



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

OUR REFERENCE  
20/11180

YOUR REFERENCE

DATE  
24.02.2021

## DECISION REGARDING VIOLATION PENALTY

### 1. Introduction

Reference is made to previous correspondence, including the advance notification from The Financial Supervisory Authority of Norway ("Finanstilsynet") dated 26 November 2020 ("Advance Notification") and to the reply by [REDACTED] ("Position holder") in the email of 16 December 2020.

Based on the information available to Finanstilsynet, it is concluded that the 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 positions (see section 3) correctly and/or 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

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<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).

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.

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 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, also where the position holder has delegated / outsourced the task of reporting short positions to others. 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 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. 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

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<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-efta-surveillance-authority-esa-and-the-european-securities-and-markets/>

- 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*
	0.29 %		
	0.22 %		
	0.9 %		
	1.37 %		
	0.27 %		

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

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

\*\*\* In Finanstilsynets letter of 6 October 2020, the reporting date for this position was wrongly referred to as [REDACTED]

### 4. Position holder's statements

Position holder's statements were provided to Finanstilsynet in letter dated 28 October 2020 and email dated 16 December 2020. Position holder has in the letter dated 28 October 2020, acknowledged that the positions in [REDACTED] were reported to Finanstilsynet after the notification deadline in NSTA section 3-14 cf. SSR Article 9 subsection (2). The Position holder did not contest or object to the factual basis upon which the Advance Notification was sent and replied to the Advance Notification that "We acknowledge receipt of your letter and have no additional information to add at this time."

Position in [REDACTED]

Position holder has in its letter of 28 October 2020 stated that it crossed a relevant net short position notification threshold in [REDACTED] but that by a mistake of persons acting on behalf 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] but submitted with incorrect position date. The mistake was recognized after the notification was submitted, and Position holder reported a new correct position with position date [REDACTED] Position holder has however not cancelled the first position, but only filed a new position and therefore in the register it appears as if there were two positions.

Position in [REDACTED]

Position holder has in its letter of 28 October 2020 stated that the company between January 2014 and April 2020 obtained a service by [REDACTED] to administer the short filing requirements for the company. Position holder states that [REDACTED] monitored and reported Position holders' investments, and Position holder itself also independently verified that all required disclosures were completed on a daily basis.

Position holder has further stated that the late reporting of the positions in [REDACTED] was caused by [REDACTED] *needing additional time to confirm the relevant details resulting from a corporate action – the spinoff of [REDACTED]* Regarding the positions in [REDACTED] that were reported late with 10 and 7 minutes respectively, the Position holder states that was caused by processing volumes by [REDACTED]

## 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 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 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. 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 email of 28 October 2020, hereunder that the late and/or incorrect notifications were caused by data entry error, the need for additional time to confirm details resulting from a corporate action and/or processing volumes by the company making notifications on behalf of Position holder. Finanstilsynet has no reason to doubt the Position holder's statement, however it is our view that one or several persons acting on behalf of Position holder has/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 inter alia must be prepared to at any given time 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. Further Position holder must ensure that incorrect filed notifications are corrected within the same deadline as the notifications should have been made.

Even though the Position holder was using [REDACTED] to administer the short filing requirements and have now ended this service, 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 Position holders reporting system has been improved to prevent further events, Position holder did fail to ensure such compliance in advance.

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 several of 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 in particular emphasis on the fact that the case involves several late reported notifications, 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 violation penalty from Finanstilsynet for late notification of a net short position (our reference for the case: 18/8988). Finanstilsynet further considers it to be aggravating that the late reported positions in [REDACTED] were above the 0,5% threshold, and thus that these infringements effectively obstructed the positions 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 delays, the size of the positions and that two of the relevant infringements are considered severe as they pertain net short positions not having been reported

within the time limit and that the delay also resulted in the positions not being made publicly available in time. 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

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:

 is ordered to pay a violation penalty of NOK 40 000 (forty 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

Geir Holen  
Head of Section

Madeleine Marie Melgård  
Higher Executive Officer

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