



FINANSTILSYNET
THE FINANCIAL SUPERVISORY
AUTHORITY OF NORWAY

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This letter is only sent by email to: compliance_ldn@pictet.com and erperez@pictet.com

OUR REFERENCE
21/5264

YOUR REFERENCE

DATE
11.10.2021

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 30 June 2021. Finanstilsynet has not received any comments to the advance notification from Pictet Asset Management LTD ("Position holder").

Based on the information available to Finanstilsynet, it is our preliminary opinion that the Position holder has violated the notification requirement under section 3-14 of the Norwegian Securities Trading Act ("NSTA") (as it was phrased before 1 March 2021), cf. Regulation (EU) No 236/2012 ("SSR") Article 5 cf. Article 9, by not notifying Finanstilsynet about the relevant net short positions (see section 3) within the time limit in accordance with the SSR. On this background Finanstilsynet has decided to impose a violation penalty of NOK 30,000.

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.

2. Legal Basis

The obligation to report net short positions of shares was set out in the Norwegian Securities Trading act (NSTA) section 3-14, cf. Regulation (EU) No 236/2012 (SSR).

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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, 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 that equals 0,2%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.

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 NSTA section 3-14, cf. SSR Article 5 and cf. Article 9. 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. 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

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)

² The notification threshold was temporarily lowered to 0,1% from March 16, 2020 to March 19, 2021. 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/>

- 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"):

Net short positions in Norwegian Air Shuttle ("NAS"):

On Wednesday 26 February 2020 the Position holder's net short position in NAS changed from below 0,2% to 0,29%. The position was reported to Finanstilsynet on Monday 2 March 2020 at 15:15 CET. On Thursday 27 February 2020, the Position holder's position (in NAS) changed from 0,29% to 0,42%. The position was not reported until Monday 2 March 2020 at 15:14 CET.

Net short position in MOWI:

The Position holder also crossed a relevant notification threshold on Friday 29 January 2021, when its net short position in MOWI changed from below 0,1% to 0,1%. The Position holder did not report the position until Tuesday 2 February 2021 at 12:15 CET. Position holder notified Finanstilsynet about the late reported position in email of Tuesday 2 February 2021 at 13:04 CET.

4. Position holder's statements

Position holder has in email dated 18 May 2021, acknowledged that the three Relevant Net Short Positions were reported to Finanstilsynet after the notification time limit in NSTA section 3-14 cf. SSR article 9 subsection (2).

Net short positions in NAS:

Position holder has however stated inter alia that the positions in NAS was reported late due to error in internal systems. The net short positions were not identified in time, but were reported correctly as soon as the positions were discovered. Position holder has later developed new solutions for monitoring net short positions.

Net short position in Mowi:

The net short position in MOWI were reported late because of error on internal IT systems. Position holder states that "*On 1 February 2021, we experienced an IT incident where positions held in portfolios as of 29 January 2021 were being double counted in our internal management system. This led to a delay in the calculation and generation of our daily net short positions monitoring file which we use to identify whether positions have reached, fallen below or exceeded certain reporting thresholds as of the previous business day.*"

Position holder specified that the company notified Finanstilsynet about the event in email of Tuesday 2 February 2021 at 13:04 CET.

Finanstilsynet has not received any comments from the Position holder on the advanced notification dated 30 June 2021.

5. Assessment of whether a violation penalty shall be imposed and its size

Finanstilsynet finds that Position holder violated the NSTA section 3-14, as it was phrased before 1 March 2021, by not notifying Finanstilsynet about the Relevant Net Short Positions within the time limit in accordance with the SSR.

The Relevant Net Short Positions were subject to the notification and all of the notifications were submitted after the deadline in SSR Article 9 subsection (2). 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 considering whether the subjective conditions for imposing a violation penalty are met, the starting point would be 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 the Position holder establishes in advance appropriate procedures and/or systems in order to proactively identify the notification obligation under SSR and ensures that these procedures and/or systems are applied.

Finanstilsynet has considered the Position holder's statements, including that the reporting was delayed due to errors in the Position holder's internal systems. It is Finanstilsynet's assessment that the Position holder had not taken the necessary precautions to ensure that the notification obligations could be met before making the trades. Further, although Position holder's reporting system has been improved to prevent further events, Position holder did fail to ensure such compliance in advance.

Finanstilsynet has concluded that one or more persons acting on behalf of the Position holder acted negligently, or that cumulative errors were present. Accordingly, Finanstilsynet finds that the subjective conditions under NSTA section 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 (1) and NPA Act section 46 subsection (2). As mentioned, participants in the Norwegian securities market are expected to have established appropriate procedures and/or systems in order to proactively identify the notification obligation under SSR. Furthermore, Finanstilsynet places emphasis on the fact that the case involves three late notifications. In Finanstilsynet's assessment, imposing a violation penalty in this case will not be disproportionate.

Finanstilsynet finds that a violation penalty should be imposed.

The NSTA section 21-4 subsection (5) states 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, (cf. section 2 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 the relevant infringements have been found to be negligent on the part of the Position holder, the length of the delays and the size of the different positions. 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

Finanstilsynet finds that the current provisions under the NSTA section 21-3, section 21-9 and 21-14 will not give a more favourable result for Pictet.

On the basis of the above, Finanstilsynet will impose a violation penalty on *Pictet Asset Management LTD* of the amount of NOK 30,000 for its violation of the NSTA section 21-4 subsection (1) and (5) (as it read before 1 March 2021) cf. 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).

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.

If you have any questions regarding this matter, please contact Madeleine M. Melgård by email mame@finansstilsynet.no, or phone +47 22 93 98 18.

On behalf of Finanstilsynet

Geir Holen
Deputy Director

Madeleine Marie Melgård
Higher Executive Officer

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