JUDGMENT OF THE COURT
10 December 2010*

(Directive 2004/25/EC – Acquisition of control – Mandatory bid – Adjustment of the bid price – Clearly determined circumstances and criteria – Reference to market price)

In Case E-1/10,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo tingrett (Oslo District Court), Norway, in a case pending before it between

Periscopus AS

and

Oslo Børs ASA;
Erik Must AS

concerning the interpretation of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, as adapted to the EEA Agreement by Protocol 1 thereto,

THE COURT,

composed of: Carl Baudenbacher, President and Judge-Rapporteur, Thorgeir Örlygsson and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

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* Language of the Request: Norwegian.

having considered the written observations submitted on behalf of:

– the Plaintiff, Periscopus AS, represented by Stephan L. Jervell, advokat, Oslo;

– Defendant No 1, Oslo Børs ASA, represented by Erik Keiserud, advokat, Oslo;

– Defendant No 2, Erik Must AS, represented by Kim Dobrowen, advokat, Oslo;

– the Norwegian Government, represented by Marius Emberland, advocate, Office of the Attorney General (Civil Affairs), and Janne Tysnes Kaasin, adviser, Ministry of Foreign Affairs, acting as agents;

– the Lithuanian Government, represented by Rūta Mackevičiencė, Deputy Director General of the European Law Department, and Karolis Dieninis, Head of Compatibility Assessment with the EU Law Division of the European Law Department, Ministry of Justice of the Republic of Lithuania, acting as agents;

– the EFTA Surveillance Authority, represented by Xavier Lewis, Director, Bjørnar Alterskjær, Deputy Director, and Markus Schneider, Officer, Department of Legal & Executive Affairs, acting as agents; and

– the European Commission, represented by Gerald Braun and Nicola Yerrell, members of its Legal Service, acting as agents,

having regard to the Report for the Hearing,

having heard oral argument of the Plaintiff, represented by Stephan L. Jervell, advokat, Defendant No 1, represented by Rolf Chr. Trolle Andersen, advokat, Defendant No 2, represented by Kim Dobrowen, advokat, and Fredrik Bøckman Finstad, advokat, the Norwegian Government, represented by its agent, Marius Emberland, the EFTA Surveillance Authority, represented by its agent, Bjørnar Alterskjær, and the European Commission, represented by its agent, Nicola Yerrell, at the hearing on 29 October 2010,

gives the following

Judgment

1 By a letter dated 26 March 2010, registered at the Court on 31 March 2010, Oslo tingrett made a request for an Advisory Opinion in a case pending before it between the Plaintiff, Periscopus AS (hereinafter “Periscopus”), and Oslo Børs ASA (hereinafter “the Oslo Stock Exchange”) as Defendant No 1 and Erik Must AS as Defendant No 2.

2 Periscopus was the second-largest shareholder in Gyldendal ASA (hereinafter "Gyldendal") at the time when Erik Must AS issued a mandatory bid to acquire all outstanding shares in that company. The Oslo Stock Exchange, in its capacity as supervisory authority, approved the bid made by Erik Must AS. The dispute before Oslo tingrett concerns the question of how the bid price to be offered in the mandatory bid should have been established.

I Legal background

EEA Law

3 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "the SCA") reads:

> *The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*
>
> *(…)*

4 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (hereinafter "Directive 2004/25" or "the Directive") is referred to at point 10d of Annex XXII to the EEA Agreement.

5 Article 3 of Directive 2004/25 ("General Principles") reads:

> *1. For the purpose of implementing this Directive, Member States shall ensure that the following principles are complied with:*
>
> *(a) all holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected;*
>
> *(…)*
>
> *(d) false markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;*
>
> *(…)*

6 Article 5 of Directive 2004/25 ("Protection of minority shareholders, the mandatory bid and the equitable price") reads:

> *1. Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a*

company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.

(…)

4. The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.

Provided that the general principles laid down in Article 3(1) are respected, Member States may authorise their supervisory authorities to adjust the price referred to in the first subparagraph in circumstances and in accordance with criteria that are clearly determined. To that end, they may draw up a list of circumstances in which the highest price may be adjusted either upwards or downwards, for example where the highest price was set by agreement between the purchaser and a seller, where the market prices of the securities in question have been manipulated, where market prices in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example the average market value over a particular period, the break-up value of the company or other objective valuation criteria generally used in financial analysis.

Any decision by a supervisory authority to adjust the equitable price shall be substantiated and made public.

(…)

National Law

7 Directive 2004/25/EC has been implemented into Norwegian law by Act No 75 of 29 June 2007 relating to Securities Trading (hereinafter “the Securities Trading Act”).

8 Pursuant to Sections 6-1 and 6-6 of the Act, whosoever acquires more than 1/3, 40% or 50% of the votes in a company listed on a Norwegian regulated market is obliged to make a bid to the remaining shareholders of that company.

9 Section 6-10(4) of the Securities Trading Act reads:

> *The bid price shall be at least as high as the highest consideration that the offeror has paid or agreed to pay during the six-month period preceding the time at which the obligation to make a bid arose. If it is clear that the market price at the time when the obligation to make a bid arises is higher than the price that results from the first sentence, the bid price shall be at least as high as the market price.*

10 Concerning the interpretation of the latter provision, the preparatory works to the second sentence of Section 6-10(4) of the Securities Trading Act state that the "*(b)asis shall be the price paid and the market price shall only be used where it is clear that the latter is higher*". This is clarified by the Ministry in its proposition to parliament which states: "*For the market price to be deemed to be clearly higher, the Ministry assumes that it ought to have been stably higher for a period of time. The proposed rule shall not cause the bid price to rise in periods during which the market price in question fluctuates widely*".

11 Section 6-4 of the Securities Trading Act specifies the Oslo Stock Exchange as the supervisory authority. According to Section 6-14 of the Securities Trading Act, the bid and the offer document (including the bid price) must be approved by the supervisory authority.

II Facts and procedure

12 Gyldendal is the parent company of the Gyldendal Group and the company's shares are listed on the Oslo Stock Exchange.

13 On 26 November 2008, Erik Must AS entered into an agreement with Uldal Invest AS for the purchase of Uldal Invest's 357 967 shares in Gyldendal at a price of NOK 350 per share. The shares constituted 15.2% of the shares in Gyldendal. This agreement was made public in a stock exchange announcement on 26 November 2008 and the purchase was effected on 1 December 2008. Following this purchase, Erik Must AS owned 52.5% of the shares in Gyldendal. Therefore, it was required to make a bid for the outstanding Gyldendal shares.

14 Periscopus was at the time the second-largest shareholder in Gyldendal, controlling 30.2% of the shares. Taking the view that the agreed consideration of NOK 350 per share was conspicuously low in relation to the trading price for Gyldendal shares during the preceding year, Periscopus requested by letter of 1 December 2008 that the Oslo Stock Exchange conduct an investigation into the acquisition in question.

15 At the time when Erik Must AS made the mandatory bid, there was a standing buy order for the purchase of a limited number of Gyldendal shares at NOK 400 in the trading system of the Oslo Stock Exchange on behalf of Periscopus. The average share price in 2008 up until the date of Erik Must AS's purchase was NOK 406.53. Apart from the purchase by Erik Must, five trades of more than 1 000 shares occurred in 2008, constituting 97.5% of the remaining trading in Gyldendal shares that year. Total trading in Gyldendal shares that year on the

Oslo Stock Exchange, apart from the transaction giving rise to the proceedings at hand, was 30 196 shares with a total value of NOK 12 275 510.

16 On 18 December 2008, Erik Must AS sent the offer document containing the bid price of NOK 350 per share to the Oslo Stock Exchange which approved the bid price of NOK 350 by letter of the same day.

17 In the letter, the Oslo Stock Exchange took the view that the market price alternative should be used only in circumvention cases. Based on its investigations, it found no grounds for supposing that the bid price did not correspond to the highest consideration paid or agreed by Erik Must AS during the six-month period preceding the time at which the obligation to make the bid arose. Noting the limited number of trades in the shares, for which, moreover, a single shareholder (Periscopus) had been responsible in virtually all cases (more than 29 435 of a total of 30 196 traded shares), it concluded that it was not possible to determine a sufficiently clear market price for Gyldendal shares.

18 On 22 December 2008, the Oslo Stock Exchange sent its formal letter of approval of the bid to Erik Must AS. On the same day, Periscopus lodged an appeal with the Oslo Stock Exchange Appeals Committee (hereinafter “the OSEAC”) against that decision, claiming that the mandatory bid price should be set at NOK 406.53, i.e. corresponding to the average price of the 30 196 shares in Gyldendal traded between 1 January 2008 and the date of Erik Must AS’s purchase.

19 By decision of 21 January 2009, the OSEAC upheld the approval of the bid. Having regard to the word “clear” in the second sentence of Section 6-10(4) of the Securities Trading Act, it reasoned that fairly strong evidence of a market price would be required for that provision to apply. In addition to the arguments relied on by the Oslo Stock Exchange, it pointed out that the last trade before the transaction in question comprised only 40 shares and took place on 4 November 2008, three weeks prior to the purchase by Erik Must AS. During the intervening period, the Oslo Stock Exchange’s OSBEX index fell by 21.88%.

20 Periscopus accepted the mandatory bid on 26 January 2009 and sold its holding to Erik Must AS for NOK 350 per share. However, by notice of proceedings of 9 July 2009, it brought an action against the Defendants before Oslo tingrett.

21 In those proceedings, Periscopus claims in relation to the Oslo Stock Exchange that the decision by the OSEAC should be declared null and void as, in its view, the bid price to be offered in the mandatory bid should have been calculated on the basis of the market price alternative set out in the second sentence of Section 6-10(4) of the Securities Trading Act. In relation to both Defendants, Periscopus claims up to NOK 37 182 052.62 in damages plus interest thereon to cover the losses which it claims to have suffered. It considers that the bid price should have been no less than NOK 402.31, which corresponds to the average price of buy orders for Gyldendal shares during the period from 4 November

2008 until 26 November 2008, when the obligation of Erik Must AS to make a bid materialised.

22 The main argument advanced by Periscopus before the national court is that the market price alternative in the second sentence of Section 6-10(4) of the Securities Trading Act is an equivalent and alternative way of calculating the bid price that cannot be restricted to circumvention cases. It submits that the Gyldendal share price had been stably higher than NOK 350 for an extended period of time before the bid was made and that therefore the market price alternative must be applied.

23 According to the Oslo Stock Exchange, it must be assumed that the price negotiated between two independent parties reflects the market price. It submits that in the present case it was not possible to determine a market price. Moreover, for it to be "clear" that the market price is higher than the agreed consideration, it maintains that a high standard of proof must be met. Erik Must AS concurs with that view. In addition, it contends that the interpretation of Section 6-10(4) of the Securities Trading Act advanced by Periscopus is incompatible with Directive 2004/25.

24 Oslo tingrett takes the view that pursuant to the second subparagraph of Article 5(4) of Directive 2004/25, national legislation may authorise the supervisory authority to adjust the bid price in derogation from the main rule provided for in the first subparagraph. However, it is unsure whether – and if so, under what conditions – the market price alternative laid down in the second sentence of Section 6-10(4) of the Securities Trading Act meets the Directive's requirements for "criteria that are clearly determined".

25 Under those circumstances, Oslo tingrett decided to request an Advisory Opinion on the following question:

> *Is it in accordance with Article 5(4) second subparagraph of Directive 2004/25/EC of the European Parliament and of the Council to order an offeror making a public bid to offer a bid price that exceeds the price that the offeror paid or agreed to during the six-month period preceding the time when the obligation to make an offer arose, considering that the market price at the time at which the obligation to make a bid arose is higher than the price that the offeror would otherwise be obliged to offer pursuant to the [Norwegian] Securities Trading Act?*

26 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Admissibility

27 Periscopus contests the admissibility of the request for an Advisory Opinion, arguing that the question referred by Oslo tingrett constitutes a request for an interpretation of national legislation and an assessment of the validity of that legislation.

28 It is not the Court's task to assess under the advisory opinion procedure whether national law is compatible with EEA law, see Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 34. Nor is the Court competent to rule on national law, see Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 22.

29 It follows from the request, however, that Oslo tingrett is faced with several possible interpretations of the Securities Trading Act and seeks guidance on the interpretation of EEA law, in particular Article 5(4) of Directive 2004/25. The request for an Advisory Opinion is thus admissible.

IV The question

30 In accordance with the first subparagraph of Article 5(4) of the Directive, as a main rule, the "equitable price" to be offered in a mandatory bid must be the highest price paid by the offeror over a certain period before the obligation to make a bid arises. The question from Oslo tingrett concerns the interpretation of the second subparagraph of Article 5(4) of the Directive according to which EEA States may authorise their supervisory authorities under certain conditions to adjust this mandatory bid price. According to this provision, any adjustment must be based on circumstances which are "clearly determined" and the adjusted price must be calculated in accordance with criteria which are also "clearly determined".

31 Oslo tingrett has to interpret a provision of national law which requires the adjustment of the mandatory bid price where it is "clear that the market price at the time when the obligation to make a bid arises is higher" and provides that the adjusted bid price must be "at least as high as the market price". Essentially, it seeks to establish whether a rule of national law such as the provision at hand satisfies the requirement under the second subparagraph of Article 5(4) of the Directive that any adjustment must be based on circumstances and criteria that are "clearly determined".

Arguments submitted to the Court

32 Periscopus claims that the terms "market price" and "clear market price" are well-known criteria in Norwegian law, and, thus, constitute "criteria that are clearly determined" within the meaning of the second subparagraph of Article 5(4) of the Directive. Therefore, the Norwegian legislature was entitled to

exercise its discretion to establish this alternative means of determining the bid price in an offer.

33 Periscopus argues further that the reference to the market price protects minority shareholders and is a true, fair and correct valuation technique which respects the general principles laid down in Article 3(1) of the Directive. In particular, Periscopus takes the view that market prices are transparent and publicly available and, as a result, there is no loss of predictability for an offeror where reference is made to the market price.

34 The Oslo Stock Exchange refers to the legislative background to the Directive. The first subparagraph of Article 5(4) was enacted as a means to reduce disparities between the laws of the Member States on the price to be paid in a mandatory bid. The aim was to introduce a common rule applying across the EU and the EEA which, at the same time, provides sufficient flexibility in particular circumstances to ensure both fair treatment of shareholders and predictability as to the consideration to be offered in a mandatory bid, thus facilitating the free movement of capital within the EU and the EEA.

35 According to the Oslo Stock Exchange, the second subparagraph of Article 5(4) of Directive 2004/25 constitutes an exemption focusing on exceptional situations, for example, collusion between the bidder and the seller. Only in those circumstances may Member States allow their supervisory authorities to deviate, on a case-by-case basis, from the "highest price paid rule", provided that the criteria for such a decision are clearly determined and that the general principles in Article 3(1) of the Directive are respected. Thus, the authority to adjust the bid price should be interpreted narrowly.

36 Consequently, the Oslo Stock Exchange submits that it is incompatible with EEA law to apply the market price alternative where (i) there is nothing to indicate that the price paid or agreed by the offeror was not set at arms' length or through ordinary market mechanisms, and (ii) it is not possible to establish a market price based on clearly determined criteria. The Oslo Stock Exchange states that in the absence of regular market trades of a share, "market price" does not constitute a clear criterion.

37 Erik Must AS emphasises that the "highest price paid rule" laid down in the Directive aims at securing the predictability of the bid price and the greatest possible legal certainty for an offeror. It considers the term "market price" to be vague and imprecise. In particular, it argues that there is no indication of the relevant interval for determining the market price, whether or not the price must be a volume-weighted average and whether actual trades are necessary or standing buy orders suffice. Additionally, it submits that the market price can be manipulated in low liquidity markets.

38 The Lithuanian Government contends that the obligation to determine a bid price as high as the market price at the time when the obligation to make a bid arose is one possible further instrument which may be established by a Member State

pursuant to the second subparagraph of Article 5(4) of the Directive. It considers that the "market price rule" both relates to clear circumstances and sets out clear criteria.

39 The Lithuanian Government argues that such a rule is transparent, enables other investors to predict the price of a mandatory offer and effectively safeguards their interests by upholding the market's evaluation of the value of a company. In addition, the Lithuanian Government notes that the rule provides the acquirer of a company with a certain degree of predictability as to the price of the mandatory bid.

40 The Norwegian Government submits that according to Article 1(1), the Directive provides for the coordination, not the harmonisation, of national laws relating to takeover bids. Moreover, Article 3 of the Directive establishes only guiding principles for the implementation of the Directive and not general principles of Community law. Reference is made to Case C-101/08 *Audiolux SA and Others* [2009] ECR I-9823, paragraph 51.

41 The Norwegian Government argues further that the reference to "circumstances and … criteria that are clearly determined" is intended only to facilitate the obligation in the third subparagraph which is to substantiate and make public any decision to adjust the price. It does not require the implementing legislation to list the relevant circumstances and criteria.

42 The EFTA Surveillance Authority (hereinafter "ESA") contends that the definition of an equitable price in Article 5(4) of Directive 2004/25 contains a common rule with an optional derogation, the details of which are to be determined by the Member States. The optional derogation is warranted by the need for flexibility in financial markets.

43 In relation to the requirement to define the circumstances in which the price may be adjusted, ESA submits that a situation where the market price is "clearly" higher than the price paid by an offeror during the six-month period preceding the time when the obligation to make an offer arose may constitute a situation where the simple application of the latter price as the mandatory bid price results in an unfair price.

44 On the issue of whether a criterion is clearly determined, ESA considers that, in general, reference may be had to the principle of legal certainty which is a general principle of EEA law. According to that principle, legislation must be sufficiently clear and precise, so that persons concerned, including third parties such as public authorities, may know unambiguously their rights and duties and take measures accordingly. Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, paragraph 163. According to ESA, the discretion enjoyed by the Member States in implementing the second subparagraph of Article 5(4) of the Directive must be construed narrowly, as it constitutes an exception to the general rule laid down in the first subparagraph. In addition, ESA emphasises that the principles of equivalent

treatment and of minority shareholder protection referred to in Article 3(1)(a) of the Directive must be respected. Adjusting the price downwards without adequate justification does not protect the other holders of securities whereas adjusting the price upwards without adequate justification could discourage bidders.

45 The European Commission notes that the indicative list of examples in the second subparagraph of Article 5(4) of Directive 2004/25 suggests a fairly precise standard for the definition of the relevant circumstances and criteria to be considered “clearly determined”. The provisions in the Securities Trading Act neither define the term “market price” nor provide guidance as to when it is “clear” that the market price is higher at the time when the obligation to make a bid arises. However, having regard to additional explanations in the preparatory works for the Securities Trading Act, the Commission takes the view that if this additional material may be taken into account by the national court in its interpretation of Norwegian law, the criteria are sufficiently clearly determined for the purposes of Article 5(4) of Directive 2004/25.

Findings of the Court

46 The ninth recital in the preamble to the Directive refers to the need to establish an “equitable price in accordance with a common definition”, whereas according to the sixth recital, takeover regulation should be flexible and capable of dealing with new circumstances as they arise and should accordingly provide for the possibility of exceptions.

47 It is against this background that the second subparagraph of Article 5(4) provides the EEA States with a certain discretion to define circumstances in which exceptions from the main rule (the “highest price paid rule”) laid down in the first subparagraph of Article 5(4) of the Directive apply. The provision also lists examples of possible exceptions which address, first, circumstances where the bid price established according to the main rule might, as a result of particular circumstances, not be equitable, for example, because the market has been manipulated, and, second, situations where other legitimate interests might be at stake, such as the need to enable a firm in difficulty to be rescued. Indeed, if an EEA State is to have the possibility to deal in a flexible way with new circumstances as they arise, it cannot be required to describe in detail each specific situation in advance.

48 Nevertheless, the Directive aims at achieving a high level of predictability for investors. This follows not only from the second subparagraph of Article 5(4) but also from the purpose of the Directive as expressed in the third recital in its preamble, namely to create EEA-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids. This is also in keeping with the principle of legal certainty. Consequently, for the circumstances and criteria referred to in the second subparagraph of Article 5(4) to be “clearly determined”, they must be formulated in a manner which renders the national rule easily applicable in the most typical cases falling within the rule.

49 The criterion used by the national legislation at hand, "market price at the time when the obligation to make a bid arises", gives no indication whether or not the price must be a volume-weighted average, whether actual trades are necessary or standing buy or sell orders suffice and on the time interval which is relevant. These are issues which have to be addressed in many, if not most, cases in which the question of adjusting the bid typically arises.

50 Accordingly, in a case such as the one at hand, a reference to "the market price at the time when the obligation to make a bid arises" cannot be considered to constitute circumstances and criteria which are clearly determined, as required by the second subparagraph of Article 5(4) of the Directive. Such a rule does not enable a prudent investor to be informed about the extent of his rights and obligations in such a way as to allow an adjustment of the equitable price established according to the main rule under the first subparagraph of Article 5(4).

51 This is the case regardless of whether the rule requires it to be "clear" that the market price at the time when the obligation to make a bid arose is higher than the highest price paid or agreed to by the offeror. Such a qualification does not clarify the issues mentioned in paragraph 49 above. Nor is there sufficient clarification in comments such as those found in the preparatory works to the Securities Trading Act which specify, first, that the market price "ought to have been stably higher for a period of time" for the provision to apply, and, second, that the rule "shall not cause the bid price to rise in periods during which the market price in question fluctuates widely". Accordingly, it is unnecessary for the Court to address whether clarifying comments in preparatory works to a provision such as the second sentence of Section 6-10(4) of the Securities Trading Act may help secure full implementation of the requirements of the Directive in a national legal system such as the one at hand.

52 In conclusion, the answer to the question posed by the national court must be that the second subparagraph of Article 5(4) of Directive 2004/25/EC precludes national legislation which provides that the price to be offered in a mandatory bid must be adjusted to be at least as high as the "market price" in situations where it is clear that the "market price" is higher than the price calculated according to the main rule prescribed in accordance with the first subparagraph of Article 5(4), without further clarification of the term "market price". In particular, further clarification is needed whether or not the "market price" must be calculated on the basis of a volume-weighted average, whether actual trades are necessary or standing buy or sell orders suffice in order to establish a "market price" and on the time interval relevant for determining the "market price".

V Costs

53 The costs incurred by the Norwegian Government, the Lithuanian Government, the EFTA Surveillance Authority and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings

are a step in the proceedings pending before Oslo tingrett, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by Oslo tingrett hereby gives the following Advisory Opinion:

The second subparagraph of Article 5(4) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids precludes national legislation which provides that the price to be offered in a mandatory bid must be adjusted to be at least as high as the "market price" in situations where it is clear that the "market price" is higher than the price calculated according to the main rule prescribed in accordance with the first subparagraph of Article 5(4), without further clarification of the term "market price". In particular, further clarification is needed of the time interval relevant for determining the "market price", whether or not the "market price" must be calculated on the basis of a volume-weighted average, and whether actual trades are necessary or standing buy or sell orders suffice in order to establish a "market price".

Carl Baudenbacher | Thorgeir Örlygsson | Henrik Bull

Delivered in open court in Luxembourg on 10 December 2010.

Skúli Magnússon
Registrar

Carl Baudenbacher
President