



## JUDGMENT OF THE COURT

9 May 2014\*

*(Directive 2003/6/EC – Admissibility – Judicial or administrative function – Information request – Requirement in national law to set out the facts that give rise to the suspicion)*

In Case E-23/13,

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 from the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*), in the case of the

### **Hellenic Capital Market Commission (HCMC)**

concerning the interpretation of Article 16 of 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 COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur), and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- the Hellenic Capital Market Commission (“the HCMC”), represented by Eleftheria Apostolidou, Director, Directorate of International Relations;
- the Belgian Government, represented by Jean-Christophe Halleaux and Marie Jacobs, Attachés within the Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;

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\* Language of the request: German.

- the Estonian Government, represented by Nele Grünberg, Ministry of Foreign Affairs, acting as Agent;
- the German Government, represented by Thomas Henze and Dr Kathrin Petersen, Federal Ministry for Economic Affairs and Energy, acting as Agents;
- the Greek Government, represented by Maria Tassopoulou, Alternate Legal Advisor at Special Legal Service – European Union Law Department of the Ministry of Foreign Affairs, acting as Agent;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Christoph Büchel, Attorney-at-law, acting as Agents;
- the Polish Government, represented by Boguslaw Majczyna, Ministry of Foreign Affairs, acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Ion Rogalski 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 HCMC, represented by Michail Mersinis and Eleftheria Apostolidou; the Greek Government, represented by Maria Tassopoulou; the Liechtenstein Government, represented by Christoph Büchel; ESA, represented by Maria Moustakali; and the Commission, represented by Nicola Yerrell, at the hearing on 31 March 2014,

gives the following

## **Judgment**

### **I Legal background**

#### *EEA law*

- 1 Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16) (“the Directive”)<sup>1</sup> was incorporated into Annex IX to the EEA Agreement at point 29a

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<sup>1</sup> The Directive has been amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the

of the EEA Agreement by Decision No 38/2004 of the EEA Joint Committee of 23 April 2004 (OJ 2004 L 277, p. 7). This Decision entered into force on 1 June 2005.

2 Recital 12 of the preamble to the Directive reads:

*Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. It is therefore advisable to adopt combined rules to combat both insider dealing and market manipulation. A single Directive will ensure throughout the Community the same framework for allocation of responsibilities, enforcement and cooperation.*

3 Recital 37 of the preamble to the Directive reads:

*A common minimum set of effective tools and powers for the competent authority of each Member State will guarantee supervisory effectiveness. Market undertakings and all economic actors should also contribute at their level to market integrity. In this sense, the designation of a single competent authority for market abuse does not exclude collaboration links or delegation under the responsibility of the competent authority, between that authority and market undertakings with a view to guaranteeing efficient supervision of compliance with the provisions adopted pursuant to this Directive.*

4 Recital 38 of the preamble to the Directive reads:

*In order to ensure that a Community framework against market abuse is sufficient, any infringement of the prohibitions or requirements laid down pursuant to this Directive will have to be promptly detected and sanctioned. ...*

5 Recital 40 of the preamble to the Directive reads:

*Increasing cross-border activities require improved cooperation and a comprehensive set of provisions for the exchange of information between national competent authorities. The organisation of supervision and of investigatory powers in each Member State should not hinder cooperation between the competent national authorities.*

6 Recital 41 of the preamble to the Directive reads:

*Since the objective of the proposed action, namely to prevent market abuse in the form of insider dealing and market manipulation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the measures, be better achieved at Community level, the Community may adopt*

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European Supervisory Authority (European Securities and Markets Authority) (OJ 2010 L 331, p. 120). However, Directive 2010/78/EU has not yet been incorporated into the EEA Agreement. The amended version of the Directive is therefore not part of the EEA Agreement.

*measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.*

7 Recital 44 of the preamble to the Directive reads:

*This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular by Article 11 thereof and Article 10 of the European Convention on Human Rights. ....*

8 Article 16 of the Directive reads:

*1. Competent authorities shall cooperate with each other whenever necessary for the purpose of carrying out their duties, making use of their powers whether set out in this Directive or in national law. Competent authorities shall render assistance to competent authorities of other Member States. In particular, they shall exchange information and cooperate in investigation activities.*

*2. Competent authorities shall, on request, immediately supply any information required for the purpose referred to in paragraph 1. Where necessary, the competent authorities receiving any such request shall immediately take the necessary measures in order to gather the required information. If the requested competent authority is not able to supply the required information immediately, it shall notify the requesting competent authority of the reasons. Information thus supplied shall be covered by the obligation of professional secrecy to which the persons employed or formerly employed by the competent authorities receiving the information are subject.*

*The competent authorities may refuse to act on a request for information where:*

- communication might adversely affect the sovereignty, security or public policy of the Member State addressed,*
- judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed, or*
- where a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed.*

*In any such case, they shall notify the requesting competent authority accordingly, providing as detailed information as possible on those proceedings or the judgment.*

*Without prejudice to Article 226 of the Treaty, a competent authority whose request for information is not acted upon within a reasonable time or whose request for information is rejected may bring that non-compliance to the attention*

*of the Committee of European Securities Regulators, where discussion will take place in order to reach a rapid and effective solution.*

*Without prejudice to the obligations to which they are subject in judicial proceedings under criminal law, the competent authorities which receive information pursuant to paragraph 1 may use it only for the exercise of their functions within the scope of this Directive and in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority communicating information consents thereto, the authority receiving the information may use it for other purposes or forward it to other States' competent authorities.*

...

#### *National law*

- 9 In Liechtenstein, the Directive has been transposed by, *inter alia*, the Law of 25 November 2010 amending the Law of 18 June 2004 on the Financial Market Authority (*Finanzmarktaufsichtsgesetz* - "FMA Act").
- 10 Article 27a of the FMA Act states that assistance shall be provided to a competent foreign authority to the extent necessary to ensure the supervision of securities markets, *inter alia*, to combat market abuse.
- 11 Article 27c of the FMA Act concerns the form and content of the request. It provides, *inter alia*, that a request for assistance shall include the designation of the requesting foreign authority, an account of the relevant facts, a specific description of the information sought, the reason for the request and the legal provisions infringed in the State of the requesting authority.
- 12 Furthermore, Article 27d of the FMA Act provides that the information requested must be shown to be necessary for the exercise of securities supervision by the requesting foreign authority. From the preparatory works to the legislation, it can be derived that this at least includes an outline of the initial suspicion.
- 13 Article 27f of the FMA Act provides that the Financial Market Authority ("FMA") shall refuse a request by a competent foreign authority where the requirements of Articles 27a to 27e are not satisfied. Moreover, the FMA may refuse a request that might adversely affect the sovereignty, security or public policy of Liechtenstein, where judicial proceedings have already been initiated in respect of the same actions and against the same person before a criminal court in Liechtenstein, or where a final judgment has already been delivered by a criminal court in Liechtenstein in relation to such person, based on the same facts.
- 14 Article 27g of the FMA Act provides that, if the FMA concludes that no grounds exist for refusal pursuant to Article 27f, it shall immediately communicate the request to the Administrative Court and request the court's consent to provide the assistance sought. The competent judge at the Administrative Court shall examine

whether the requirements for a request specified in Articles 27a to 27e of the FMA Act are satisfied and ensure that no grounds for refusal exist.

## **II Facts and procedure before the national court**

- 15 In summer 2013, the HCMC requested the FMA to provide assistance in accordance with Article 16 of the Directive. In the request, it stated that it was conducting a preliminary investigation into potential market abuse regarding transactions in the shares of a particular company over a 10-day period in 2013. It went on to explain that the trading in shares in the company was being closely monitored because of a capitalisation process, as well as high volatility in the volume and price of its shares. The volume had fluctuated by 210%, and the price by 120%.
- 16 Against this background, the HCMC sought information about a specific transaction from 2013, in which a Liechtenstein bank had acquired a number of shares in the company. In particular, the HCMC stated that it wished information about the beneficial owners for whose account the transaction was effected in order to determine whether there was a relationship between those beneficial owners and the management team / the principal shareholders of the company.
- 17 The FMA made several requests to the HCMC for further information about the background to the investigation. In its replies, the HCMC confirmed, *inter alia*, that this type of preliminary review took place in all cases involving major corporate operations that might cause significant fluctuations in share prices. However, it had concrete suspicions in the present case, linked to the specific transaction already communicated in detail to the FMA.
- 18 On this basis, the FMA concluded that the request for assistance satisfied the requirements of Articles 27a to 27e of the FMA Act, and that none of the grounds for refusal set out in Article 27f applied. It accordingly transmitted the request to the competent judge at the Liechtenstein Administrative Court for consent in accordance with the procedure laid down by Article 27g of the FMA Act.
- 19 Although the FMA proposed that the request for assistance be granted, the President of the Administrative Court, in his capacity as the competent judge pursuant to Article 27g of the FMA Act, noted that a certain divergence of views had emerged in the course of the earlier exchange of correspondence between the HCMC and the FMA as regards the level of reasoning required to justify such a request. Against this background, the President decided that it was necessary to refer the matter to the Court for an advisory opinion on the proper interpretation and effect of Article 16 of the Directive.
- 20 Consequently, on 21 October 2013 the Administrative Court referred the following question to the Court:

*Must an authority making a request to the competent authority of another Member State in accordance with Article 16 of Directive 2003/6/EC set out*

*in its request the facts that give rise to the suspicion that the prohibition on insider dealing and market manipulation has been infringed?*

- 21 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 The question**

#### *Admissibility*

Observations submitted to the Court

- 22 ESA and the Commission submit that the request is inadmissible.
- 23 In the view of the Commission, the question referred appears to be general in nature rather than linked to the specific procedure at issue. According to the Commission, the FMA took the view that the request from the HCMC complied with the requirements of Liechtenstein law and adequately set out the background to the request. It was on this basis that the FMA launched the procedure under Article 27g of the FMA Act to obtain the consent of the Administrative Court to provide the assistance. Although Article 27g(2) of the FMA Act also requires the competent judge to examine whether the underlying requirements are satisfied, no information has been provided that casts doubt on the FMA's initial assessment.
- 24 The Commission submits that it appears to be highly questionable whether a case can be said to be pending before the national judge, or, indeed, whether the latter is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.
- 25 In the Commission's view, the Administrative Court, which has been consulted in accordance with Article 27g of the FMA Act, appears to be taking a purely administrative decision, as it simply intervenes in the final step of an administrative procedure set up to answer a request for assistance. There is no legal dispute to be decided, and, for this reason, the Administrative Court cannot be regarded as exercising a judicial function. At the oral hearing, the Commission argued that its view was strengthened by information provided by the Liechtenstein Government that the Administrative Court does not hand down a formal decision when acting pursuant to Article 27g of the FMA Act.
- 26 In its written observations, ESA submitted that the Administrative Court has merely an administrative function or confirmatory role. In the alternative, ESA submitted that, if the Administrative Court performs a judicial function, that judicial oversight by the Administrative Court pursuant to Article 27g of the FMA Act goes beyond what is allowed under the Directive.
- 27 At the oral hearing, ESA stated, after hearing the explanations given by the Liechtenstein Government, that the Administrative Court performs a judicial

function pursuant to Article 27g of the FMA Act. The Administrative Court may conclude that a request does not fulfil the requirements under Articles 27a to 27e of the FMA Act, and such a decision cannot be appealed. That means that the Administrative Court may definitively block a request for information.

- 28 Nevertheless, ESA maintained that the request is inadmissible, since such a judicial oversight is, in its view, not compatible with the Directive. The procedure in question would delay the provision of the requested information, which, pursuant to Article 16(2) of the Directive, must be provided immediately. Involving a judicial body each time before granting access to information to the requesting authority would constitute an obstacle to mutual assistance between the competent authorities, which the Directive intends to remove. It would also compromise the rationale of the Directive set out in recital 38 of the preamble.
- 29 According to ESA, pursuant to Article 15 of the Directive, judicial review of the decisions of the competent authorities must be ensured *ex post* in the form of an appeal against the decisions taken by the competent authority, and not *ex ante*, as the case appears to be in Liechtenstein. Thus, the examination by the Administrative Court pursuant to Article 27g of the FMA Act goes beyond what is allowed under the Directive.

#### Findings of the Court

- 30 Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.
- 31 It is clear that the Administrative Court of the Principality of Liechtenstein, which is a court against whose decisions there is no judicial remedy under national law, constitutes a court or tribunal within the meaning of Article 34 SCA. In fact, the Administrative Court has made a number of references to the Court.
- 32 However, a national court or tribunal may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. In other words, a national body may be classified as a court or tribunal within the meaning of Article 34 SCA when it is performing judicial functions, whereas, when it is exercising other functions, for example of an administrative nature, it may not be so classified (see, for comparison, *inter alia*, Case C-363/11 *Epitropos tou Eleggতিকou Synedriou*, judgment of 19 December 2012, published electronically, paragraphs 19 and 21).
- 33 The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law.



- 34 Accordingly, the purpose of this procedure does not require a strict interpretation of the terms court and tribunal. The same applies to the question of whether a requesting body in a specific case exercises a judicial or an administrative function, in particular when its decisions are not subject to judicial review. The procedure under Article 34 SCA is determined on the basis of EEA law. Indeed, the Court has no competence to interpret national rules. The Court must nevertheless include national rules in its assessment of the situation. In case of doubt in that context, it would run counter to the purpose of Article 34 SCA to declare the reference inadmissible.
- 35 When dealing with the applicability of Article 34 SCA, it is incumbent on the EEA States to take the necessary steps to ensure, within their own territory, that the provisions of EEA law are implemented into national law in their entirety. The case pending before the national court concerns a provision of EEA law, which is based on an allocation of responsibilities and administrative cooperation between the national authorities of the EEA States. If, under the legal system of an EEA State, national courts are assigned the task of overseeing such co-operation, it is imperative in order to ensure the proper functioning of EEA law that the Court should have an opportunity to address the issues of interpretation arising out of such proceedings.
- 36 For the same reason, ESA's argument that the request is inadmissible, since the judicial review undertaken by the Administrative Court pursuant to Article 27f of the FMA Act is not compatible with the Directive, must be rejected. The Court would find an infringement proceeding pursuant to Article 31 SCA more appropriate for such an assessment of compatibility.
- 37 At the oral hearing, the Liechtenstein Government stated, in response to questions put by the Court, that, in proceedings pursuant to Article 27g of the FMA Act, the Administrative Court may decide that the requirements under Article 27(1)(a) to (f) are not fulfilled. No formal decision is handed down, but the FMA is informed of the Administrative Court's view. It is not possible to appeal the decision. The consequence is that the FMA must reject the request for information in its current form.
- 38 Such a rejection by the FMA may not be subject to subsequent judicial review. It may, however, be challenged by the requesting authority in accordance with the procedure established by the fourth subparagraph of Article 16(2) of the Directive.
- 39 As a result of the foregoing considerations and, in particular, the fact that the decision of the Administrative Court in procedures such as the one pending before the national court cannot be appealed, the Court finds that, in proceedings pursuant to Article 27g of the FMA Act, the Administrative Court performs a judicial function for the purposes of Article 34 SCA. Even though the FMA has concluded that no grounds exist for refusal pursuant to Article 27f, the Administrative Court's assessment may entail that the FMA must reject the request for information. Such a rejection by the FMA is not subject to subsequent judicial review. This suggests that the procedure before the Administrative Court is closer to a judicial than an

administrative review. It cannot be decisive in this regard that the Administrative Court does not hand down a formal decision.

- 40 The Court holds that the question referred by the Administrative Court is admissible.

*Substance*

Observations submitted to the Court

- 41 The HCMC submits that Article 16 of the Directive does not require the requesting authority to indicate the facts giving rise to a particular suspicion and its reasons for carrying out an investigation. It is for the requesting authority to determine whether there has been a potential breach of the relevant provisions. The second subparagraph of Article 16(2) of the Directive exhaustively stipulates when the requested authority may refuse to act on a request for information.
- 42 The Belgian Government is of the opinion that the requesting authority must demonstrate that the information or assistance requested is necessary for it to carry out its duties. This implies that the principle of proportionality is satisfied.
- 43 The elements to be indicated in a request for assistance logically differ, depending on the information that the requesting authority wishes to obtain. In the case of a preliminary investigation, it suffices that the requesting authority indicates the existence of a market incident and the transactions that, in its view, require further investigation.
- 44 The principle of proportionality cannot be interpreted in such a way that it would oblige a requesting authority to indicate factual elements that it cannot know at this stage of a preliminary investigation, such as specific elements linking the beneficial owners of transactions to inside information. Were it otherwise, this would render Article 16 of the Directive ineffective.
- 45 The Estonian Government observes that Article 16 of the Directive does not contain any express obligation for an authority to set out in its request the facts that give rise to the suspicion. However, some description of the underlying facts of the investigation is necessary. Explaining the reason for and providing underlying facts in a request is acknowledged in international agreements on securities markets supervision. Reference is made to Article 8 of the International Organisation of Securities Commissions' ("IOSCO") Multilateral Memorandum of Understanding ("MMoU"), as well as to Article 4 of the European Securities and Market Authority's ("ESMA") MMoU.
- 46 The purpose of Article 16 can be better achieved when the requested authority knows exactly what information it needs to send to the requesting authority. Moreover, the requested authority needs relevant information in order to be able to evaluate whether there are grounds for refusal pursuant to the second subparagraph of Article 16(2). Finally, a description of the facts helps to ensure

that requests are proportionate in relation to achieving the objectives pursued and do not go beyond what is necessary to achieve those objectives.

- 47 The German Government submits that, pursuant to Article 16(1) of the Directive, the only precondition for entitlement to administrative assistance is that the requested information is necessary for the requesting authority to fulfil its duties. It is therefore not necessary to present the specific legal relevance of the desired information, or to specify other circumstances in greater detail. Moreover, pursuant to Article 16(2), the requested authority shall immediately supply any information required.
- 48 The requesting authority must merely make it plausible that the information is somehow relevant to the purpose of carrying out its duties pursuant to the Directive or to the exercise of the relevant powers granted to it in national law. The requested authority will then carry out a plausibility check as to whether there is sufficient indication of a potential market distortion that justifies the request for assistance.
- 49 Specifically, this means that the requesting authority must present the facts that form the grounds for initial suspicion of a potential violation of the rules of the Directive and that led to the launching of the investigation. Similarly, it must specify as far as possible what information it requires and why this information is of relevance to its investigation. However, the requirements placed on the requesting authority in terms of the burden on it to produce evidence must not be particularly high. For example, it cannot be expected to present a complete and consistent statement of the facts, or even an application of the Directive.
- 50 The Greek Government submits that the aim of the Directive would be compromised if a request for information were followed up by a request for concrete evidence of the tenability of the suspicion. Therefore, in the present case, an outline description of the case and an explanation as to why the information requested is considered “necessary and required” in relation to the investigation is in line with the Directive, as well as in compliance with the principle of proportionality.
- 51 When the European legislature placed restrictions on this process, this was done explicitly by stating that the competent authority may refuse to act on a request for information only in the circumstances listed in the second subparagraph of Article 16(2).
- 52 The Liechtenstein Government submits that, when the FMA is called upon to act in the case of a request for information from an authority of another EEA State, such a request must contain sufficiently precise information about the facts underlying the request for the FMA to be able to ascertain whether it is competent to act as requested. This includes facts that enable the requested authority to assess whether grounds for refusal of the request – as provided for in the Directive – exist. In this regard, it must be recalled that to provide information such as the identity of an account holder actually requires the FMA to encroach on the account holder’s fundamental right to banking secrecy.

- 53 Before the FMA, upon request, can provide information to a requesting authority in another EEA Member State, it has to obtain prior consent from the Administrative Court. This procedure assures that the provision of information is within the rule of law. It is also for the purposes of this procedure that information is needed about the case under investigation by the requesting authority.
- 54 The Liechtenstein Government also argues that the requesting and the requested authority must not be burdened with extensive formalities. That would not be in line with the purpose of the Directive. Furthermore, the requested authority shall not question the validity of the facts provided by the requesting authority. This applies to the FMA as well as to the Administrative Court. This guarantees that requests for information can be executed swiftly. It rests with the requesting authority to obtain assistance quickly.
- 55 The Polish Government takes the view that the request for information referred to in Article 16 should not be limited to simple confirmation that the investigation cannot be conducted without the requested information. A request should also specify the facts giving rise to the initial suspicion and explain how the requesting authority intends to use the information received.
- 56 Article 16 does not set out any requirements as to the form and content of the request for information. This does not mean that Member States cannot set and apply requirements concerning the form and content of such requests, as long as their objective is to enable cooperation between competent authorities on preventing market abuse.
- 57 The facts giving rise to a suspicion of market abuse and the uses for which assistance is sought are necessary in order to enable effective cooperation, and to adjudicate on whether a request may be rejected. Moreover, it is in accordance with the IOSCO MMoU. Finally, if the requested authority did not require the facts that gave rise to the suspicion to be set out, the requesting authority would be free to ask for assistance also in situations where there is no specific suspicion of market abuse.
- 58 ESA submits that Article 16 of the Directive entails no obligation on the part of the requesting authority to set out the facts giving rise to suspicion of a breach of the prohibition on market manipulation. A request for assistance is part of the process of collecting information, which will indicate whether or not the suspicion is founded.
- 59 Fundamental rights were taken into account by the EU legislature when adopting the Directive. The legislature opted to ensure that judicial protection, as well as all safeguards and guarantees relating to fundamental rights and rights of defence, are implemented in the EEA State of the requesting authority, pursuant to Articles 12 and 15 of the Directive.
- 60 The rationale of Article 16 of the Directive, which leaves no doubt that it is for the competent national authority requesting assistance to decide which information is

necessary for the purpose of carrying out its duties, is that the requested authority cannot review the basis on which the requesting authority is conducting the investigation. The requesting authority is best placed to decide which information is necessary for the purposes and scope of its investigation and then to seek assistance accordingly. Any other interpretation would lead to incongruous delays. The system would thereby not be operational, and its objective of prompt detection and sanctioning of any infringements would be seriously compromised.

- 61 Pursuant to Article 3 EEA, EEA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the EEA Agreement. By imposing an obligation on the Administrative Court to examine whether the requirements for a request specified in Articles 27a to 27e are satisfied, Liechtenstein is imposing an additional requirement before providing information to the competent authority of another EEA State. By doing so, it is compromising the system established by the Directive.
- 62 The Commission submits that there is no legal obligation on the requesting authority to provide a certain level of detail in its request. Unless information relevant to the investigation and sanctioning of market abuse is easily available to the competent authorities, there is clearly a serious risk that the Directive's primary objective of combating market abuse throughout the EEA will be undermined. It is the exchange of information and participation in investigations that form the core of the cross-border system established by the Directive.
- 63 The broad nature of the cooperation obligation is further reinforced by the fact that a request for assistance under Article 16 is not made subject to any conditions. In particular, no details were laid down by the legislature as to the format for a request for information, nor as to the level of detail required. The key point is simply that a request is made by the relevant competent authority.
- 64 This is further illustrated by the wording of Article 16(2), which requires a competent authority immediately to supply any information required, and, similarly, immediately to take any necessary measures to gather the information required. The receiving authority is merely required to set in motion the necessary steps to pass on the information to its counterpart, but not to examine the validity of the request that has been made.
- 65 Only three exceptions to the obligation to exchange information are envisaged and expressly set out in the second subparagraph of Article 16(2). It clearly follows that no other exceptions are permitted. Any other interpretation would not only be contrary to the plain wording of that provision, but would also risk jeopardising the Directive's key objective of swift and effective investigation of suspected cases of market abuse.
- 66 At a practical level, and in order to ensure the effectiveness of the cooperation procedure, a request for information under the Directive should enable the requested authority to identify the information required. However, the Commission points out that this is quite different from an interpretation of Article

16 that permits the requested authority to demand a certain format or content, and to reject a request that does not comply with such demands.

- 67 Moreover, general legal principles, such as proportionality and fundamental rights, were already taken into account by the legislature at the time when the Directive was adopted. Its provisions were designed to strike a balance between the objective of preventing market abuse and ensuring market integrity as well as the prevention of crime, and considerations of data protection and privacy.
- 68 In particular, under the system set up by Article 16, the analysis of necessity and proportionality, including the issue of safeguarding fundamental rights, has already been carried out by the requesting authority prior to the sending of a request, with the result that no additional control by the requested authority is necessary.
- 69 A distinction must in any event be drawn between the provision of information under the mutual cooperation procedure and the subsequent use to which it is put by the receiving competent authority. Under the Directive, the first step relies upon a system of mutual cooperation and confidence between the designated competent authorities to facilitate the swift exchange of information. It is at the subsequent stage of investigation and possible follow-up of that information by a receiving competent authority that considerations of data protection and privacy will once again be relevant – that is, in connection with the use and application of the information received.

#### Findings of the Court

- 70 By its question, the national court essentially wishes to know whether a requirement, which obliges the authority requesting information in accordance with Article 16 of the Directive to specify the facts giving rise to the suspicion, is in compliance with Article 16 of the Directive.
- 71 As is clear from, *inter alia*, recitals 41 and 12 of its preamble, the objective of the Directive is to prevent market abuse in order to ensure the integrity of EEA financial markets and to enhance investor confidence in those markets.
- 72 As stated in recital 38 of the preamble, in order to ensure a sufficient framework against market abuse, any infringement of the prohibitions or requirements laid down pursuant to the Directive will have to be promptly detected and sanctioned. For those reasons, the Directive seeks to establish an effective and uniform system to prevent and sanction market abuse (compare Case C-45/08 *Spector Photo Group* [2009] ECR I-12073, paragraph 45).
- 73 According to recital 37 of the preamble, the objective of the Directive is to establish a common minimum set of effective tools and powers for the competent authority of each EEA State to guarantee supervisory effectiveness. Moreover, it is stated in recital 40 of the preamble that the Directive aims to improve cooperation and to determine a comprehensive set of provisions for the

exchange of information between national competent authorities. Furthermore, the organisation of supervision and of investigatory powers in each Member State should not hinder cooperation between the competent national authorities.

- 74 For these reasons, Article 16(1) of the Directive establishes that competent authorities shall cooperate with each other whenever necessary for the purpose of carrying out their duties, making use of their powers, whether set out in the Directive or in national law. Assistance shall be rendered between competent authorities of the EEA States, in particular by exchanging information and cooperating in investigation activities.
- 75 The Directive is silent as to the form and content of a request for information. Nevertheless, in order to ensure the effectiveness of the cooperation procedure in practice and for the requested authority to be able to identify the information required, a request for information under the Directive must include a description of the investigation giving rise to the request. However, the system for information exchange established by the Directive suggests that a national rule that empowers the requested authority to refuse a request on the basis that the requesting authority must specify the facts giving rise to the suspicion is not compatible with the Directive.
- 76 It follows from the wording of Article 16(1) of the Directive that the only precondition for entitlement to administrative assistance is that the requested information is necessary for the requesting authority to fulfil its duties. It must be for the requesting authority to undertake this necessity assessment. As the cooperation procedure relies upon mutual trust and recognition between the authorities, the requested authority is not entitled to review the necessity assessment.
- 77 It follows from the first subparagraph of Article 16(2) of the Directive that, when requested, competent authorities shall immediately supply any information required for the purpose referred to in paragraph 1 of that provision. The requested authority shall immediately take the necessary measures in order to gather the required information.
- 78 In its explanatory memorandum accompanying the proposal which led to the adoption of the Directive (COM(2001) 281 final), the Commission stated (p. 13) that, to ensure the effectiveness of the investigation measures and to deter the development of cross-border schemes for misbehaviour, the reply must be sent in as short a time as possible.
- 79 Therefore, if it were possible for the requested authority to require the requesting authority to specify the facts giving rise to the suspicion before granting the request, that could compromise the aim of efficient exchange of information.
- 80 The second subparagraph of Article 16(2) sets out an exhaustive list as to when the requested authority may refuse to act on a request for information. A request can be rejected only where communication might adversely affect the sovereignty,

security or public policy of the EEA State addressed; where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the EEA State addressed; or where a final judgment has already been delivered in relation to such persons for the same actions in the EEA State addressed.

- 81 Furthermore, a national rule empowering the requested authority to refuse a request on the basis that the requesting authority must specify the facts giving rise to the suspicion cannot be justified on grounds of protection of fundamental rights. Fundamental rights were taken into account by the legislature when adopting the Directive, as stated in recital 44 of its preamble. As argued by the Commission, its provisions were designed to strike a balance between the objective of preventing market abuse and ensuring market integrity as well as the prevention of crime, and considerations of data protection and privacy. This is illustrated by the necessity requirement in Article 16(1), the assessment of which is undertaken by the requesting authority.
- 82 In its referral, the Administrative Court has raised the question of whether the requested authority may refuse to act if it has reason to believe that the request amounts to a search for incriminating evidence in the absence of reasonable suspicion (a “fishing expedition”). The Court does not regard it as necessary to go into this matter because there is no indication whatsoever that this could be the case in the proceedings in Liechtenstein.
- 83 For these reasons, the reply to the question from the national court must be that a requirement that obliges the requesting authority to specify the facts giving rise to the suspicion is not compatible with the Directive.

#### **IV Costs**

- 84 The costs incurred by the Belgian, Estonian, German, Greek, Liechtenstein and Polish Governments, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the Administrative Court, any decision on costs concerning those proceedings is a matter for that court.



On those grounds,

THE COURT

in answer to the question referred to it by the Verwaltungsgerichtshof des Fürstentums Liechtenstein, hereby gives the following Advisory Opinion:

**A requirement that obliges the authority requesting information in accordance with Article 16 of Directive 2003/6/EC to specify the facts giving rise to the suspicion is not compatible with Directive 2003/6/EC.**

Carl Baudenbacher

Per Christiansen

Páll Hreinsson

Delivered in open court in Luxembourg on 9 May 2014.

Philipp Speitler  
Acting Registrar

Carl Baudenbacher  
President