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Judgment in Case E-5/19 *Criminal proceedings against F and G*

THE EFTA COURT DELIVERS AN ADVISORY OPINION ON THE DEFINITION OF MARKET MANIPULATION

In a judgment delivered today, the Court answered questions referred by Borgarting Court of Appeal (*Borgarting lagmannsrett*) regarding the interpretation of the definition of market manipulation in Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (“the Directive”).

The case concerns criminal charges brought against F and G for allegedly manipulating the bond market on the Oslo Stock Exchange. F was an advisor and manager of a bond fund, and G was a bond broker in a brokerage firm. On 19 August 2016, F, through G, sold a bond holding with a nominal value totalling NOK 10 million at a price quote of 77.25, before, on 22 August 2016, purchasing a larger bond holding of NOK 50 million, at a price quote of 79.625. It was undisputed that the transactions in question were real, in the sense that they transferred expense and risk with full effect between independent parties.

The national court sought advice on the interpretation of the concept of market manipulation, as defined in Article 1(2) of the Directive, by referring five questions to the Court.

The Court held that real transactions may be capable of giving false or misleading signals as to the supply of, demand for, or price of financial instruments. Thus, they are not excluded from the scope of the first indent of Article 1(2)(a) of the Directive. The assessment of false or misleading signals must be based on objective factors and consideration of the results of transactions and their effects. In examining whether a transaction conveys false or misleading signals, the real interest in buying and selling the security in question, while not by itself a necessary or sufficient element in finding market manipulation, may support a finding of such objective factors.

Further, the Court held that individual prerequisites of an investor are not sufficient to determine whether the price is secured at an “abnormal” or “artificial” level, within the meaning of the second indent of Article 1(2)(a) of the Directive. However, the Court found that, subject to the referring court’s assessment and determination based on relevant signals, factors, and market conditions, the determination of an “abnormal” or “artificial” level may be established based on an individual transaction, and that a price can be secured in a transaction involving a security that has come into being through direct negotiations between two of several brokerage houses.

The Court noted that the second subparagraph of Article 1(2)(a) of the Directive requires the fulfilment of two conditions. Transactions must be based on legitimate reasons and be in conformity with accepted market practices. The Court went on to hold that reasons related to uncovering the market situation as to supply, demand, and price of a financial instrument, or taking advantage of other investors' uncertainty in this regard, can, in principle, constitute legitimate reasons, provided that they are not contrary to the objectives of the Directive and subject to an assessment by the national court of the investor's behaviour as a whole. The Court continued that it is also for the national court to assess whether an accepted market practice, applicable to the market and financial instrument in question, exists. Both the condition of a legitimate reason and the transaction's conformity with an accepted market practice need to be fulfilled for an investor to benefit from the defence in the second subparagraph of Article 1(2)(a).

Finally the Court held that information exchanges between an investor and a broker in relation to a potential transaction, such as that at issue in the main proceedings, cannot be considered as "dissemination" within the meaning of Article 1(2)(c) of the Directive.

The full text of the judgment may be found on the internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.