Merkur Market Appeals Committee – Case 1/2016

Ruling issued on 18 October 2016 on an appeal by Oxxy Group PLC against a decision by Oslo Børs ASA on 17 August 2016 to impose a violation charge on Oxxy Group PLC for a breach of the duty of disclosure in the rules for Merkur Market in connection with the company's application and acceptance for admission to trading on Merkur Market.

1. Background to the case

Oxxy Group PLC ("Oxxy Group" or the "Company") is a public limited liability company that was incorporated in Cyprus in 2012. The Company is the holding company of a group and has three subsidiary companies, which are domiciled in Malta, Bulgaria and Great Britain. Oxxy Group provides services in the areas of web design and the development of online publishing platforms for the SME market.

Oxxy Group was admitted to trading on Merkur Market on 13 January 2016 following an admission process that was commenced on 18 December 2015. The case concerns alleged violations of the "Admission to Trading Rules for Merkur Market" (the "Admission to Trading Rules") and the "Continuing obligations of companies admitted to trading on Merkur Market" (the "Continuing Obligations"). The violations allegedly committed by Oxxy Group principally concern the fact that the Company did not provide sufficient information on a range of convertible loan agreements entered into by the Company with two of its main shareholders.

At the time of its admission to trading on Merkur Market, Oxxy Group's share capital consisted of 2,600,000 ordinary shares each with a nominal value of EUR 0.01.

Prior to the admission process, six convertible loan agreements were entered into by Oxxy Group with the Company's two main shareholders: The White November Fund Ltd. ("WNF"), and the Company's founder, CEO and board member Dimitar Dimitrov ("Dimitrov"). At the time of admission to trading on Merkur Market, these two shareholders together controlled 90% of the shares. WNF is a private investment company/active ownership fund and is represented on the Company's board in the form of the chairman of the board, Lars Christian Beitnes. The agreements gave the two shareholders the right to convert private loans into new shares in the Company (the "conversion agreements"). Between 2013 and 2015 WNF and Dimitrov had provided the Company with around EUR 600,000 in capital advances to support its operations. In accordance with the agreements entered into in the period between January 2013 and January 2015, the Company could convert these advances into shares in the Company at the conversion price set in the agreements no later than 31 December 2016. These conversions were made and the corresponding new shares issued on 11 and 12 April 2016. The market was informed that new shares had been issued on 14 April 2016. The transactions increased the total number of shares in the Company to 8,600,000 from 2,600,000, which is an increase of 230%.

When the Company started the process of admission to trading on Merkur Market, detailed information on the conversion agreements was not provided in the documentation that was produced in connection with the Company's application to Oslo Børs, and the Company did not provide the market with such information on its own initiative once it had been admitted to trading on Merkur Market.

Oslo Børs ASA (hereinafter "Oslo Børs") carried out further investigations and notified Oxxy Group in a letter dated 1 July 2016 that it was considering removing the Company from trading on Merkur

Market as a consequence of the Company having breached its duty to provide information in the application process and its continuing duty to provide the market with information following its admission to trading. Oslo Børs received comments from the Company in response to its notification in a letter dated 1 August 2016. Oslo Børs then passed the following resolution on 17 August 2016:

> *"A violation charge is hereby imposed on Oxxy Group PLC for material breaches of the rules for Merkur Market in an amount of NOK 1,000,000, cf. Continuing obligations of companies admitted to trading on Merkur Market section 12.3 (2) and (3)."*

Oxxy Group appealed the resolution passed by Oslo Børs in a letter dated 4 September 2016. The deadline for submitting an appeal is two weeks, but following a request Oslo Børs extended the deadline to 5 September 2016, meaning that the appeal was correctly lodged.

Oslo Børs did not find reason to reverse its resolution and the appeal was sent to the Merkur Market Appeals Committee (the "Appeals Committee" or the "Committee") for a ruling in accordance with Section 14 of the Continuing Obligations. The Appeals Committee has to rule on cases within four weeks of receiving them, Cf. Section 5 of the Mandate and procedures for the Merkur Market Appeals Committee (the "Procedural Rules").

The Appeals Committee received the case from Oslo Børs on 20 September 2016. The Appeals Committee assessed the case at meetings on 28 September and 18 October 2016. The Appeals Committee has had access for its assessment to all information relevant to the case.

For the purposes of assessing the case the Appeals Committee's members were Mads Magnussen (Chair), Camilla Nyhus-Møller and Morten Brundtland.

2. The appellant's representations

In its letter dated 4 September 2016, Oxxy group appealed against Oslo Børs' assessment of the factual matters of the case, its case management and the scale of the violation charge. The Company principally argued the following:

The time pressure under which it was working during the admission process increased the risk of mistakes and Oslo Børs was aware of this. Furthermore, Oslo Børs had taken on an advisory role to the Company in connection with the admission process and Oslo Børs was negligent in carrying out this role.

The Company recognises that the circumstances surrounding the conversion agreements should have been better described in its admission document, but argues that in the admission document there are several places where reference is made to loans that have been made by the shareholders. Oslo Børs has incorrectly assumed that the Company deliberately withheld information on the conversion agreements. The Company never intended to withhold information. The Company thinks that sufficient information was given on the shareholder loans, and that Oslo Børs should have asked for further information in connection with its reviewing and providing guidance on the document.

The Company also thinks that Oslo Børs has attached too little importance to the fact that the Company has implemented several measures to limit the negative impact of the Company's failure to provide sufficient information on the conversion agreements.

The Company also thinks that Oslo Børs made mistakes in terms of its case management that mean that there are no grounds for imposing a violation charge. The Company thinks that Oslo Børs only

notified it that the Company might be removed from the marketplace, not that it was considering imposing a violation charge. This is a matter on which the Company has made comments and that is subject to challenge. The Company also alleges that Oslo Børs also provided inadequate justification for the scale of the violation charge it imposed as it only briefly stated that the Company's financial position was taken into consideration, without further explanation.

The Company thinks that in deciding on the scale of the violation charge to impose Oslo Børs did not attach sufficient importance to the Company's financial situation. The size of the violation charge is entirely out of proportion to a company listed on a multilateral trading facility such as Merkur Market.

Oxxy Group has principally claimed that Oslo Børs' resolution imposing the violation charge must be declared void and that its response must be limited to public criticism of the Company. The Company has in the alternative claimed that the violation charge should be significantly less than NOK 1,000,000.

3. The Appeals Committee's evaluation

The Appeals Committee is the appeals body for decisions taken by Oslo Børs on the basis of specific provisions in the "Continuing obligations of companies admitted to trading on Merkur Market", including for decisions on violation charges pursuant to Section 12.3 of the Continuing Obligations, cf. Section 14. The Appeals Committee can examine all aspects of a case, cf. Section 14 (2) of the Continuing Obligations, but its authority is limited to upholding a decision or to finding in favour of the appellant. The Appeals Committee can accordingly not independently make decisions that are more punitive than those previously made by Oslo Børs. The Appeals Committee's rulings are advisory for Oslo Børs, cf. Section 2 of the Procedural Rules, but the Appeals Committee assumes that exceptional circumstances would be required for Oslo Børs to decide not to accept its rulings.

Having taken Oslo Børs' resolution to impose a violation charge and the appeal submitted by Oxxy Group as the starting point for its evaluation, the Appeals Committee finds that in this case there are three main issues: first, whether there has been a breach of the rules for Merkur Market such that there are grounds for a violation charge to be imposed; second, whether Oslo Børs is guilty of having made mistakes in its management of the case that could have influenced the nature of the decision; and, thirdly, whether the charge imposed is too high.

3.1. The grounds for sanctioning the Company

The Appeals Committee first addresses whether Oxxy Group is guilty of a breach of the rules for Merkur Market such that Oslo Børs had grounds for imposing a violation charge. In connection with this issue, the Committee also needs to assess the significance of the fact that Oslo Børs was aware of the time pressure under which Oxxy Group was working during the admission process, whether Oslo Børs had assumed an advisory role in relation to the Company and was negligent in carrying out this role, and whether Oslo Børs has attached too little weight to the fact that the Company has implemented measures to limit the negative impact of its failure to provide complete information.

Section 12.3 (2) and (3) of the Continuing Obligations regulate Oslo Børs' right to impose violation charges. The provision in Section 12.3 (2) states that Oslo Børs can impose a violation charge if a company "materially breaches" the rules for Merkur Market. It is accordingly only certain breaches of the rules that can be sanctioned with violation charges. Breaches of both the Admission to Trading Rules and the Continuing Obligations are covered by this. The Admission to Trading Rules apply in connection with the admission to trading process that takes place prior to a company being admitted

to trading on the marketplace, while the Continuing Obligations apply to companies that have been admitted to trading on Merkur Market.

Before admission to trading

Section 2.1.1 of the Admission to Trading Rules states that shares can only be admitted to trading on Merkur Market if the company provides sufficient information during the admission process for market participants to be in a position to determine fair market prices. What information this involves is set out in detail by Section 3.2 of the Admission to Trading Rules, which address the content requirements for applications, by Section 3.3, which addresses the need to carry out due diligence investigations and their presentation, and by Section 7, which addresses the production of an admission document and the content of this document. Before a company can be admitted to trading on Merkur Market, Oslo Børs has to approve the company's application and to review its admission document, cf. Sections 5 and 6 of the Admission to Trading Rules. It is, however, the company's responsibility to ensure that the information it provides during the admission process provides a clear, accurate and comprehensive description of the company and the shares for which admission to trading is sought.

In its decision of 17 August 2016, Oslo Børs took the view that Oxxy Group had breached the duty to provide information pursuant to these provisions in the Admission to Trading Rules by not providing sufficient information on the conversion agreements entered into by the Company with its two main shareholders, WNF and Dimitrov.

The Appeals Committee considers it to be clear that Oxxy Group did not provide sufficient information on the conversion agreements either in its application or in its admission document. Such information was not present either in the presentation on the due diligence investigations carried out at the Company. Oxxy Group has recognised that sufficient information on the conversion agreements was not provided in connection with the admission process, but has pointed to several places in the admission document where reference is made to loans from its shareholders. The Appeals Committee's evaluation is that the information provided is clearly not sufficient for the Company to be said to have complied with its duty to provide information. It was not possible on the basis of the information provided by the Company to understand that there were conversion agreements liable to have such a significant impact on the Company's issued shares.

The Appeals Committee's evaluation is that Oxxy Group breached both the general duty to provide information and the special requirements on the information to be included in the application and the admission document. With regard to the application, Section 3.2 (4) nos. 15 and 16, for example, make clear that the application shall in particular contain information on "any options, warrants or loans giving the right to require the company to issue shares, and any subordinated debt or transferable securities issued by the company" and on "any possible increases in the share capital, distribution sales of shares etc. that the company expects to carry out". With regard to the admission document, a clear and comprehensive description is also required "in which the significant characteristics and risk factors associated with the company and its shares are clearly presented", and, inter alia, "the amount of any convertible securities, exchangeable securities or securities with warrants, with an indication of the conditions governing and the procedures for conversion, exchange or subscription" also has to be provided, cf. Section 7 (2) of the Admission to Trading Rules and Section 21.1.4 of Appendix A: Content requirements for admission documents for Merkur Market.

The conversion agreements were entered into with the Company's two main shareholders, WNF and Dimitrov, the latter of whom is the Company's founder and CEO. Furthermore, both parties are represented on the Company's board of directors. The commitments were significant and the

conversion deadlines were clear. The size, the timing, and the terms and conditions for conversion should therefore have been made clear in the basis for the application for admission to trading on Merkur Market and also should have been highlighted by the Company in connection with the admission to trading process. Such processes rely on trust and the assumption that investment decisions can be made on the basis of correct and complete information.

The Appeals Committee's evaluation is that information on the conversion agreements between Oxxy Group and its main shareholders was of absolutely fundamental significance to the market's ability to determine fair market prices for the shares. The conversion agreements gave the two shareholders the right to convert private loans totalling around EUR 600,000 into new shares in the Company. The conversions took place on 11 and 12 April 2016, less than three months after the Company was admitted to trading on Merkur Market, and caused the total number of shares issued by the Company to increase by approximately 230%, and therefore significantly diluted existing shareholders.

The conversion agreements were of such a nature and significance that the Appeals Committee considers it unlikely that the Company was not aware of the necessity to provide such information in connection with the admission process. This appears particularly clear in light of the fact that other contingent liabilities that could increase the Company's share capital were presented in detail.

The Appeals Committee's evaluation is that Oxxy Group committed a significant breach of its duty to provide information pursuant to the Admission to Trading Rules by not providing sufficient information on its conversion agreements in its application and in its admission document.

Oxxy Group has argued that Oslo Børs was aware of the time pressure the Company was under and that Oslo Børs was negligent in its capacity as advisor by not advising the Company to delay the admission process. The Appeals Committee does not see that Oslo Børs either can be deemed to be the Company's advisor or to have breached its duty to provide guidance in connection with Oxxy Group's admission process. The responsibility to provide correct and exhaustive information in connection with the admission process lies with the Company. Oslo Børs' role is limited to providing guidance on the process and to carrying out a subsequent review. Oslo Børs is not the Company's advisor and is not responsible for the information that the Company provides or does not provide. The fact that the Company was under time pressure can have no significance to assessing the case. Oxxy Group failed to provide the requisite information on its conversion agreements, which the Company must have been aware would have been crucial to the market's ability to be in a position to determine fair market prices for its shares. The Appeals Committee cannot see how time pressure can be the reason for a company to breach its duty to provide information. Regardless of this, it is a company's responsibility to assess whether it needs to postpone the admission process if time pressures are creating a risk that the company will not fulfil the admission requirements. It is also up to a company to assess whether it needs to engage advisors for the process.

After admission to trading

The rules in the Continuing Obligations apply to companies whose shares have been admitted to trading on Merkur Market. The rules on companies' continuing duty of disclosure, including their duty to publicly disclose inside information without delay and on their own initiative, are contained in Section 3.1 of the Continuing Obligations. The duty to publicly disclose inside information to market participants is fundamental to preventing market abuse such as insider trading. Equal access to information enables investors to value companies more correctly. The principle is absolutely central to protecting the confidence upon which the marketplace relies. The rules on inside information in Section 3.1 of the Continuing Obligations reflect the provisions of the Securities Trading Act in this area.

In its decision of 17 August 2016, Oslo Børs took the view that the content of the conversion agreements between Oxxy Group and its main shareholders WNF and Dimitrov represented inside information and that the Company breached its duty pursuant to the provisions of the Continuing Obligations by not publicly disclosing the content of the conversion agreements either in connection with or after the admission of its shares to trading on Merkur Market.

The Appeals Committee considers it to be clear that the content of the conversion agreements represents inside information pursuant to Section 3.1.1 (2) and (3) of the Continuing Obligations. The content of the conversion agreements constitutes information of a precise nature on circumstances which had not been made public or were not commonly known in the market and which was obviously likely to have an effect on the shares in Oxxy Group. The conversion was imminent and involved significant dilution for existing shareholders. The Appeals Committee therefore agrees with Oslo Børs' view that the content of the conversion agreements should have been publicly disclosed without delay and on the Company's own initiative, pursuant to Section 3.1.1 (1).

As the above makes clear, Oxxy Group did not publicly disclose the information about the conversion agreements in connection with the Company's admission to trading on Merkur Market. Even in the stock exchange announcements of 11 and 12 April 2016 in which it was announced that new shares had been issued to WNF and Dimitrov, no mention is made of the conversion agreements. They were first reported in a brief stock exchange announcement two and half months later on 4 July 2016 once Oslo Børs had asked the Company to explain the grounds for the new shares being issued. A somewhat more detailed stock exchange announcement was published on 19 August 2016.

The Appeals Committee accordingly shares Oslo Børs' view that Oxxy Group breached the duty to provide information in both the Admission to Trading Rules and the Continuing Obligations by not providing Oslo Børs and the market with sufficient information on the conversion agreements it had entered into with its two main shareholders, WNF and Dimitrov. The breaches must be deemed to be material breaches of the rules. This is not altered by the fact that the Company, once it had been notified of the possibility of removal from trading, took measures to limit the negative effect of the breach of the duty to provide information. It is the Appeals Committee's view that Oxxy Group's breaches of the Admission to Trading Rules and of the Continuing Obligations provide grounds for the imposition of sanctions in the form of violation charges, cf. Section 12.3 (2) and (3) of the Continuing Obligations.

3.2. Case management mistakes

In this section the Appeals Committee considers whether Oslo Børs made mistakes in its management of the case that may have influenced the decision to impose a violation charge. Oxxy Group has argued that Oslo Børs made a mistake in the management of the case by only notifying the Company that it might be removed from the marketplace, not that Oslo Børs was considering imposing a violation charge.

It is clear that in its letter dated 1 July 2016 Oslo Børs notified the Company that it was considering imposing sanctions on the Company and that at that time it thought the conditions for Oxxy Group's shares to be removed from trading on Merkur Market had been met on the basis of gross and repeated breaches of the duty to provide information pursuant to the Admission to Trading Rules and the Continuing Obligations. In terms of its content, the notification is similar to Oslo Børs' resolution of 17 August 2016, with the exception that in the resolution a violation charge of NOK 1,000,000 is imposed instead of the Company being removed from trading. Oslo Børs' letter dated 1 July 2016 contains no explicit reference to it considering imposing a violation charge.

The rules on removing companies from trading are set out in Section 12.1 of the Continuing Obligations and the rules on violation charges are set out in Section 12.3 of the Continuing Obligations. When removing a company from trading, Oslo Børs is subject to a duty to discuss the issue with the company before such a decision is taken, cf. Section 12.1 (4) of the Continuing Obligations. No equivalent special duty to discuss the issue is set in relation to imposing violation charges. There is, however, a general requirement in Section 13 (1) for Oslo Børs to "examine the facts of the matter and obtain all the information needed to determine whether a rule has been breached". This applies to all types of sanctions, including imposing violation charges. There is also a requirement that "the company shall be informed that the imposition of a violation charge is under consideration and of the circumstances on which this is based", cf. Section 12.3 (3) no. 1 of the Continuing Obligations.

What is key to the requirements in Sections 13 (1) and 12.3 (3) item 1 of the Continuing Obligations is that Oslo Børs has to carry out the investigations and to gather the information required in order for it to have sufficient grounds for any decision to impose a sanction. This requires the company to be given the opportunity to express its views on the facts on which Oslo Børs is to base its decision. It is not necessary for Oslo Børs to notify the company of the size of the potential violation charge provided the facts that form the grounds for imposing the charge are clarified.

Oslo Børs notified Oxxy Group of its possible removal from trading, but, having received the Company's comments in response to this, Oslo Børs opted for a less punitive sanction in the form of a violation charge. The notification explains in detail the factual circumstances around the Company's breach of the rules for Merkur Market, which the Company was able to correct and supplement, and which Oslo Børs used as the grounds for its decision. The Appeals Committee's evaluation is that Oslo Børs had justifiable factual grounds for its decision to impose a violation charge. Oslo Børs did not make the Company aware that it was considering imposing a violation charge before the decision to do so was made, but the Appeals Committee takes the view that the requirement in Section 12.3 (3) no. 1 does not apply where Oslo Børs has first followed the more comprehensive discussion process associated with notifying a company of its possible removal from trading set out in Section 12.1 (4) of the Continuing Obligations. The Appeals Committee's assessment is that the requirement in Section 12.3 (3) no. 1 only applies independently where Oslo Børs judges that the strictest sanction relevant to a case is a violation charge. Regardless of this, the Appeals Committee does not think that not making reference to the possibility of a violation charge in the notification letter dated 1 July 2015 can have had an impact on Oslo Børs' decision in this case.

The Appeals Committee would like to add that the Company has had the chance to refute and pass comment on the decision to impose a violation charge through the process of appealing to the Merkur Market Appeals Committee. In connection with the appeal, Oslo Børs assessed the case again in order to determine whether there were grounds for it to reverse the decision. Oslo Børs made a reasoned decision on 16 September 2016 to uphold its resolution of 17 August 2016 to impose a violation charge. The Appeals Committee would also like to add that the change in the sanction to a violation charge has given the Company a further chance to challenge the grounds for the decision by using the appeals process, as decisions to remove a company from trading cannot be appealed to the Appeals Committee, cf. Section 14 (1) of the Continuing Obligations.

The Appeals Committee accordingly finds that Oslo Børs did not commit any mistakes in its management of the case that could be grounds for the decision to be changed in favour of Oxxy Group.

3.3. The violation charge

Finally, the Appeals Committee has considered whether Oslo Børs attached too little weight to the Company's financial situation in deciding on the scale of the violation charge to impose on Oxxy

Group. In connection with this the Appeals Committee expresses its view on whether Oslo Børs has failed to provide sufficient grounds for the scale of the charge, and whether the amount is disproportionate.

Oslo Børs chose to view the breaches as a single instance and accordingly to impose the maximum violation charge for one single instance. Section 12.3 (3) no. 2 states that the maximum violation charge is NOK 1,000,000 "for each violation". It also states that when the scale of a violation charge is being decided, "Oslo Børs will attach importance to the Company's market capitalisation and financial condition, as well as to the seriousness of the breach and its character in general".

The Appeals Committee notes that the provision in Section 12.3 (3) no. 2 sets out the framework for violation charges and provides details of the issues that will be part of the overall assessment required to determine the scale of a violation charge. The provision does not exhaustively state all the issues that will be assessed. Oslo Børs has to be able to attach importance to other issues that may have some relevance to the violation's impact on trading in the shares in the marketplace, including for example the duration of the violation or whether the company identified the violation itself and rectified it of its own accord. It is also the case that the importance attached to issues may vary from case to case. The seriousness of a violation will normally be the most important consideration when the size of a violation charge is being determined. In the event of particularly serious violations, the largest violation charge possible will potentially be imposed, even if other considerations imply a lower charge.

The Appeals Committee's evaluation is that the nature and seriousness of the violation in the present case are in themselves grounds for the maximum rate for a violation charge to be applied.

The Appeals Committee notes that the considerations of openness and transparency on Merkur Market are the same as on a regulated market place. Although Oxxy Group is not legally obliged to comply with the rules on the duty to provide information set out in the Securities Trading Act, the company is in reality subject to the same obligations due to the rules adopted for Merkur Market. The rules are intended to help prevent market abuse.

In common with Oslo Børs, the Appeals Committee regards the breach of trust that is represented by Oxxy Group's failure to properly provide information during the admission process and following its admission to trading as very serious. The intention is for companies to find the admission procedure for Merkur Market to be simpler than that for regulated marketplaces, but this does not involve any weakening of the requirements for companies to comply with the rules.

It is clear from Oslo Børs' decision that the Company's financial situation was assessed in connection with determining the scale of the violation charge. The Appeals Committee is of the opinion that a more comprehensive explanation of what assessments have been made of a company's financial position should normally be given, but that in light of the seriousness of the violation, the Committee thinks that what was stated represents sufficient grounds in this case. The Appeals Committee can see no evidence for the existence in this case of some consideration related to the Company's finances or some other special consideration that would mean that the size of the violation charge was disproportionate. Reference is made in this regard to the fact that the Company carried out a repair issue at the end of July 2016 through which it raised approximately NOK 1,500,000.

The Appeals Committee has accordingly concluded that there are no grounds for reducing the violation charge that Oslo Børs imposed on Oxxy Group.

Taking everything into account, the Appeals Committee's evaluation is that Oslo Børs' resolution imposing a violation charge on Oxxy Group must be upheld.

The ruling is unanimous.

Ruling:

Oslo Børs ASA's resolution of 17 August 2016 to impose a violation charge of NOK 1,000,000 on Oxxy Group PLC is upheld.

(sign.)

Mads Magnussen

(sign.)
Camilla Nyhus-Møller

(sign.)
Morten Brundtland