

Orca Capital GmbH
Sperrling 2
85276 Pfaffenhofen
GERMANY

OUR REFERENCE
22/13035

YOUR REFERENCE

DATE
08.05.2023

Dear Sir,

Decision on violation penalty

Reference is made to the Advance notification of violation penalty dated 17 March 2023 from The Financial Supervisory Authority of Norway ("Finanstilsynet"), letter dated 25 April 2023 from Orca Capital GmbH ("Orca") and other correspondence.

The case concerns Orca's sale of shares in Flyr AS ("Flyr") (ISIN NO0010931900) in November 2022.

Based on the information available, Finanstilsynet finds that Orca violated the Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps ("SSR"), cf. Section 3-5 of the Norwegian Securities Trading Act ("NSTA").

Against this background Finanstilsynet has decided to impose a violation penalty of NOK 500 000, cf. Sections 21-2 and 21-9 of NSTA.

1. Legal basis

SSR applies to financial instruments admitted to trading on a multilateral trading facility ("MHF") where Finanstilsynet is the "relevant competent authority", cf. SSR Article 2 no 1 j). At the time Bergström's sale of shares in Flyr took place, the shares in Flyr were admitted to trading on Euronext Growth (Oslo). SSR is thus applicable.

Article 2 paragraph 1 (b) of SSR defines "short sale" in relation to a share as *"any sale of the share which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share [...] for delivery at settlement, not including:*

- (i) *a sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price;*

- (ii) *a transfer of securities under a securities lending agreement; or*
- (iii) *entry into a futures contract or other derivative contract where it is agreed to sell securities at a specified price at a future date."*

Article 12 of SSR sets out restrictions on the uncovered short sale of shares. Article 12 no 1 reads as follows:

"A natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled:

- a) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;*
- b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;*
- c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due".*

Pursuant to Section 21-2, cf. Section 21-5 third to fifth paragraphs of NSTA, Finanstilsynet may, in the event of a violation of rules in the SSR on reporting and uncovered short sales, impose a violation penalty on legal entities of up to NOK 43 million, or up to 10 per cent of the total annual turnover according to the last approved annual accounts. The violation penalty can be set at twice the profit achieved or loss avoided, if this results in a higher penalty.

The conditions for imposing a violation penalty are set out in Section 21-9 of NSTA. For legal entities, reference is made to the second paragraph of Section 46, first paragraph of the Public Administration Act. It appears in that provision that when it is laid down in law that an administrative sanction can be imposed on an legal entity, the culpability requirement is negligence unless otherwise determined. This means that a violation penalty may be imposed if a person acting on behalf of the legal entity commits the violation negligently. The culpability requirement can also be met through anonymous or cumulative fault.

It follows from Section 21-14 of NSTA that when deciding whether an administrative sanction is to be imposed and in the assessment of the penalty, a number of factors may be taken into account:

1. the gravity and duration of the violation,
2. the degree of culpability of the violator,
3. the violator's financial capability, in particular overall turnover or annual income and assets,
4. profit gained or losses avoided,
5. loss inflicted on any third party as a result of the violation,

6. willingness to cooperate with the authorities,
7. previous violations,
8. conditions as mentioned in the Public Administration Act section 46 second subsection
9. other relevant factors

The factors in section 21-14 are supplemented by partly overlapping factors in section 46 second subsection of the Public Administration Act, which apply to sanctions against legal entities. A factor that appears in section 46, second paragraph, is whether the legal entity could have prevented the violation by means of guidelines, instructions, training, control or other measures.

2. Background

2.1 The private placement in Flyr

After a period of significant financial challenges, Flyr carried out a capital raise in the autumn of 2022. The company received new share capital through a private placement where selected investors were given the opportunity to subscribe for new shares in the company.

In a stock exchange announcement published on 10 November 2022 at 8:44 PM (CET) the company informed that through the private placement it had raised NOK 250 million by issuing 25 billion shares with a subscription price of NOK 0.01. The private placement was subject to approval by an extraordinary general meeting, which was to be held on 16 November 2022.

The stock exchange announcement stated, *inter alia*, the following:

"First day of trading of the New Shares is expected to be on or about 17 November 2022, but not before the capital increase pertaining to the New Shares has been registered with the Norwegian Register of Business Enterprises ("the NRBE").

Settlement of the New Shares is expected to take place on a delivery versus payment (DVP) basis on or about 21 November 2022. DVP settlement of the New Shares is expected to be facilitated by a prepayment agreement between the Company and the Managers, however, the allocated New Shares will not be delivered to the relevant applicant before the registration of the capital increase pertaining to the New Shares with the NRBE has taken place. The New Shares allocated to investors will be tradeable on Euronext Growth Oslo following a stock exchange announcement by the Company announcing the registration of the share capital increase pertaining to the New Shares in the NRBE".

In a stock exchange announcement of 16 November 2022 at 12:17:16 PM (CET), Flyr disclosed that the company's extraordinary general meeting had approved the capital increase. In a stock exchange announcement of 17 November 2022 at 10:01:27 AM (CET), Flyr announced that the new share capital had been registered in the Register of Business Enterprises.

Finanstilsynet's investigations show that, prior to the registration of the increased share capital on 17 November, 1,2 billion shares in Flyr were sold. At this time, the share capital in the company amounted to 633,019,667 shares, in other words only about half of the number of shares traded that day.

2.2 Orca's sale of shares

According to information provided to Finanstilsynet, Orca was allocated with 500,000,000 shares in the private placement.

On 16 November 2022, Orca bought a total of 5 058 400 shares between 10:12 and 13:35 (CET). On the same day between 10:21 and 14:19, Orca sold a total of 2 722 175 shares. This implies that on 16 November 2022, Orca had a net long position in Flyr of 2 336 225 shares.

The following day, Orca sold a total of 24 500 000 shares between 09:04 and 09:31. However, as Orca bought a total of 3 405 628 shares between 09:21 and 09:28, Orca had a net short position of 18 758 147 shares as of 17 November at 09:31.

After the publication of the stock exchange announcement on 17 November about the registration of the capital increase, the price of the share fell significantly. Orca made a profit compared to those investors who waited to sell the shares until the capital increase had been registered.

Finanstilsynet has calculated Orca's profit by taking as a starting point the price observed in the market after the stock exchange announcement about the capital increase was published (November 17 at 10:01), which is compared with the sale price achieved by Orca. The volume-weighted average price (VWAP) has been used to calculate a price estimate for the trade after the announcement of the capital increase was made public. The VWAP is calculated at 0.0094. VWAP has also been calculated on the short sales that Orca carried out. The difference between these is multiplied by the number of shares sold to calculate the profit.

Based on the calculation method mentioned above, Finanstilsynet estimates that Orca obtained the following profit by selling the shares before they were registered in the Register of Business Enterprises (in NOK):

Investor	Number of shares	VWAP before announcement	VWAP after announcement	Estimated profit
Orca	18 758 147	0.01021	0.00940	15 173

3. Orca's comments

3.1 Orca's comments of 20 February 2023

In an e-mail to Finanstilsynet 20 February 2023, Orca provided comments to Finanstilsynet's letter of 20 December 2022. In the e-mail, Orca stated, *inter alia*, the following about the sales of shares:

"In fact, a short position was created on 17.11.2022 in the period from 09:04 a.m. to 10:01 a.m. The reason for this was a misunderstanding between the responsible employee in the settlement and the responsible dealer.

Orca Capital had subscribed for shares in Flyr AS and received an allotment of 500,000,000 shares. Arctic Securities AS sent a "Flyr AS Syndicate Message" to the Settlement of Orca Capital on 11/11/2022. Page 2 of the Syndicate Message contains the reference: „Tradable shares: On or about 17 November 2022 but not before the capital increase pertaining has been registered with the Norwegian Register of Business Enterprises“.

The responsible employee at the settlement only passed on this information incompletely to the responsible trader. He informed the trader that the shares from the capital increase will be tradable on 17.11.2022. There was no further reference to the required registration. Based on this information, the trader started selling Flyrs shares on 17.11.2022, 09:04 a.m.

At 10:16 a.m. on 17/11/2022, Arctic Securities sent the "Contract Note" to Orca Capital for the purchase of 500,000,000 Flyrs shares.

Orca Capital regrets this misunderstanding. The directors have instructed the settlement staff to check with the appointed broker in the future when shares from a capital increase will be tradable".

3.2 Orca's comments to Finanstilsynet's advance notification

In a letter dated 25 April 2023, Rechtsanwalt/Lawyer Gerald Pöschl has provided comments on behalf of Orca.

In the letter, it is confirmed that Orca intended to fulfill its delivery obligations with the "new" shares and thus had an uncovered short position on 17 November 2022.

Orca notes that one reason for the prohibition of uncovered short sales is that at the time of the short sale, it is not ensured that the short sale can be settled at maturity.

The new 50 million shares were registered on 17 November 2022. Thus, the shares existed on 17 November 2022 so that Orca Capital could fulfill the delivery obligation from the short sales in a timely manner. Orca does not deny that there is nevertheless a violation of SSR Article 12 as the new shares did not yet exist at the time of the short sale. However, the breach must be considered as only a formal breach.

As regards the subjective conditions for imposing a violation penalty, Orca again points out that the short sales occurred due to an internal misunderstanding. Orca was informed that the new shares would only become tradable upon registration, however this information was not passed on to the trader by the responsible employee in settlement. Unfortunately, it has not been possible to clarify why the information was not passed on. Orca states that the fact that Orca has been operating

globally as a proprietary trading firm since 2009, and that the short selling identified is the first violation of trading rules, proves that Orca nevertheless has a functioning communication between settlement and trading. Thus, Orca can only be accused of simple negligence.

Orca notes that Orca only made a small profit from the short selling. Finanstilsynet is therefore requested to reassess whether a violation penalty has to be imposed on Orca. It should be taken into consideration that the violation of SSR is a formal breach, and Orca can only be accused of simple negligence. The violation only occurred for a short period of time.

Orca states that if Finanstilsynet despite the circumstances believes that the imposition of a violation penalty is appropriate and proportionate, Finanstilsynet is requested to review the amount of the penalty. The composition of a fine of more than 30 times the profit generated by Orca does not seem appropriate and is clearly too high.

4. Finanstilsynet's assessment

4.1 The conditions for imposing a violation penalty

The objective conditions

According to SSR Article 12 no 1, a natural or legal person may carry out a short sale of a share that is listed on a trading venue if the conditions in points a) to c) is fulfilled. If any of the conditions are not met, the short sale is prohibited.

Initially, a decision must be made as to whether there was a short sale.

As mentioned above, in Article 2 no. 1 b) of SSR "short sale" is defined as any sale of a share which the seller does not "own" at the time the sale agreement is entered into.

When assessing whether there is a short sale, it is necessary to identify the point in time when the seller "owns" the shares. Sales made prior to this stage are considered short sales.

The time when the investor becomes the "owner" of the shares is not regulated in the SSR. It follows from Commission Delegated Regulation No. 918/2012, cf. the Norwegian Securities Trading Regulations Section 3-7, that this would be subject to national law.

Finanstilsynet considers that the term "owner" must be interpreted on the basis of the purpose of the provision. The assessment in connection with new issues will be that the shares "exist", i.e. that they are registered in the Register of Business Enterprises, and that there is sufficient evidence that the share ownership is such that rights can be exercised and that timely delivery can take place.

Various circumstances may indicate that an investor becomes "owner" of the shares as defined in SSR at a later time than the time of registration. Finanstilsynet cannot see that there are any such circumstances in this case.

Finanstilsynet therefore considers that Orca became "owner" of the new shares when the capital increase was registered in the Register of Business Enterprises, i.e. immediately before the publication of the stock exchange announcement on 17 November at 10:01 AM.

Sales of new shares in Flyr made before this point in time must therefore be regarded as short selling.

With regard to the net short position that Orca had on 17 November 2022, Orca has not made reference to any agreements or any other measures which, at the time of entering into the sales agreement, could provide sufficient evidence for the shares to be delivered on time. Based on the information provided, it seems clear that Orca intended to fulfill its delivery obligations with the "new" shares.

Finanstilsynet therefore assumes that the conditions in SSR Article 12 a) to c) were not met. Consequently, the sales must be considered uncovered short sales in violation of Article 12.

Based on the comments provided, Finanstilsynet understands that Orca agrees that the short selling at issue implied a violation of SSR Article 12.

The objective description in SSR Article 12 is thus fulfilled.

The subjective conditions

The question is whether the subjective conditions for a violation penalty has been met.

As mentioned in section 1 above, when imposing a violation penalty on a legal entity, the requirement is that the person or persons who have acted on behalf of the entity have shown negligence, cf. Section 46 first paragraph of the Public Administration Act. The culpability requirement may be met regardless of whether there is negligence or a qualified degree of culpability (gross negligence or intent). The degree of guilt may, however, be taken into consideration when assessing the size of the violation penalty, cfr. Section 4.2 below.

As mentioned, Finanstilsynet assumes that Orca had no cover in the form of borrowed shares or through any other measures, cf. SSR Article 12.

Finanstilsynet considers that it was clearly communicated to the market in a stock exchange announcement from the issuer that the shares would only be tradable once the issue had been registered in the Register of Business Enterprises. The syndicated message submitted to Orca from Arctic Securites AS on 11 November 2022 also contained this information. In its comments to Finanstilsynet, Orca admits having been informed that the shares would only become tradable upon registration.

As referred to above, Orca has explained that the uncovered short selling was a result of an internal misunderstanding. However, Orca has not able to provide any further information as to why the

information about when the shares would become tradable was not passed on to the relevant persons involved in the trading.

The starting point of Finanstilsynet's culpability assessment is that Orca is a professional operator in the securities market. It must be expected from such an investor, when subscribing shares in a private placement, to obtain knowledge about factual circumstances concerning the tradability of the shares. Professional investors must, as a minimum, familiarize themselves with information from the issuer communicated to the market and to the investor, and ensure that this information is forwarded to the persons in the organisation responsible for the trading activities.

In addition to this general starting point, Finanstilsynet considers that account must be taken of specific circumstances in the case. The fact that 25 billion shares were issued in the private placement suggests that investors had to understand that there would be significant selling pressure – with potentially considerable price decrease – when the new shares were tradable. This meant that investors who wanted to sell the new shares had to ensure that the shares were actually tradable when placing a sales order.

In Finanstilsynet's assessment, Orca's conduct deviates significantly from the normal prudent course of action for a professional investor in the securities market. In Finanstilsynet's opinion, the behaviour constitutes gross negligence.

Finanstilsynet's conclusion is that one or more persons who acted on behalf of Orca acted with gross negligence. Finanstilsynet therefore considers that the subjective conditions for a violation penalty for a breach of SSR Article 12 has been met.

Finanstilsynet's assessment is that both the objective and subjective conditions for violation penalties have been met.

4.2 Assessment of whether a violation penalty shall be imposed and the size of the penalty

NSTA Section 21-14 and the Public Administration Act section 46 second subsection provide a number of various factors that may be taken into consideration when assessing whether a violation penalty shall be imposed and the size of the penalty. The overview of factors is non-exhaustive. Under any circumstances, the assessment must be made based on an overall evaluation in the specific case.

Finanstilsynet does not agree with Orca that the violation of SSR constituted only a "formal breach". In general, short selling outside the scope of SSR Article 12 is illegal as such activities represent a possible risk of non-settlement. In addition to the size of the trade and the degree of negligence on Orca's part, Finanstilsynet has put emphasis on the fact that an illegal act was carried out by a limited number of investors at the same time as the vast majority of other investors in the

private placement loyally aligned themselves with so that the newly issued shares could not be traded until they were registered in the Register of Business Enterprises. Such behaviour is likely to undermine confidence in the integrity of the securities markets. In this context, Finanstilsynet refers to the purpose of the NSTA to facilitate safe, orderly and efficient trading in financial instruments and investor protection, cf. NSTA section 1-1.

It cannot be considered disproportionate that a violation penalty is imposed in this case. Finanstilsynet's assessment is therefore that a violation penalty should be imposed.

With regard to the assessment criteria in NSTA section 21-14, Finanstilsynet assumes that Orca obtained a profit, although limited, cf. the calculation above. Orca has responded that the proposed violation penalty would correspond to an amount 30 times the profit generated by Orca in the short selling, which Orca considers inappropriate. Finanstilsynet underlines that the profit generated in the illegal act is only one factor that has been taken into consideration in the assessment. In this case, a number of other factors have also been considered relevant, as set out below.

In its assessment, Finanstilsynet has taken into consideration the size of the transaction. In addition, Orca carried out illegal actions at the same time as the vast majority of investors were loyal to the regulations. Such behaviour may undermine confidence in the securities market.

Regarding Orca's comment that the violation lasted for a short period of time, Finanstilsynet emphasizes that there was a clear threshold for when the shares were tradable, and that the exact timing for when that threshold would be met was unknown. With respect to trades made on 17 November, Finanstilsynet does not consider the short period of time between the trades and the registration in the Register of Business Enterprises as a relevant factor. The timing of the registration was outside of Orca's control and therefore the length of time for the violation was arbitrary.

Furthermore, Finanstilsynet has taken into consideration that gross negligence was shown in connection with the uncovered short sales. It is also emphasized that Orca, as a professional operator, must be expected to prevent such violations through internal routines, guidelines or other relevant measures.

Finally, emphasis is placed on Orca's financial strength. Finanstilsynet does not have a detailed overview of Orca's financial situation. However, taking into consideration that Orca was approached in the private placement as well as the number of allocated shares, it is assumed that Orca has a considerable financial strength.

Finanstilsynet's assessment, based on the above and an overall evaluation of all relevant factors, is that the violation penalty should be set at NOK 500 000.

5. Decision on violation penalty

Based on the circumstances above, Finanstilsynet has decided to impose a violation penalty of NOK 500 000 on Orca Capital GmbH for breaching the prohibition against uncovered short sales in SSR Article 12, cf. NSTA Section 3-5.

The basis for imposing a violation penalty is NSTA Section 21-2 first paragraph.

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.

On behalf of Finanstilsynet

Anne Merethe Bellamy
Director

Thomas Borchgrevink
Head of Section

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