in [REDACTED] and [REDACTED] Position holder refers to the decision by ESMA on 16 March 2020⁴ which temporarily but immediately lowered the notification threshold for net short positions from 0,2% to 0,1%. According to Position holder, due to this change Position holder had to carry out certain processes manually to identify and calculate the equivalent net short positions for all securities in within the scope of SSR and *"needed to submit approximately ten times our typical daily average number of net short position reports [...]"*.

Finanstilsynet understands Position holder's email of 22 October 2020 so that Position holder is claiming that the positions in [REDACTED] and [REDACTED] *"were all submitted within the time frame accorded by Article 9 of the Short Selling Regulation"* on [REDACTED] but that it was first discovered after the deadline that the notifications *"did not take into account all equivalent shares comprising these securities' net short positions"*. Position holder is describing that it therefore had to make new notifications (after the deadline). Position holder is highlighting in its email that *"the differences between the originally reported and correctly reported notifications were only a few basis points different and reflected the same thresholds for both [REDACTED] and [REDACTED]"*

Net short position in [REDACTED]
Position holder has in its email of 22 October 2020 stated that it crossed a relevant net short position notification threshold in [REDACTED] on [REDACTED] but that by a mistake of Position holder the wrong position date of [REDACTED] was entered into Finanstilsynet's Short Sale Register. The position was therefore reported within the deadline on the [REDACTED] at 13:56 CET, but submitted with incorrect position date. The mistake was recognized immediately after the notification was submitted, and Position holder reported a new correct position with position date [REDACTED] on [REDACTED] at 13:57 CET. However, the first notification containing a wrong position date was not cancelled as the Position holder was *"not aware that there is a mechanism to cancel an erroneous notification in the Short Sale Register"* and Finanstilsynet was neither contacted in this relation.

5. Finanstilsynet's assessment

5.1 Infringement of the SSR

⁴ https://www.esma.europa.eu/sites/default/files/library/esma70-155-9546_esma_decision_-_article_28_ssr_reporting_threshold.pdf

It is Finanstilsynet's assessment that Position holder's failure to notify Finanstilsynet within the deadline and/or not cancel and/or correct incorrect notifications within the same deadline, constitutes clear violations of the reporting requirements under NSTA section 3-14, cf. Articles 5 and 9 of the SSR. The Relevant Net Short Positions were subject to the notification requirement in SSR Article 5 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 assessing whether the subjective conditions are met, Finanstilsynet has taken into account Position holder's statements in the emails of 22 October 2020 and 8 December 2020, hereby the statement that the delays in the reporting of the short positions in [REDACTED] inter alia occurred because the Position holder was under the assumption that [REDACTED] was exempted from the notification obligation. Further Finanstilsynet has also considered that fact that the position in [REDACTED] was reported in time but with incorrect position date, and that regulatory changes whereas Position holder had to implement changes in the systems and processes for reporting net short positions during the days around when the Position holder were under the obligation to report the net short positions in [REDACTED] and [REDACTED]. Finanstilsynet has also taken into consideration the changes in the reporting threshold on 16 March 2020 and that Position holder's filing of corrected positions.

Finanstilsynet has no reason to doubt the Position holder's statement, however it is our view that persons acting on behalf of the Position holder have acted negligent. 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.

Even though [REDACTED] previously had been exempted from the reporting obligation of net short positions, from [REDACTED] until [REDACTED] it is the position holder's obligation to hold track of changes in ESMAs exempted shares list cf. section 2 of this letter. Net short positions in [REDACTED] taken after [REDACTED] was included in the reporting obligation to Finanstilsynet. It is Finanstilsynet's assessment that the reasons for the delays stated by the Position holder do not excuse the delays, and that the Position holder had not taken the necessary precautions to ensure that the notification obligations could be met before taking making the trades. Further, although the team reporting on behalf of the Position holder has taken actions to prevent further events, Position holder did fail to ensure such compliance in advance. Finanstilsynet also notes that the changes in the

notification threshold was decided and published on 16 March 2020, including on Finanstilsynet's webpage for the Short Sale Register, and that Position holder in its statement confirms knowledge of this change.

On this background Finanstilsynet finds that both the objective and subjective conditions under NSTA section 21-4 subsection (1) for imposing a violation penalty, are met.

5.2 Assessment of whether a violation penalty should be imposed

Finanstilsynet finds that the identified violations are manifest and severe and thus deems it necessary to impose a violation penalty under section 21-4 of the NSTA.

In determining whether to impose a penalty, Finanstilsynet has made an overall assessment of the individual circumstances in the case. Finanstilsynet places emphasis on the fact the case involves five late and/or errors in the notifications made, and that the Position holder who is responsible for the delayed notification is a legal person. Finanstilsynet considers it to be aggravating that the late reported positions in [REDACTED] was above the 0,5% threshold, and thus that the infringement effectively obstructed the position to be disclosed to the market in time in accordance with NASTA 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.

5.3 Assessment of the size of the violation penalty

In accordance with NSTA section 21-4 subsection (5), certain circumstances *shall* be taken into account when determining the size of the violation penalty hereby the scale and effects of the violation(s), as well as the degree of fault found. Reference is also made to the principles for sanctions under the SSR Article 41, and the NPA Act section 46 which supplements the sector legislation and prescribes certain circumstances that Finanstilsynet may have regard to in addition to the circumstances prescribed in the NSTA (for further details see section 2 (*Legal basis*) 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, the size of the positions and the fact that Position holder itself reported the previous non-reported positions in [REDACTED] and also that it had tried to correct previously incorrect notifications. 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.

When considering the size of the violation penalty in this particular case, we have also taken into consideration that ESMA decided to lower the reporting threshold from 0,2% till 0,1% on Monday

16 March 2020 and that two of the positions in question (positions in [REDACTED] and [REDACTED] had position dates that same week and would not have been subject to the notification obligation prior to ESMA's decision. Furthermore, we have taken into consideration that [REDACTED] had been exempted from reporting until [REDACTED] and that the positions in [REDACTED] had not been subject to notification obligation for over a year.

6. Finanstilsynet's decision

Based on the facts described above and in accordance with the NSTA section 21-4 subsection (1) and (5) cf. SSR Articles 5, 6 and 9, Finanstilsynet has made the following decision regarding a violation penalty:

[REDACTED] is ordered to pay a violation penalty of NOK 200 000 (two hundred thousand Norwegian kroner) to the Norwegian Treasury.

Pursuant to section 28 of the NPA Act, 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.

On behalf of Finanstilsynet

Knut Haugan
Head of Section

Madeleine Marie Melgård
Higher Executive Officer

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