



FINANSTILSYNET

THE FINANCIAL SUPERVISORY
AUTHORITY OF NORWAY

Pentwater Capital Management Europe
LLP 7th Floor, 50 Broadway
SWIH OBL, London
UNITED KINGDOM

OUR REFERENCE
23/9729

YOUR REFERENCE

DATE
29.08.2024

Decision regarding violation penalty

1. Introduction

Reference is made to the Financial Supervisory Authority of Norway's (Finanstilsynet) decision regarding violation penalty dated 28 May 2024 imposed on Pentwater Capital Management Europe ("Pentwater") for violation of the notification requirements under article 5, cf. article 6 and article 9 of Regulation (EU) No 236/2012 (SSR) cf. section 3-14 (as it was phrased before 1 March 2021) of the Norwegian Securities Trading Act ("NSTA") by not notifying Finanstilsynet in accordance with the SSR of the relevant short positions listed therein.

By a letter dated 25 June 2024, Pentwater, through their representative from Dalan Advokatfirma has sent a complaint over Finanstilsynet's decision.

Finanstilsynet has made an overall assessment of the matter, taking into consideration all arguments presented by Pentwater and has decided to issue a new decision against Pentwater. Finanstilsynet has decided to maintain the original size of the violation penalty and re-issue a violation penalty in the amount of NOK 500 000.

2. Legal basis

The obligation to report net short positions is set out in the SSR cf. the NSTA section 3-14 (as it was phrased before 1 March 2021).

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.

A natural or legal person who has a net short position (a "position holder") in relation to the issued

FINANSTILSYNET

Revierstredet 3
P.O. Box 1187 Sentrum
NO-0107 Oslo

Tel. +47 22 93 98 00

post@finansstilsynet.no
www.finanstilsynet.no

Enquiries to

Anisa Isaksen
Dir. line +47 22 93 98 58

share capital of a company whose shares are admitted to trading on a trading venue and for which Finanstilsynet is the relevant competent authority, shall in accordance with article 5 and article 9 of the SSR, cf. the NSTA section 3-14 notify Finanstilsynet of certain net short positions.

The notification obligation applies if a net short position reaches or falls below a percentage that equals 0,1 % 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 the SSR article 9 subsection 1, any notification or disclosure under article 5, 6, 7 or 8 shall set out details of the identity of the natural or legal person who holds the relevant position, the size of the relevant position, the issuer in relation to which the relevant position is held and the date on which the relevant position was created, changed or ceased to be held.

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

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 SSR article 5, article 6 and article 9 cf. the NSTA section 3-14. 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. Furthermore, 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
- 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

XXL ASA (XXL) is a company whose shares (ISIN NO0010716863) are admitted to trading on a venue with Finanstilsynet as relevant competent authority (Oslo Stock Exchange).

On 14 May 2020, Pentwater's net short position in XXL changed from 0,66% to 0,79%. The position was reported correctly to Finanstilsynet at 12:46 CET on 15 May 2020. Finanstilsynet published the position to the market at 15:30 CET on 15 May 2020.

Finanstilsynet did not receive any subsequent notifications from Pentwater regarding any subsequent changes to their net short position in XXL after the initial report of 14 May 2020.

In connection with a routine check of old positions which had remained unchanged for a considerable amount of time, Finanstilsynet discovered that Pentwater's net short position in XXL had changed from 0,79% to 0%. This change was not reported to Finanstilsynet.

In its letter of 25 August 2023, Finanstilsynet requested a statement from Pentwater in respect of the unreported net short position. According to an overview received from Pentwater on 30 August 2023, the company's net short position in XXL had also changed during the period from 14 May 2020 to 27 May 2020. Two additional positions should therefore also have been reported to Finanstilsynet.

E-mail correspondence with Pentwater and Finanstilsynet's own investigations show that Pentwater has failed to report the following net short positions to Finanstilsynet:

No.	Position date	Deadline	Position	Status
1	19 May 2020	20 May 2020	0,55%	Not reported
2	26 May 2020	27 May 2020	0,73%	Not reported
3	27 May 2020	28 May 2020	0	Not reported

4. Pentwater's statements

In its complaint of 25 June 2024, Pentwater claims that Finanstilsynets decision of 28 May 2024 is invalid due to several reasons.

Pentwater states that the decision is invalid due to an incorrect understanding of the SSR. The company agrees with Finanstilsynet that all positions listed in the overview above under clause 3, should have been notified to Finanstilsynet and were all subject to the notification requirements in the SSR. However, Pentwater claims that Finanstilsynet has referred to the wrong provision in its

decision. According to Pentwater, the correct reference is article 6 of the SSR as the unreported net short positions are above 0,5%.

Pentwater also claims that Finanstilsynet has made an incorrect interpretation of the SSR as Finanstilsynet seems to treat the unreported crossing of the net short position from 0,73% to 0% as an "on-going" violation of the SSR i.e. that the SSR has been continuously violated from May 2020 to August 2024 when Finanstilsynet reached out to Pentwater.

The company claims furthermore that Finanstilsynet's decision is mainly based on the unreported crossing of the net short position from 0,73% to 0%. Henceforth, the decision should be considered as invalid in its entirety – i.e. regardless of the two other unreported net short positions listed in the overview under clause 3 which also constitute independent breach of the SSR.

Pentwater also points out that Finanstilsynet in its decision has made incorrect references to other provisions in the NSTA. The violations in this matter occurred in 2020, and the correct reference should be the provisions which were in place before 1. Mach 2021¹.

The company has also maintained that Finanstilsynet's decision is in breach of the Human Rights Act article 6 and the NPA Act article 25 as Finanstilsynet's justification in relation to each violation is unclear and not sufficiently substantiated.

Finally, Pentwater states that the size of the violation penalty is set too high in comparison with other similar cases where Finanstilsynet has issued a violation penalty for breach of the SSR. Pentwater claims that a violation penalty in the size of NOK 50-80 000 is more suitable.

5. Finanstilsynet's assessment of whether a violation penalty shall be imposed and its size

Finanstilsynet's assessment is that Pentwater's failure to notify Finanstilsynet within the deadline set out in the SSR constitutes a violation of the reporting requirements under articles 5, article 6, and article 9 of the SSR, cf. the NSTA section 3-14.

The net short positions listed in the overview under clause 3 were all subject to the notification requirement set out in the SSR article 5 cf. article 6 cf. article 9 subsection 2.

The obligation to notify Finanstilsynet in connection with a change to a net short position follows directly from article 5 of the SSR. Article 6 of the SSR sets out the obligation to publish changes to net short positions which are above 0,5%. In Norway such publication is done by Finanstilsynet (after Finanstilsynet has received a notification from the company).

Finanstilsynet finds that the objective conditions under the SSR article 5 cf. article 6 and article 9 cf. the NSTA section 21-4 subsection 1 for imposing a violation penalty on Pentwater are met.

¹ In connection with the implementation of the Market Abuse Regulation which came into force on 1 March 2021, transitional rules were provided for violations which occurred prior to this date.

When considering whether the subjective conditions for imposing a violation penalty are met, the starting point is 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 a position holder in advance establishes appropriate procedures and/or systems to proactively identify the notification obligation under the SSR and ensures that these procedures and/or systems are applied.

In this matter, Pentwater has failed to notify Finanstilsynet of changes to its net short position in XXL on three occasions. This shows that Pentwater did not have in place satisfactory procedures and systems which would identify changes to its net short positions in XXL.

Pentwater has argued that a former employee responsible for submitting notifications of changes to net short positions left the company, which explains why the three unnotified net short positions were not detected. However, Finanstilsynet finds that Pentwater should have implemented routines in its organisation in the event of employees leaving the company. Such routines could have prevented the violations from occurring. In any event, subjective requirements can also be met by anonymous or cumulative errors.

Finanstilsynet finds therefore that one or more persons acting on behalf of Pentwater acted negligently in respect of the unreported net short positions listed in the overview under clause 3 or that cumulative errors were present. Pentwater is regardless responsible for any action conducted – negligently or wilfully – by both its former and current employees.

Finanstilsynet finds that the subjective conditions under the NSTA 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 5 and NPA Act section 46 subsection 2. Participants in the Norwegian securities market are expected to have established appropriate procedures and systems in order to proactively identify the notification obligation under the SSR.

Based on the above, Finanstilsynet finds that a decision to impose a violation penalty regarding the abovementioned violations of the SSR, will not be disproportionate in this case.

The NSTA section 21-4 subsection 1 cf. subsection 5 state 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.

Finanstilsynet has made an overall assessment of the individual circumstances in this case and has in particular taken into consideration that Pentwater is a professional legal person and thereby required and expected to have the necessary procedures in place in order to timely report its net short positions.

Pentwater cannot be heard with its argument that the reporting obligations were carried out by a former employee who no longer works for Pentwater. As a professional legal person, Pentwater should have in place procedures which ensured the transmission of information and responsibilities when an employee leaves the company.

In its overall assessment, Finanstilsynet has considered the size of the net short positions which were all above 0,5%. Finanstilsynet has also taken into consideration that due to lack of reporting from Pentwater, the market was misled in relation to Pentwater's exposure in XXL-shares for a considerable period.

Pentwater has argued that a suitable size of the violation penalty in this matter would be in the range of NOK 50-80 000.

The company has in its complaint referred to previous cases where Finanstilsynet has issued a lower violation penalty. Finanstilsynet finds that the previous cases which Pentwater refers to are not comparable to the matter at hand. In two of those cases the delay in relation to the notification deadline was substantially shorter. In the referred case 21/5478, the net short positions arose in May 2020 and Finanstilsynet reached out to the position holder in May 2021. In case 18/9129, Finanstilsynet discovered two net short positions which were reported too late whereby the delay for significantly shorter i.e. 49 minutes and 3 days. As such, these cases are not comparable to the unnotified net short positions in this matter.

Pentwater also mentions case 18/10274 (Alpha Blue Ocean). However, this case involved 171 violations of the SSR and is therefore not comparable to Pentwater's violations.

Finanstilsynet does therefore not agree that the violation penalty in this matter is set too high. There are three (independent) violations of the SSR – three cases where changes to the net short position were not reported to Finanstilsynet. The size of each unreported net short position is also considered as large. The net short positions are – not only subject to notification – but also subject to publication requirements under the SSR article 6.

Pentwater has also maintained in its complaint that the unreported positions are old – they date back to 2020 and that Finanstilsynet is (somehow) to blame for not contacting Pentwater sooner. If Finanstilsynets understands this argument correctly, Pentwater seems to imply that if Finanstilsynet had reached out sooner to Pentwater, then the length of the violations would have been shorter.

In this respect, Finanstilsynet would like to underline that it is the position holder who is responsible for submitting notifications in a correct and timely manner to Finanstilsynet in accordance with its obligations under the SSR. Finanstilsynet conducts subsequent routine checks from time to time. However, Finanstilsynet can only base its investigations on reporting made by the relevant position holder and has no other data to consider in this regard.

As such, Finanstilsynet finds that the size of the violation penalty is consistent with the level of previous penalties given by Finanstilsynet for similar violations of the SSR.

6. Decision regarding violation penalty

Finanstilsynet finds that the current provisions under the NSTA section 21-2, section 21-9 and 21-14 will not give a more favourable result for Pentwater.

On the basis of the above, Finanstilsynet has decided to impose Pentwater Capital Management Europe LLP a violation penalty in the amount of NOK 500,000 for its violation of the NSTA section 3-14 cf. the NSTA section 21-4 subsection 1 and 5 (as each provision read before 1 March 2021) cf. the 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).

Please be informed that the decision will be published on Finanstilsynet's website.

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 (NNCA). If the administrative decision is not appealed, the NNCA will send a claim for payment after the deadline for an appeal has expired. If the decision is appealed, the claim will be sent after the appeal has been decided by the Ministry of Finance. The NNCA's deadline for payment is 3 weeks after the invoice has been sent.

If you have any questions regarding this matter, please contact Anisa Isaksen by email anisa.isaksen@finansstilsynet.no or phone +47 22 93 98 58.

On behalf of Finanstilsynet

Anne Merethe Bellamy
Deputy Director General

Thomas Borchgrevink
Head of section

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

