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Guidelines for determining a special fine for certain infringements of the EU Short Selling Regulation

Summary

These guidelines pertain to absent and late short selling notifications and short selling notifications for public disclosure according to Articles 5, 6 and 9 of Regulation (EU) No. 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps. Finansinspektionen shall decide on a special fine for such infringements according to Section 6, points 1, 2 and 5 of the Supplemental Provisions for the EU Short Selling Regulation Act (2012:735). When Finansinspektionen is determining the special fine, the authority shall use the tables set out in these guidelines and consider if there are any mitigating or aggravating circumstances.

1 Background

According to Regulation (EU) No. 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (the Short Selling Regulation), as a main rule only such short selling may occur that involves the seller borrowing the security or ensuring that the security can be borrowed prior to short selling.

In short selling, according to the Short Selling Regulation, notification of certain net short positions¹ in the issued share capital of a company whose shares are traded on a regulated market or multilateral trading facility shall be given to the competent authority. In Sweden, Finansinspektionen is the competent authority. Natural persons and legal entities shall provide notification if the position equals or falls below the threshold of 0.2 per cent of the issued share capital of the company concerned and each 0.1 per cent above that (Article 5).

Net short positions in shares reported to Finansinspektionen shall also be publicly disclosed if they equal or fall below 0.5 per cent of the company's issued share capital and each 0.1 per cent above that (Article 6). In Sweden, Finansinspektionen publicly discloses the net short positions (cf. Article 9.4).

¹ A net short position in shares is calculated by deducting all the long positions from short ones. Hence, in order to ascertain how many shares are sold short, the shares held by a person are deducted from the number of shares sold short by the person.

According to the Supplemental Provisions for the EU Short Selling Regulation Act (2012:735) (the Short Selling Act), Finansinspektionen shall issue a special fine for infringements of the Short Selling Regulation. Relevant infringements include absent or late notifications, which also comprises notifications for public disclosure (infringements of Articles 5, 6 and 9 of the Short Selling Regulation). For such infringements, Finansinspektionen shall issue a special fine (Section 6, points 1, 2 and 5 of the Short Selling Act). According to Section 7, point 1 of the Short Selling Act, the special fine shall be a minimum of SEK 5,000 and a maximum of SEK 5 million.

It is possible for Finansinspektionen to wholly or partly waive the special fine if the infringement is negligible or excusable or if special grounds otherwise exist.

2 Preparatory works

The preparatory works of the Short Selling Act states that all relevant circumstances should be taken into account when determining the size of the special fine. Examples of circumstances that may be of significance are the size of the transaction and the duration of the delay. Furthermore, the preparatory works states that the Short Selling Regulation's aim of achieving transparency in the market should be taken into account with respect to the disclosure of significant positions. In order for the special fine to be considered a deterrent, consideration should be given to the financial strength of the party that has committed the infringement. Natural persons should therefore pay lower fines than legal entities. It should also be seen as a mitigating circumstance if the party who has violated a provision has reported the infringement itself and demonstrated determination to rectify, for example, deficient procedures that have led to infringements (Govt Bill 2011/12:175, p. 25).

3 Assessment criteria for the standardised model

Finansinspektionen finds it appropriate to use a standardised model as a basis for setting the special fine, in a way similar to that for infringements of the major shareholder notification regulations in Chapter 4 of the Financial Instruments Trading Act (1991:980).

The special fine shall be proportionate to the gravity of the infringement. Notifications shall be received by Finansinspektionen no later than 3.30 p.m. on the trading day following the day on which the person obtains the net short position subject to notification. It is important that Finansinspektionen and the market are quickly informed of a threshold having been passed. Damage will reasonably be greater the more time passes between the change in the holding taking place and notification thereof being given and, as appropriate, being publicly disclosed. In light of this, the size of the special fine should primarily depend on the duration of the delay measured in trading days. At the same time, the fine should gradually increase in proportion to the number of days a notification is delayed in order to create an incentive to provide notification despite being late. Furthermore, infringements of the obligation to provide notification should justify a larger fine when the natural person or legal entity has exceeded or fallen below

the threshold of 0.5 per cent or higher because in such cases the market does not receive the relevant information on time.

The fine should also be dissuasive and noticeable. It should thus be so high that it dissuades even financially strong market participants from violating the rules. The standardised model should also take into account whether it is a natural person or a legal entity that have committed the infringement because they usually have different financial capabilities.

4 Guidelines for determining the special fine

When Finansinspektionen examines delayed short selling notification cases, the authority first determines whether there has been any infringement of the rules in the Short Selling Regulation. Subsequently, the size of the fine is set on the basis of the intervals in the standardised model. Finansinspektionen should use the tables below as a basis for this. The authority then decides whether there are any aggravating or mitigating circumstances. If there are both mitigating and aggravating circumstances and these are deemed to have the same weight, the basic premise is that the fine shall be equivalent to the basic fine as per the table. In individual cases, however, it shall be possible to set a smaller or larger fine, depending on whether the aggravating or mitigating circumstances carry more weight. Finally, Finansinspektionen examines whether the infringement is negligible or excusable or if there are otherwise special grounds to fully or partially waive the fine according to Section 9 of the Short Selling Act.

Basic fines – intervals for time value assessment – for late notifications regarding thresholds below 0.5

Delay in trading days	1	2	3	4	5	6–10	11–20	21–40	>40*
Fine for natural person (SEK)	5,000	10,000	15,000	20,000	25,000	30,000–50,000	50,000–80,000	80,000–100,000	100,000–5,000,000
Fine for legal entity (SEK)	10,000	20,000	30,000	40,000	50,000	60,000–100,000	100,000–200,000	200,000–300,000	300,000–5,000,000

Basic fines – intervals for time value assessment – for late notifications regarding the threshold 0.5 and above and which shall be publicly disclosed

Delay in trading days	1	2	3	4	5	6–10	11–20	21–40	>40*
Natural Person	10,000	20,000	30,000	40,000	50,000	60,000–80,000	80,000–100,000	100,000–200,000	200,000–5,000,000
Legal Person	20,000	40,000	60,000	80,000	100,000	120,000–150,000	150,000–300,000	300,000–500,000	500,000–5,000,000

* Notification or notification for public disclosure has taken place after more than 40 trading days, or not at all.

Document information

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Purpose
To provide guidance in cases of fines for late short selling notification.
Reference to external requirements that gave rise to the governance document
The Supplemental Provisions for the EU Short Selling Regulation Act (2012:735)

Reference to underlying internal governance documents

Version history

Entry into	Version	Comments
10/11/2014	1.0	Cf. FI Ref. 14-13923
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