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OUR REFERENCE  
20/8165

YOUR REFERENCE

DATE  
17.02.2021

## 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 4 December 2020 ("Advance Notification"), Finanstilsynets email dated 3 January 2021 and to the reply by RAM Active Investments SA ("Position holder") in the email of 4 January 2021.

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 Finanstilsynet of the relevant net short position (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 venue<sup>1</sup> 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 the net short position. The notification obligation will apply if a net short position *reaches, exceeds or falls below* a percentage that equals 0,1%<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.

<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).

<sup>2</sup> 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-efsa-surveillance-authority-esa-and-the-european-securities-and-markets/>

Notification to Finanstilsynet shall be made in the manner and within the deadline in accordance with SSR Article 9 cf. commission delegated regulation 2012/826 ("2012/826") whereas 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. The position holder is responsible for the notification of net short positions being correct and complete.

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 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 shall in particular be placed on 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 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 position (referred to as the "Relevant Net Short Position"):

Issuer	Position	Position date	Reported*
Aker Solutions	0.94 %	06.07.2020	08.07.2020, 12:02 CET

*\* Date and time of the filing in Finanstilsynet's Short Sale Register. Position holder also informed Finanstilsynet of the late reporting of net short position in Aker Solutions by email of 8 July 2020 at 12:13 CET.*

#### **4. Position holder's statements**

Position holder's statements were provided to Finanstilsynet in emails dated 22 October 2020 and 4 January 2021. Position holder acknowledged that the Relevant Net Short Position was reported to Finanstilsynet after the notification deadline in NSTA section 3-14 cf. SSR Article 9 subsection (2) and has further offered its' apologies for the inconvenience caused.

Position holder points out in the emails dated 22 October 2020 and 4 January 2021 that they informed Finanstilsynet about the late reported notification in an email of 8 July 2020 at 12:13 CET, right after reporting it in Finanstilsynet's Short Sale Register.

#### **5. Finanstilsynet's assessment**

##### **5.1 Infringement of the SSR**

It is Finanstilsynet's assessment that Position holder's failure to notify Finanstilsynet within the 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 Position was subject to the notification requirement in SSR Article 5 and the notification was submitted after the expiry of the deadline in SSR Article 9 subsection (2). On this background it is Finanstilsynet's assessment that the provided notification 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.

It is the Position holder's responsibility to ensure, in advance of taking a net short position 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 that the procedures and/or systems inter alia must be prepared to at any given time identify shares which are subject to the reporting obligation.

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**

In determining whether to impose a penalty, Finanstilsynet has made an overall assessment of the individual circumstances in the case. Finanstilsynet places in particular emphasis on the fact the case involves one late reported notification, that the Position holder who is responsible for the delayed notifications is a legal person, and that Position holder also previously has been imposed a warning from Finanstilsynet for late notification of net short positions (our reference for the case: 19/8832). Finanstilsynet further considers it to be aggravating that the Relevant Late Reported position 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 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.

### **5.3 Assessment of the size of the violation penalty**

As described above, the reporting obligation, hereunder to report net short positions within the deadline of 15:30 CET on the following trading day, is a key part of the SSR, that it is expected that professional parties such as Position holder are familiar with and organize their business according to. 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 delay, the size of the position and that the relevant infringement is considered severe as it pertains a net short position not having been reported within the time limit and that the delay also resulted in the position not being made publicly available in time cf. SSR Article 6. Finanstilsynet has also taken into consideration that the relevant infringement has 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**

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:

*RAM Active Investments SA is ordered to pay a violation penalty of NOK 20 000 (twenty 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.

If you have any questions regarding the matter, please contact Madeleine M. Melgård by e-mail [mame@finanstilsynet.no](mailto:mame@finanstilsynet.no).

On behalf of Finanstilsynet

Geir Holen  
Head of Section

Madeleine Marie Melgård  
Higher Executive Officer

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