REPORT FOR THE HEARING
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.[1]

I Introduction

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

2. The Plaintiff, Periscopus AS, was the second-largest shareholder in Gyldendal ASA (hereinafter "Gyldendal") at the time when Defendant No 2, Erik Must AS, issued a mandatory bid to acquire all outstanding shares in Gyldendal. Defendant No 1, Oslo Børs ASA (the Oslo Stock Exchange), in its capacity as takeover supervisory authority, approved the bid made by Defendant No 2. The case pending before Oslo tingrett concerns in essence the question of whether the bid price offered by Defendant No 2, and approved by Defendant No 1, is in accordance with the Norwegian legislation on mandatory takeover bids.

[1] OJ 2004 L 142, p. 12, referred to at point 10d of Annex XXII to the EEA Agreement.

II 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. Article 40 of the Agreement on the European Economic Area (hereinafter "EEA") reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.*

5. 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.

6. 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:*
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> *(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;*
>
> *(…)*

2. With a view to ensuring compliance with the principles laid down in paragraph 1, Member States:

(a) shall ensure that the minimum requirements set out in this Directive are observed;

(b) may lay down additional conditions and provisions more stringent than those of this Directive for the regulation of bids.

7. 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.

(…)

6. In addition to the protection provided for in paragraph 1, Member States may provide for further instruments intended to protect the interests of the holders of securities in so far as those instruments do not hinder the normal course of a bid.

National law

8. Directive 2004/25/EC is implemented into Norwegian law by Act No 75 of 29 June 2007 relating to Securities Trading (hereinafter the "Securities Trading Act").

9. 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.

10. 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.

11. Concerning the application of the latter provision, it is stated in the preparatory works to the second sentence of Section 6-10(4) of the Securities Trading Act 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*".[2] This is clarified by the Ministry: "*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*".[3]

12. Section 6-4 of the Securities Trading Act specifies Defendant No 1 as the takeover supervisory authority. According to Section 6-14 of the Securities Trading Act, the bid and the offer document (including the bid price) shall be approved by the takeover supervisory authority.

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2 NOU 1996:2 page 122.

3 Proposition to the Odelsting No 29 (1996-97) page 79.

III Facts and procedure

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

14. On 26 November 2008 Defendant No 2, 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, Defendant No 2 owned shares corresponding to 52.5% of the shares in Gyldendal. Therefore, it was required to make a bid for the outstanding Gyldendal shares.

15. The Plaintiff, Periscopus AS, was at the time the second-largest shareholder in Gyldendal, controlling 30.2% of the shares. There has been a long-standing dispute between the Plaintiff and Defendant No 2 relating to, amongst other things, management and control of Gyldendal. Taking the view that the agreed consideration of NOK 350 per share was conspicuously low in relation to the trading price for the Gyldendal share during the past year, the Plaintiff requested in a letter dated 1 December 2008 that the Oslo Stock Exchange, Defendant No 1, conduct an investigation of the acquisition in question.

16. At the time when Defendant No 2 made the mandatory bid, there was a standing buy order in the trading system of the Oslo stock exchange on behalf of the Plaintiff for the purchase of a limited number of Gyldendal shares at NOK 400. The average share price in 2008 up until the date of Defendant No 2's purchase was NOK 406.53. Apart from the purchase by Defendant No 2, 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 at the Oslo stock exchange, apart from the transaction giving rise to the proceedings at hand, was 30,196 shares totalling NOK 12,275,510.

17. On 18 December 2008, Defendant No 2 sent the offer document containing the bid price of NOK 350 per share to the stock exchange. Defendant No 1 approved the bid price of NOK 350 in a letter of the same day.

18. In the letter, Defendant No 1 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 Defendant No 2 during the six-month period preceding the time at which the obligation to make the bid arose. Pointing out the limited number of trades in the shares, for which, moreover, a single shareholder (the Plaintiff) 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 the Gyldendal share.

19. On 22 December 2008, Defendant No 1 sent the formal letter of approval of the bid to Defendant No 2. The Plaintiff appealed the decision to the Oslo Stock Exchange Appeals Committee (hereinafter "OSEAC") the same day, claiming that the mandatory bid price should be set to NOK 406.53, i.e. corresponding to the average price of the 30,196 shares in Gyldendal that were traded between 1 January 2008 and the date of Defendant No 2's purchase.

20. 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 Defendant No 1, 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 Defendant No 2. During that time, the Oslo Stock Exchange's OSBEX index fell by 21.88%.

21. The Plaintiff accepted the mandatory bid on 26 January 2009 and sold its holding to Defendant No 2 for NOK 350 per share. However, by notice of proceedings dated 9 July 2009, it brought an action against the defendants before Oslo tingrett.

22. With respect to Defendant No 1, the Plaintiff claims that the decision by the OSEAC be declared null and void. In relation to both Defendant No 1 and Defendant No 2, the Plaintiff claims up to NOK 37,182,052.62 plus interest in damages to cover the losses it maintains it has suffered. It considers the bid price should have been at least 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 Defendant No 2 to make a bid materialized.

23. The Plaintiff's main argument is that the market price alternative in Section 6-10(4) second sentence 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 the market price alternative must be applied.

24. Defendant No 1 argues that 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.

25. Defendant No 2 concurs with Defendant No 1; in addition, it considers that the Plaintiff's interpretation of Section 6-10(4) of the Securities Trading Act would be incompatible with Directive 2004/25.

26. Oslo tingrett considers that according 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 relation to the main rule provided for in the first subparagraph. However, it is unsure whether – and if so, under what conditions – the market price alternative in Section 6-10(4) second sentence of the Securities Trading Act meets the Directive's requirements for "clearly defined criteria".

27. Under these circumstances, Oslo tingrett has decided to refer the following question to the Court:

> **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?**

IV Written Observations

28. Pursuant to Article 20 of the Court's Statute and Article 97 of the Rules of Procedure, written observations have been received from:

- the Plaintiff, represented by Stephan L. Jervell, advokat, Oslo;
- Defendant No 1, represented by Erik Keiserud, advokat, Oslo;
- Defendant No 2, represented by Kim Dobrowen, advokat, Oslo;
- the Norwegian Government, represented by Fanny Platou Amble, 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 Mackevičienė, 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.

The Plaintiff

29. The Plaintiff is principally of the opinion that the request for an Advisory Opinion is inadmissible because it calls for an interpretation of national legislation and/or an assessment of whether national legislation is in accordance with the Directive. Alternatively, it submits that the request must be answered in the positive.

30. Concerning its principal line of reasoning, the Plaintiff considers that the question referred by Oslo tingrett corresponds, in reality, to a request for an interpretation of national legislation and an assessment of the validity of the Norwegian legislation. To the Plaintiff, an interpretation of the term "clear market price" is related to national law only and thus outside the Court's jurisdiction. Similarly, the Court does not have jurisdiction to assess the compatibility of a Norwegian rule of law with the EEA Agreement.[4] Lastly, the Plaintiff submits that it would also be inadmissible to examine circumstances outside the scope of the wording of the request, such as to give a more general clarification of the Directive.[5]

31. In its alternative line of reasoning, the Plaintiff claims that the terms "market price" and "clear market price" are well-known criteria in Norwegian law, and thus "criteria that are clearly determined" in the meaning of the second subparagraph of Article 5(4) of the Directive. Reference is made to the preparatory works of the Norwegian legislation, case law and legal doctrine. It submits that the Norwegian legislator was therefore entitled to exercise its discretion in granting this alternative way to determine the bid price in an offer.

32. Furthermore, the Plaintiff submits that the reference to market price protects minority shareholders[6] 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, it is argued that market prices are transparent and

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4 Reference is made to Article 34 SCA; Notice 1/99 – Note for guidance on requests by national courts for advisory opinions, OJ 1999 C 223, p. 4; Article 267 TFEU; Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023; Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, at paragraphs 6–7; and Fenger/Broberg, *Præjudicielle forelæggelser for EF-Domstolen*, Copenhagen 2007, p. 91.

5 Reference is made to Case C-189/95 *Franzén* [1997] ECR I-5909, at paragraph 89; Case C-466/00 *Kaba* [2003] ECR I-2219, at paragraphs 40–41; and Fenger/Broberg, *Præjudicielle forelæggelser for EF-Domstolen*, Copenhagen 2007, pp. 254–256.

6 Reference is made to recital 9 in the preamble to Directive 2004/25.

publicly available; thus the offeror does not lose any predictability due to a reference to market price.

33. To support its view that Member States have a wide margin of discretion in the implementation of the Directive, the Plaintiff also refers to the different implementations of the Directive in other Member States, namely in Denmark,[7] Sweden,[8] Finland,[9] Italy, Ireland,[10] Germany[11] and the Netherlands.

34. Hence, provided that the Court finds the request to be admissible, the Plaintiff suggests answering the question as follows:

> *It is 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.*

Defendant No 1

35. Defendant No 1 submits that the request is admissible. It argues that Section 6-10(4) of the Securities Trading Act should be interpreted in a manner that complies with Article 5(4) of Directive 2004/25. Accordingly, the Court's guidance in the interpretation of the Directive is relevant to the proceedings pending before Oslo tingrett.[12]

36. On substance, Defendant No 1 considers that any obstacle to takeovers amounts to a restriction of the free movement of capital contrary to Article 40 EEA.[13] Thus, any implementation of the Directive as well as any application of

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7 Reference is made to § 8 of the regulation to the Danish Securities Trading Act, which the Plaintiff considers comparable to the Norwegian legislation; a decision of the Danish Financial Supervisory Authority of 21 July 2006 and a comment on this decision in Paul Van Hooghten (ed.), *The European Takeover Directive and its implementation*, Oxford University Press 2009, p. 219.

8 Reference is made to Clause II. 13 of the NASDAQ OMX Stockholm rules regarding public acquisitions of 1 October 2009.

9 Reference is made to Section 11 of the Finish Securities Market Act.

10 Reference is made to Section 9.4 (f) of the Irish 1997 Takeover Panel Act.

11 Reference is made to Paul Van Hooghten (ed.), *The European Takeover Directive and its implementation*, Oxford University Press 2009, p. 331.

12 Reference is made to Case E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, at paragraph 15.

13 Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, at paragraph 25; Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, at paragraphs 44-45; Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, at paragraph 12; Joined Cases C-163/94,

the optional and discretionary provisions of the Directive leading to an adjustment of the mandatory bid price exceeding the highest price paid or agreed in the preceding six-month period must, in order not to constitute an unjustified restriction, be justified by clear criteria which safeguard the predictability as well as legal certainty for potential investors.[14]

37. Concerning Directive 2004/25, Defendant No 1 refers to its legislative background. The first subparagraph of Article 5(4) of the Directive was established 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 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 EEA. The highest price paid rule was considered to offer the double benefit of allowing minority shareholders to fully share the premium paid by the acquirer while at the same time permitting the offeror itself to determine the maximum price it is prepared to pay to acquire all the company's shares.[15]

38. It is argued that the second subparagraph of Article 5(4) of Directive 2004/25 is an exemption that focuses on exceptional situations, e.g. collusion between the bidder and the seller. It is only for such circumstances that Member States may allow their supervisory authorities to decide, on a case-by-case basis, to deviate from the "highest price paid principle", 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.[16]

39. Accordingly, it is submitted that applying "the market price alternative" would not be in accordance with EEA law (i) where 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) where it is not possible to establish a market price based on clearly determined criteria.

C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, at paragraph 25; and Case C-302/97 *Konle* [1999] ECR I-3099, at paragraph 44.

14 Reference is made to Case C-265/95 *Commission* v *France* [1997] ECR I-6959, at paragraphs 33–35.

15 Reference is made to recitals 1 and 20 in the preamble to Directive 2004/25; and the Report of the European Commission's High Level Group of company law experts on issues related to takeover bids of 10 January 2002, pp. 45 and 49–50.

16 Reference is made to Memo/02/201 of the Commission of 2 October 2002 "Proposal for a Directive on Takeover Bids – Frequently Asked Questions", p. 2; the Report of the European Commission's High Level Group of company law experts on issues related to takeover bids of 10 January 2002, p. 50; and Silja Maul/Danièle Muffat-Jeandet, *Takeover bids in Europe*, Memento Verlag 2008, p. 26.

40. Defendant No 1 maintains that the interpretation of Section 6-10(4) of the Securities Trading Act argued by the Plaintiff is not sufficiently precise and predictable to fulfil the latter requirement, and would mean that the offer price would have to be set in an arbitrary manner, based on a large number of unpredictable factors. Determining the "market price" is submitted to be particularly difficult in cases of illiquid securities. It is pointed out that in the case at hand, the main index at the Oslo Stock Exchange fell more than 20% in the three weeks since the last trade before the mandatory bid was triggered, and during which period Gyldendal had presented negative third-quarter results.

41. Defendant No 1 notes that it is important also to the authorities that the offer price be easy to determine, in order to avoid liability in cases of incorrect assessment of the bid price where this is difficult to determine unequivocally.

42. In view of the above, Defendant No 1 suggests the following answer:

> *In cases where there is no indication that the price the offeror has paid or agreed to pay when the obligation to make an offer arose, was not set at arms' length or through ordinary mechanisms, and where it is not possible to determine a market price based on clearly determined criteria, it would not be 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 pay in the six-months 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 an offer arose is higher than the price that the offeror would otherwise be obliged to offer pursuant to the Norwegian Securities Trading Act.*

Defendant No 2

43. On admissibility, Defendant No 2 submits that the request is admissible since it concerns the interpretation of EEA law, does not relate to hypothetical or general questions, and the Court's answer will assist Oslo tingrett in applying Norwegian law in a way compatible with EEA law.[17]

44. For Defendant No 2, the core issue of the case concerns the question of whether and under what circumstances a reference to the "market price", without further qualification, fulfils the requirement of the second subparagraph of Article 5(4) of Directive 2004/25 that criteria be "clearly

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[17] Reference is made to Case E-1/95 *Samuelsson* [1994-1995] EFTA Ct. Rep. 145, at paragraph 15; Case C-384/08 *Attanasio Group*, judgment of 11 March 2010, not yet reported, at paragraphs 16–18; Case E-5/96 *Nille* [1997] EFTA Ct. Rep. 30, at paragraph 12; Case E-4/04 *Pedicel* [2005] EFTA Ct. Rep. 1, at paragraph 42; E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, at paragraphs 21–23; and Fenger/Broberg, *Præjudicielle forelæggelser for EF-Domstolen*, Copenhagen 2007, pp. 224–225 with further references.

determined". It submits that EEA law prohibits criteria in national law that create undue uncertainty and unpredictability for a potential offeror who contemplates launching a takeover bid for the shares of a company listed in the EEA.

45. With regard to the legislative history of Directive 2004/25, Defendant No 2 underlines the importance attributed to the predictability of the bid price and to ensuring the greatest possible legal certainty for the offeror when the "highest price paid" rule was established.[18] Defendant No 2 concludes that the second subparagraph of Article 5(4) of Directive 2004/25 must be interpreted strictly and that any price adjustment mechanism must relate to "clearly determined criteria" which afford the greatest possible legal certainty to the offeror.

46. Defendant No 2 further notes that, even though the enumeration of examples of price adjustment mechanisms listed in the second subparagraph of Article 5(4) of Directive 2004/25 is not exclusive, it is significant that it does not contain the term "market price". It is argued that this amounts to an assumption that the clarity requirement of the Directive is not met.

47. Moreover, Defendant No 2 considers the term "market price" to be vague and imprecise. The assertion by the Plaintiff that "market price" is a well-known concept in Norwegian law is contested. In particular, it is argued that there is no indication of the relevant interval for determining the market price, of whether or not the price shall be a volume-weighted average, and of whether actual trades are necessary or if standing buy orders are sufficient. Additionally, it is claimed, the market price can be manipulated in low liquidity markets by placing artificially high orders which are never or rarely filled. Reference is made to the facts of the case to illustrate the difficulties of determining the market price.

48. Defendant No 2 argues that a lack of predictability of the eventual bid price is a major disincentive for foreign investors contemplating launching a bid, as it is not possible to withdraw a bid once it has been put forward. Concerning the need for rules to be clear, precise and predictable, Defendant No 2 also underlines the principle of legal certainty.[19] To Defendant No 2, the need for a predictable method of calculating the offer price is further reinforced by the fact that in Norway, the provision in question can be applied directly by the courts.

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[18] Reference is made to the Report of the European Commission's High Level Group of company law experts on issues related to takeover bids of 10 January 2002, p. 49; and COM(2002) 534 final of 2 October 2002, p. 7.

[19] Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, at paragraph 37; Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, at paragraph 80.

49. It is submitted that uncertainty as to whether the bid price will be adjusted by the authorities would also amount to a restriction of the free movement of capital, contrary to Article 40 EEA.[20] This situation is considered to be comparable to a system of prior authorization which, if it does not give any objective indication as to when an authorization will be granted or refused, constitutes a restriction, as it does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 40 EEA.[21] It is further submitted that a broad interpretation of the term "market price" does not serve any consideration of overriding public interest capable of justifying that restriction.[22] Defendant No 2 adds that this must also have a bearing on the interpretation of the Directive, which must be in accordance with the fundamental freedom which the Directive seeks to implement.[23]

50. Lastly, Defendant No 2 maintains that no other Contracting Party except the Kingdom of Norway uses the term "market price" as the sole mechanism for adjusting the offer price. It claims that other countries would either use objective criteria such as volume-weighted trades in a specific period prior to the bid being triggered, or grant discretion to the authorities to adjust the price in certain specific circumstances, or use a combination of those measures.[24]

51. Defendant No 2 suggests the following answer:

> *Using the term "market price" to adjust an offer price established in accordance with the Takeover directive article 5(4) first paragraph, will not be compliant with the Takeover directive article 5(4) second paragraph.*

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20 Concerning the identity in substance of EEA and EC rules governing the free movement of capital, reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11; and Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76. Relating to the acquisition of shares on a regulated market as a capital movement, reference is made to Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, at paragraphs 20–21.

21 Reference is made to Case C-483/99 *Commission* v *France* [2002] ECR I-4781, at paragraphs 50–51.

22 Reference is made to Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76; and Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933 regarding the general requirements for justification of restrictions by reasons of overriding public interest.

23 Reference is made to Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

24 Reference is made to Dirk Van Gerven (ed.), *Common Legal Framework for Takeover Bids in Europe*, Cambridge Volume I-2008, Volume II-2010; and Sodali GWM Group/LTT Studio Legale Associato, *Comparative Analysis of European Legislations dealing with Takeover bid: implementation of Directive 2004/25/EC*, published 24 April 2009 on http://www.sodali.com/pdf/studies/22090424.pdf.

The Lithuanian Government

52. The Lithuanian Government notes that Article 5(4) of Directive 2004/25 sets up a common definition of an equitable price in its first subparagraph, but allows Members States to establish further instruments in order to adjust the price under clearly determined circumstances and criteria in the second subparagraph.[25]

53. The Lithuanian Government submits 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 such a further instrument which may be established by a Member State. It considers that the "market price rule" both relates to clear circumstances – the market price being higher than the highest price paid or agreed on – and sets out clear criteria – the mandatory bid price has to be as high as the market price. It is added that except when the market price is manipulated, the rule is objective in nature and does not need bureaucratic interference by a regulatory authority.

54. 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. Otherwise, the price of the shares could drop due to the acquisition of control by the offeror, threatening the financial interests of minority shareholders. In addition, the Lithuanian government notes that the rule also provides the acquirer of a company with a certain degree of predictability as to the price of the mandatory bid.

55. Regarding the requirement to respect the general principles laid down in Article 3(1) of the Directive, the Lithuanian government considers that it is sufficient to implement this requirement generally in national law and practice; e.g., respect for these principles could be ensured by threatening persons breaching these principles with deterrent sanctions. To the Lithuanian government, not admitting the "market price rule" would even compromise the Directive's aim of protecting minority shareholders by increasing the risk of market manipulation. In that regard, it is argued that it is often difficult to detect whether shares have been bought at artificially low prices.

56. Lastly, the Lithuanian government submits that, whereas Member States enjoy wide discretion to establish the circumstances and conditions under which a mandatory bid price has to be as high as the market price, in order to be sufficiently clear, those conditions must be stated in legal acts.

57. Based on these considerations, the Lithuanian government suggests answering the question as follows:

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[25] Reference is made to recital 9 in the preamble to Directive 2004/25.

Second paragraph of Article 5(4) of Directive 2004/25/EC allows 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 national law, if such an order arises as an automatic rule under clearly defined circumstances and conditions.

The Norwegian government

58. As a preliminary remark, the Norwegian government observes that it is not for the Court to assess under the advisory opinion procedure whether national law is compatible with EEA law, and that the principles of direct effect and precedence of directives do not form part of EEA law. Nonetheless, national courts are bound to interpret national law as far as possible in conformity with EEA law.[26] The Norwegian government considers that accordingly, the request is to be understood as seeking guidance as to the interpretation of the second subparagraph of Article 5(4) of Directive 2004/25 for the purposes of interpreting national law in conformity with EEA law.

59. The Norwegian government notes that according to Article 1(1) of Directive 2004/25, the Directive provides for the coordination, not the harmonisation, of national laws relating to takeover bids. Moreover, Article 3 of the Directive stipulates only guiding principles for the implementation of the Directive, and not general principles of Community law.[27] The Norwegian government also notes that neither Oslo tingrett nor the parties to the proceedings have asked the Court to comment on those principles.

60. The Norwegian government submits that the reference to "circumstances and … criteria that are clearly determined" is only intended 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 that the relevant circumstances be listed in the implementing legislation. In that regard, the Norwegian government points out that it was a conscious choice of the Community legislator that Member States "may" draw up such a list, rather than "shall", as proposed in the original draft by the Commission.[28]

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[26] Reference is made to Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, at paragraphs 34 and 39–40.

[27] Reference is made to Case C-101/08 *Audiolux SA and Others*, judgment of 15 October 2009, not yet reported, at paragraph 51.

[28] Reference is made to the proposal for a Directive of the European Parliament and of the Council on takeover bids, COM (2002) 534 final, OJ 2003 C 45E, p. 1; and the Report of the Committee on Legal Affairs and the Internal Market and the opinions of the Committee on

61. Based on these observations, the Norwegian government suggests answering the question as follows:

> *Article 5(4) second subparagraph of Directive 2004/25/EC does not preclude a Member State from authorizing its supervisory authorities to adjust upwards the price referred to in the first subparagraph of Article 5(4), provided that the general principles laid down in Article 3 are respected.*

The EFTA Surveillance Authority

62. As a starting point, the EFTA Surveillance Authority (hereinafter "ESA") submits that the EEA law rules concerning the weighing of private and public interests related to corporate takeovers are to be found in secondary law only.[29]

63. ESA notes 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 was warranted by the need for flexibility in financial markets.[30] In order to make use of that derogation, Member States first have to set out certain circumstances in which the supervisory authority can adjust the price; secondly, they have to lay down predetermined criteria on how to find the alternative bid price.

64. Concerning the need to define the circumstances in which the price may be adjusted, ESA submits that a situation where the market price is "clearly" higher than that which an offeror paid during the six-month period preceding the time when the obligation to make an offer arose could be a situation where the simple application of the latter price as the mandatory bid price could result in an unfair price.

65. As to whether a criterion is clearly determined, ESA considers that, in general, reference may be made to the general principle of legal certainty in EEA law,[31] i.e. that legislation must be sufficiently clear and precise, so that persons concerned, including third parties such as the public authorities, may know unambiguously their rights and duties and take measures accordingly. It

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Economic and Monetary Affairs, the Committee on Employment and Social Affairs and the Committee on Industry, External Trade, Research and Energy, A5-0469/2003 final, at 17.

29 Reference is made to Case C-101/08 *Audiolux SA and Others*, judgment of 15 October 2009, not yet reported, at paragraphs 47–52 and 58.

30 Reference is made to the Report of the European Commission's High Level Group of company law experts on issues related to takeover bids of 10 January 2002, p. 52; and the proposal for a Directive of the European Parliament and of the Council on takeover bids, COM (2002) 534 final, OJ 2003 C 45E, p. 1 (p. 7).

31 Reference is made to Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnfjord* [2005] EFTA Ct. Rep. 117, at paragraph 163.

is submitted that the Member States' discretion concerning the implementation of the second subparagraph of Article 5(4) of the Directive must be construed narrowly, as it is an exception to the general rule in the first subparagraph; furthermore, that the general principles of equivalent treatment and of minority shareholder protection referred to in Article 3(1)(a) of the Directive must be respected, and that 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.[32]

66. ESA concludes that Member States cannot simply confer on supervisory authorities unfettered power to determine when the alternative bid price should be applied in individual cases. Rather, objective valuation criteria such as the ones listed in the second subparagraph of Article 5(4) of Directive 2004/25 must be applied.

67. Having regard to the terms "clear" and "market price" in the Norwegian Securities Trading Act, ESA considers that it is neither apparent from the Norwegian legislation, nor from any internal rules or guidelines of the supervisory authority, nor from the decisions in the case at hand how the market price is to be determined, what the period under consideration is and when a price difference is sufficient for the alternative bid price rule to be applied. ESA concludes that the definition of the market price within the Norwegian Securities Trading Act is not based on objective, foreseeable conditions in order to be sufficiently clear and precise to enable those concerned, including the national supervisory authorities, to know unambiguously their rights and duties and take measures accordingly.

68. Accordingly, ESA suggests that the question be answered as follows:

> *Article 5(4) second subparagraph of the Act referred to at point 10d of Annex XXII (Company Law) to the EEA Agreement (Directive 2004/25/EC of the European Parliament and of the Council on takeover bids) should be interpreted as precluding national legislation, such as that in issue in the main proceedings, that grants the competent supervisory authority broad discretion to adjust the equitable price referred to in Article 5(4) first subparagraph, in the absence of clearly defined and objective circumstances and criteria laid down in advance indicating when such an adjustment can be made.*

The European Commission

69. The Commission notes that the indicative list of examples in the second subparagraph of Article 5(4) of Directive 2004/25 suggests a fairly precise

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[32] Reference is made to Papadopoulos, *The European Union Directive on Takeover Bids: Directive 2004/25/EC*, Vol. 6 [2008] International and Comparative Corporate Law Journal, No. 3, pp. 30–31.

standard for the definition of the relevant circumstances and criteria to be considered "clearly determined".

70. It points out that 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 can be taken into account for the purpose of interpretation of Norwegian law by the national court, the criteria are sufficiently clearly determined for the purposes of Article 5(4) of Directive 2004/25.

71. Accordingly, the European Commission suggests that the question be answered as follows:

> *Article 5(4) second subparagraph of Directive 2004/25/EC does not preclude an adjustment such as that contained in Section 6-10(4) of the Securities Trading Act from being made to the equitable price for a bid calculated in accordance with Article 5(4) first subparagraph of that Directive, provided that it is based on sufficiently clearly determined criteria.*

Carl Baudenbacher
Judge-Rapporteur