E-23/13-41

REPORT FOR THE HEARING

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 Fürstentum 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).

I Introduction

1. In a letter of 21 October 2013, registered at the EFTA Court on 25 October 2013, the Administrative Court requested an Advisory Opinion in a case pending before it concerning the Hellenic Capital Market Commission ("HCMC"). The background is a request for assistance from the HCMC to the Liechtenstein Financial Market Authority ("FMA") in connection with an investigation into potential market abuse.

II Legal background

EEA law

2. 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") was incorporated into Annex IX to the EEA Agreement at point 29a of the EEA Agreement by Decision No 38/2004 of the EEA Joint Committee of 23 April 2004 (OJ 2004 L 277, p. 7). The Decision entered into force on 1 June 2005.[1]

[1] 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,

3. 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. To this end, sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied.

4. 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.

5. 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. In this regard, this Directive does not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.

6. 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

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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 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. Therefore, the amended version of the Directive is not yet part of the EEA Agreement.

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.

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5. In accordance with the procedure laid down in Article 17(2), the Commission shall adopt implementing measures on the procedures for exchange of information and cross-border inspections as referred to in this Article.

National law

7. In Liechtenstein, the Directive has been transposed by the Law of 24 November 2006 against market abuse in trade in financial instruments (*Marktmissbrauchsgesetz*)[2] (the Market Abuse Act) and by the Law of 25 November 2010 amending the Law of

[2] Liechtenstein Law Gazette (*Liechtensteinisches Landesgesetzblatt*) ("LGBl.") 2007 No 18.

18 June 2004 on the Financial Market Authority (*Finanzmarktaufsichtsgesetz*)[3] ("FMA Act").

8. 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.

9. Article 27c of the FMA Act concerns the form and content of the request. It provides, *inter alia*, that the 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.

10. 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.

11. Article 27f of the FMA Act provides that the 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 by the competent foreign authority where to do so 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 a final judgment has already been delivered by a criminal court in Liechtenstein in relation to such person based on the same facts.

12. 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 are satisfied and ensure that no grounds for refusal exist.

III Facts and procedure

13. In summer 2013, the HCMC requested the Liechtenstein FMA to provide assistance in accordance with Article 16 of the Directive. In the request, it stated that it was conducting a preliminary investigation of 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 trades in the company were being closely monitored because of a capitalisation process as well as high volatility in the volume and price of its shares, which had fluctuated by 210% and 120%, respectively.

[3] LGBl. 2010 No 464.

14. In this context, the HCMC requested assistance from the FMA in order to obtain 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.

15. It appears that 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.

16. 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 21f of that law applied. It accordingly transmitted the request to a judge at the Liechtenstein Administrative Court for consent in accordance with the procedure laid down by Article 27g of the FMA Act.

17. Although the FMA proposed that the request for assistance be granted, the Administrative Court judge 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 to the level of reasoning required to justify such a request. In this context, the judge 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.

18. Consequently, 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?**

IV Written observations

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

- the Hellenic Capital Market Commission, 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;

- the Estonian Government, represented by Nele Grünberg, Ministry of Foreign Affairs, acing 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.

V Summary of the arguments submitted

HCMC

20. The HCMC submits that Article 16 of the Directive does not contain any specific prerequisite for the exchange of information. It provides that the competent authorities shall cooperate with and render assistance to each other whenever necessary for the purpose of carrying out their duties. In particular, they shall exchange information in connection with investigation activities.

21. The HCMC submits that the second subparagraph of Article 16(2) of the Directive stipulates when the requested authority may refuse to act on a request for information. None of these reasons is even remotely valid in the case at hand.

22. 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 breach of the relevant provisions. In the case at hand, all relevant facts have already been provided to the requested authority, in line with best cooperation practices.

23. Finally, the HCMC observes that, for the same case and based on the same facts, it has requested and received information from other competent authorities in the UK, USA and Cayman Islands. Moreover, in another case, the Liechtenstein FMA has not provided the information requested by the HCMC. In that case, the requested information has been provided by the competent authorities in Luxembourg, Jersey and Guernsey.

The Belgian Government

24. The Belgian Government is of the opinion that, by using the wording "whenever necessary", Article 16 of the Directive duly incorporates the general principle of proportionality. In its request for assistance the requesting authority must demonstrate that the information or assistance requested is necessary for carrying out its duties. This implies that the principle of proportionality is satisfied.

25. The Belgian Government submits that 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, need further investigation in light of that market incident.

26. The principle of proportionality cannot be interpreted in such a way that it would oblige a requesting authority to indicate, in the framework of a preliminary investigation, factual elements which, by definition, it cannot know without this preliminary investigation, such as specific elements linking the beneficial owners of transactions to inside information. Were it otherwise, it would render Article 16 of the Directive ineffective.

27. The Belgian Government proposes that the Court answer the question as follows:

> *Article 16 of Directive 2003/6/EC duly incorporates the general principle of proportionality: a request to a competent authority of another Member State in accordance with this Article 16 setting out the reasons why the information/assistance requested is necessary for carrying out its duties, therefore satisfies the principle of proportionality.*
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> *The factual elements to be indicated in the request differ depending on the information that the requesting authority wants to obtain. In particular in case of a preliminary investigation, it is not required to indicate any facts that give rise to a particular suspicion, but it is sufficient to indicate the existence of a market incident and of the transactions which, in the competent authority's opinion, need further investigation in the light of that market incident.*

The Estonian Government

28. The Estonian Government observes that trading in securities on regulated markets is a cross-border activity in which several layers of intermediaries or securities

depositories may be linked together. It is therefore of the utmost importance that Member States cooperate whenever necessary for the purpose of carrying out their duties. A national competent authority that suspects or monitors possible market abuse should be able to receive information about the full chain of command or trades in securities. Otherwise, it is difficult to uncover the person(s) conducting the market abuse.

29. The Estonian Government observes that Article 16 of the Directive does not contain any express obligation of an authority to "set out in its request the facts that give rise to the suspicion". The Estonian Government submits, however, that some description is necessary of the underlying facts of the investigation that is the subject of the request. This view is based on the system and the purpose of Article 16, and it is confirmed by international agreements in this area of law.

30. As regards the systematic interpretation, the Estonian Government submits that the second subparagraph of Article 16(2) sets out that the requested authority may refuse a request if certain conditions are fulfilled. However, the requested authority needs relevant information to be able to make a decision to refuse or at least evaluate where there are any possible grounds for refusal.

31. The Estonian Government submits that the purpose of Article 16 is to make sure that competent authorities cooperate with each other whenever necessary. Article 16(2) states that competent authorities, on request, shall immediately supply any information required. It also requires the requested authority to take necessary measures in order to gather the required information. According to the Commission's proposal for the Directive, "[t]he reply must be sent in as short a time as possible, to ensure the effectiveness of the investigation measures and to deter development of cross-border schemes for misbehaviour".[4]

32. The Estonian Government is of the opinion that the objective of Article 16 can be better achieved when the requested authority knows exactly what information it needs to gather and send to the requesting authority.

33. The Estonian Government submits that explaining the reason for and providing underlying facts in a request is acknowledged in international agreements on securities markets supervision principles. 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.

34. In the view of the Estonian Government, assessing the proportionality of the request and the scope of information should normally be carried out by the requesting authority. Nevertheless, when a request contains a description of the facts, this helps to ensure that requests are proportionate for attaining the objectives pursued and do not go beyond what is necessary to achieve those objectives.

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[4] Reference is made to the Commission's proposal, Explanatory memorandum, COM(2001) 281 final, p. 13.

35. Requests for information may require the requested authority to carry out its own administrative actions. As is the case in Estonia, for example, administrative actions have to be proportionate and necessary, and they must include an explanation of their objectives so that their purpose can be verified. Such administrative actions are subject to judicial control. In order to ensure that administrative actions are proportionate and necessary, they should include a description of the facts.

36. According to the Estonian Government, this is especially important when a request may require the gathering of information that may constitute an interference with the right to respect for private life and personal data under Articles 7 and 8 of the Charter of Fundamental Rights. If there is such interference, it is only permissible when it is “provided for by law” or “proportionate”, that is to say when it is necessary and meets objectives of general interest or the need to protect the rights and freedoms of others (Article 52(1) of the Charter of Fundamental Rights). The description of the facts that give rise to the suspicion that the prohibition on insider dealing and market manipulation has been infringed helps the requested authority to verify that its actions meet the above-mentioned criterion.

37. The Estonian Government proposes that the Court answer the question as follows:

> *Taking into account Article 16(2), international agreements as well as the need for the requests to be proportionate when considering articles 7 and 8 of the Charter of Fundamental Rights, an authority making a request to the competent authority of another Member State in accordance with Article 16 of Directive 2003/6/EC must 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. At the same time, the need for further factual information should not hinder the cooperation and should not be used as a ground for denial to fulfil the request or impede immediate cooperation.*

The German Government

38. The German Government submits that excessive requirements should not be imposed on the substance of a request for assistance or on the actual entitlement to receive assistance. The fundamental rights of the citizen to respect for private life and protection of personal data are already ensured by the European rules on the use of the information transmitted in the State conducting the investigation into market abuse. Moreover, the principle of proportionality has already been taken into account by the restrictive precondition in Article 16(2) that the information requested has to be necessary for the requesting authority to carry out its duties.

39. In the view of the German Government, fundamental rights and general legal principles cannot result in excessive requirements being imposed on the substance of a request for information or in the mutual assistance being delayed due to comprehensive prior examinations by the requested authority. This can be seen not only from the interests of the State that is investigating market abuse, but in particular

from the principle of effective enforcement of the Directive, which is the purpose the mutual assistance ultimately serves.

40. 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 authorities shall immediately supply any information required.

41. The requesting authority must merely make it plausible in its request for information that the information is somehow of relevance 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.

42. 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 to be 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 a legal subsumption under a provision of the Directive.

43. The principle that excessive requirements should not be imposed on the request for information also corresponds to the purpose of the Directive. According to recital 40 of its preamble, the Directive aims to improve cooperation and to set out 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. Corresponding statements can also be found in the explanatory memorandum to the Commission’s proposal for the Directive. It states that the reply must be sent in as short a time as possible to ensure the effectiveness of the investigation measures and to deter the development of cross-border schemes for misbehaviour.[5]

44. The German Government submits that the aim is to obtain information from the requested authority with a view to clarifying the circumstances in which the transactions took place. The administrative procedure is at an investigatory stage in which relevant information is being gathered. In this regard, the mutual assistance between the financial supervisory authorities differs structurally from the mutual legal assistance between judicial authorities in criminal investigations. The latter requires the formal launching of an investigation. This, in turn, requires the existence of

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[5] Reference is made to the Commission’s proposal, cited above, p. 13.

suspicion of a specific crime. However, such a specific suspicion can generally only be established after the supervisory authority has carried out an investigation. For this reason, a request for information made in the context of an investigation based on supervisory regulations cannot be made contingent on the existence of a specific suspicion. Rather, it is only necessary to state why the requesting authority deems it appropriate to act and to launch an investigation.

45. The German Government observes that, if the requested authority is unable to provide the requested information without delay, pursuant to Article 16(2), it must give the requesting authority the reasons for this. The burden of justification basically rests with the requested authority. This is another reason why the requirements imposed on the content of the request for information cannot be too rigorous.

46. The German Government submits that the situations in which the requested authority can refuse to provide the requested information are listed exhaustively in the second subparagraph of Article 16(2). This means that the requested authority may not categorically refuse to provide information for other reasons, and particularly not because the requesting authority has failed to provide details of the case that are not necessary for a plausibility check.

47. In practice, the requesting authority entrusted with the investigation is best placed to determine whether a certain piece of information is needed. After all, due to the territoriality principle, the requested authority is merely acting in a supporting role and providing missing information.

48. For these reasons, the German Government believes that a request for information pursuant to Article 16 cannot be rejected merely because, for example, the requesting authority does not know the names of the parties to the transaction or because the actual movement of the share price or the level of the transaction volume is not particularly remarkable *per se*.

49. The German Government proposes that the Court answer the question as follows:

> *An authority making a request to the competent authority of another Member State in accordance with Article 16 of Directive 2003/6/EC must lay out in its request why the information is necessary to enable it to carry out its duties under the directive and thus, inter alia, set out the facts that gave rise to its initial suspicion.*
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> *However, the requirements relating to this obligation are not to be interpreted in too rigorous a manner, as it is ultimately up to the requesting authority to assess the need for the information requested.*

The Greek Government

50. The Greek Government supports the observations of the HCMC. In addition, it submits that it cannot be inferred from the Directive that, with respect to the

information sought being necessary and required for its investigation, the burden of proof rests with the requesting authority.

51. On the contrary, the spirit as well as the wording of the Directive is clearly aimed at encouraging and facilitating cooperation between the respective competent authorities of the Member States. Nor is it suggested in Article 16 that the requesting authority has to prove, beyond doubt, that there are "concrete suspicions" relating to the information sought by the requested authority. Pursuant to the Directive, when such a request is made by a national authority, the requested authority must gather and provide the information without delay.

52. The Greek Government submits that, when the EU legislator placed restrictions on this process, it was done explicitly by stating that the competent authorities may refuse to act on a request for information only in the circumstances listed in the second subparagraph of Article 16(2).

53. The aim of the Directive is to combat insider dealing and market manipulation by, *inter alia*, strengthening cooperation and the exchange of information, without delay, between national authorities. That aim would be compromised if a request for information were followed up by asking 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" for the investigation is in line with the Directive, as well as in compliance with the principle of proportionality.

54. The Greek Government submits that the Directive provides for adequate data protection safeguards as regards information supplied under Article 16. It is stated in the article that "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". This notion of data protection concerns the handling of information delivered to the requesting authority. The handling of the relevant information is safeguarded by the professional secrecy rules applicable to the HCMC and explicitly described in the request for assistance to the FMA. This is in accordance with the provisions of the Directive and also of the Committee of European Securities Regulators (CESR) and IOSCO MMoUs, to which both authorities are signatories.

55. The Greek Government proposes that the Court answer the question in the negative.

The Liechtenstein Government

56. 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 regarding which legal framework is to be applied, and, as the case may be, the facts underlying the request, for the FMA to be able to ascertain whether it is competent to act as requested.

57. The Liechtenstein Government submits that, for obvious reasons like divergent powers of national authorities, the legal framework cannot be settled merely by the requesting authority making reference to the Directive. The Directive is not a direct source for the competences of national authorities to deal with information requests, but requires transposition into national law. If the FMA, in order to assess whether a request falls within its competences, needs further information from the requesting authority in order to ascertain its powers to act, the FMA is obliged under the rule of law to ask the requesting authority for such information.

58. Before the FMA can provide information upon request to a requesting authority in another EEA Member State, it has to receive 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. The Administrative Court must be put in a position to approve the provision of information. This is only the case if the Administrative Court has all the necessary information at hand in order to make its assessment.

59. According to the Liechtenstein Government, 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. Therefore, it is indispensable that the FMA is able to ascertain that the request is compliant with the legal framework it must respect when gathering information to be forwarded to the requesting authority.

60. Because encroachments on fundamental rights need to be proportionate in light of the purpose sought, all information must be at hand for the FMA and for the Administrative Court to verify the proportionality of the request.

61. Of course, the scrutinising of information requests, first by the requesting authority when formulating and before addressing a request for information and, second, by the requested authority when receiving the request for information, must not render the functioning of cooperation ineffective. Therefore, the requesting and the requested authorities must not be burdened with extensive formalities relating to a request for information. It would not be in line with the purpose of the Directive if the requested authority unnecessarily or unfoundedly demanded that the requesting authority set out the facts of its request. However, in the view of the Liechtenstein Government, this is not the case under Liechtenstein law.

62. In any case, the validity of the facts provided by the requesting authority along with a request for information shall not be questioned by the requested authority. This applies to the FMA as well as to the Administrative Court. This guarantees that information requests can be executed swiftly. No "burden of proof" is placed on the requesting authority. It is only required to set out the relevant facts necessary for the requested authority to ascertain its competence to respond. It therefore lies in the hands of the requesting authority to obtain assistance quickly.

63. The Liechtenstein Government submits that execution of a request for information can only be refused due to the reasons exhaustively listed in the Liechtenstein Market Abuse Act and the FMA Act. No further grounds for refusal to comply with the request can be invoked. Thus, grounds for refusal of a formally correct request cannot be based on analogy or interpretation of the law. In the view of the Liechtenstein Government, this is in conformity with the Directive.

64. The Liechtenstein Government submits that, if the requesting authority is to set out facts in order for the requested authority to ascertain its competence to act, this includes facts that enable the requested authority to assess whether grounds for refusal of the request – as provided for in the Directive – exist.

65. The Liechtenstein Government is of the opinion that it is not up to the Court to analyse whether the HCMC's request for information is compliant with the Directive, nor is it within the Liechtenstein Government's competence to comment thereupon. It should be the Administrative Court that, in light of the Advisory Opinion received from the Court, adjudicates this question.

66. The Liechtenstein Government proposes that the Court answer the question as follows:

> *The competent authority of an EEA Member State addressed with a request from a competent authority of another EEA Member State under Article 16(2) of Directive 2003/6/EC must be provided with sufficient facts of the case which is under investigation in order to be able to ascertain the application of the provisions of national law implementing Directive 2003/6/EC.*

The Polish Government

67. The Polish Government observes that the Directive does not specify any formal requirements that should be fulfilled in a request for information submitted pursuant to Article 16. In particular, the Directive does not specify what information should be provided in such a request. The Court is therefore asked whether Liechtenstein law, which obliges the requesting authority to specify the facts giving rise to the suspicion, complies with Article 16 of the Directive.

68. The Polish Government takes the view that the request for information referred to in Article 16 should not be limited to a simple confirmation that the investigation cannot be conducted without the requested information. Such a request should also include additional elements. In particular, it should specify the facts giving rise to the initial suspicion of market manipulation and explain how the requesting authority intends to use the information received from the authority of the Member State addressed.

69. The Polish Government submits that the fact that Article 16 does not set out any requirements as to the form and content of the request for information does not mean that Member States are not allowed to set out and apply any requirements relating to the form and content of such requests.

70. Pursuant to recital 40 of the preamble to the Directive, increasing cross-border activities necessitate improved cooperation and a comprehensive set of provisions for the exchange of information between national competent authorities. Furthermore, the need to specify the procedures for and forms of such exchange of information is also expressed in Article 16(5) of the Directive. Therefore, in the view of the Polish Government, despite the fact that the Directive itself does not set out a comprehensive set of provisions for the exchange of information, it confirms that such a set of rules is desirable.

71. Accordingly, the Polish Government submits that the specific requirements relating to the form of requests for information cannot be perceived as being contrary to the Directive, as long as their objective is to enable cooperation between competent authorities on preventing market abuse.

72. This concerns in particular the facts giving rise to a suspicion of market abuse and the uses for which assistance (information) is sought. Such information is necessary to enable effective cooperation, and to adjudicate on whether a request may be rejected pursuant to the second subparagraph of Article 16(2). If the requested authority cannot make such an assessment due to a lack of sufficient information in the request, it cannot exercise its right to reject the request. In such case, the right guaranteed under the second subparagraph of Article 16(2) becomes hypothetical. Similarly, the procedure pursuant to the third subparagraph of Article 16(2) of the Directive, whereby disputes regarding a rejection made pursuant to that Article may be referred to the ESMA (the European Securities and Markets Authority), would become inapplicable.

73. The Polish Government refers to Appendix C of the IOSCO MMoU, which states that requests should, in particular, include a description of the facts underlying the investigation, and a description of how the information requested will assist in developing the investigation. As the aim of the MMoU corresponds to the objective of the Directive, the requirements in the MMoU cannot be contrary to the Directive.

74. Finally, the Polish Government submits that, 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. As a result, the efforts made by the requested authority to analyse the request and provide the information could turn out to be pointless. That would be unacceptable in view of the general principle of proportionality and the objective of the Directive. The purpose of Article 16 is to provide for effective cooperation and facilitate the investigation of real suspicions of market abuse – not those of very hypothetical nature.

75. The Polish Government proposes that the Court answer the question as follows:

An authority making a request to the competent authority of another Member State in accordance with Article 16 of Directive 2003/6/EC must 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 upon.

ESA

Admissibility of the request

76. ESA submits that the request should be dismissed as inadmissible.

77. First, ESA raises the question of whether the Administrative Court, when exercising the function laid down in Article 27g of the FMA Act, can be regarded as a court or tribunal as required by Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA").

78. ESA submits that, since the second sentence of Article 34 SCA is identically worded to the second sentence of Article 267 TFEU, procedural homogeneity needs to be ensured.[6] This requires that the two provisions are interpreted and applied in an identical manner throughout the EEA.

79. ESA submits that, in order to determine whether a body making a request is a court or a tribunal for the purposes of Article 34 SCA, the Court should take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

80. ESA submits that it follows from Article 34 SCA that a national court may send a request for an Advisory Opinion 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.[7]

81. According to ESA, it is constant case law of the Court of Justice of the European Union that, when the national court is called upon to exercise administrative authority without at the same time being called upon in a dispute, then it is performing a non-judicial function.[8]

82. In ESA's view, it is obvious from the factual background to the case at hand that there are neither *inter partes* proceedings nor a dispute pending before the Administrative Court. Thus, in this instance, the Administrative Court has a merely administrative function or a merely confirmatory role, which is subject to national law in all cases.

83. ESA submits that it is very difficult to infer from the request for an Advisory Opinion how the procedure will develop in the event that the Administrative Court

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[6] Reference is made to the Order of the President of 8 January 2014 in Case E-19/13 *Konkurrenten.no* v *ESA*, not yet reported, paragraph 33, and the case law cited.

[7] Reference is made to Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 13 and the case law cited.

[8] Reference is made to Cases C-111/94 *Job Centre* [1995] ECR I-3382, paragraph 11, C-178/99 *Salzmann* [2001] ECR I‑4421, paragraph 15, C-182/00 *Lutz* [2002] ECR I-558, paragraph 14, *Standesamt Stadt Niebüll*, cited above, C-344/09 *Bengtsson* [2011] ECR I-1999, paragraph 19, and C-443/09 *Grillo Star*, judgment of 19 April 2012, not yet reported, paragraphs 21 and 22.

issues an order rejecting the FMA's decision to grant assistance, and whether any party would be entitled to challenge that order. However, ESA continues, if the Administrative Court issued an order refusing the assistance and an interested party challenged that refusal, then that appeal would constitute the initiation of judicial proceedings, and the court hearing that appeal would exercise a judicial function.[9]

84. Secondly, and in the alternative, ESA submits that judicial oversight of the requested authority, as provided for in Liechtenstein law, is not foreseen by the Directive. In ESA's view, the procedure in question would delay the provision of the requested information, which must, pursuant to Article 16(2) of the Directive, be provided immediately. Seizing 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, that any infringements of the Directive must be promptly detected and sanctioned.

85. 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.

86. The referring court is bound to interpret domestic law as far as possible in light of the wording and purpose of the Directive in order to achieve the result sought by the Directive and, consequently, to comply with Articles 3 and 7 EEA and Protocol 35 to the EEA Agreement.[10] In this case, such conforming interpretation would entail that the national court limits itself to its administrative task of ensuring that no grounds exist for refusal pursuant to Article 27f(1)(b) and (c) of the FMA Act, without undertaking the function of a judicial review relating to the satisfaction of the requirements under Articles 27a to 27e.

87. Accordingly, if the national court had interpreted and applied national law in light of the Directive, it would have declined to exercise its jurisdiction as to the content of the request received by the HCMC. It would then conclude that a request for an Advisory Opinion would be devoid of any substance.

88. On the basis of the above, ESA submits that, even if the Administrative Court exercises a judicial function in this case, its request for an Advisory Opinion should be declared inadmissible as it is based on a provision of national law that has not been interpreted and applied in light of the wording and purpose of the Directive.

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[9] Reference is made to *Job Centre*, cited above, paragraph 11.

[10] Reference is made to Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 123, and the case law cited.

89. In addition, ESA argues that, while, on the level of principles, a difference of opinion may exist between the requesting and the requested authorities concerning the amount of background information that must be supplied to justify the request for mutual assistance, it would seem, in this particular case, that the difference was resolved to the satisfaction of the requested authority in Liechtenstein. Consequently, it is difficult to see how any answer provided by the Court could provide further help to the national court.

The substance of the question

90. 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 the suspicion of a breach of the prohibition on market manipulation. A request for assistance is part of the process of collecting information,[11] which will indicate whether or not any suspicion is founded.

91. It is true that, according to the established case law of the Court, provisions of the EEA Agreement are to be interpreted in light of fundamental rights. Regarding the Directive, the European legislature was required to take into account and weigh proportionality and the human rights aspects against the prohibition on insider dealing and market manipulation.

92. ESA submits that the European legislature opted to ensure that judicial protection, as well as all safeguards and guarantees relating to fundamental rights and rights of defence aspects, are implemented in the EEA State of the requesting authority, pursuant to Articles 12 and 15 of the Directive.[12]

93. According to ESA, the rationale of the EU legislature for Article 16 of the Directive, which leaves no doubt that it is for the competent national authority requesting the 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 to then seek assistance accordingly.

94. ESA observes that the second subparagraph of Article 16(2) of the Directive exhaustively lists three grounds for refusing to supply information. In its view, it thus follows that the requested authority cannot review the soundness or appropriateness of the investigation being carried out in the requesting State. Even if the requested authority considers that it would not, in similar circumstances, conduct an investigation, it is bound by Article 16 to provide the requesting authority with the information requested. Accordingly, the requested authority cannot refuse to supply the information requested even if it considers that the investigation in the requesting State is a "fishing expedition". In a theoretical case, even a "fishing expedition" by the

[11] Reference is made to Case C-276/12 *Sabou*, judgment of 22 October 2013, not yet reported, paragraph 42.

[12] Ibid., paragraph 45.

requesting authority would, under the Directive, create an obligation on the requested authority to provide the requested assistance.

95. ESA submits that, in the single EEA market of financial services where each EEA State at the same time has its national competent authority, barriers arising need to be lifted as far as possible by the efficient coordination of such authorities and by basically letting the authority conducting the investigation decide the amount and content of the necessary information. Any other interpretation would lead to incongruous delays, and the system established by the Directive would thereby not be operational, and its purpose, i.e. the prompt detection and sanctioning of any infringements, would be seriously compromised.[13]

96. ESA submits that, 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 on the Administrative Court an obligation 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.

97. ESA proposes that the Court declare that it has no jurisdiction to answer the question referred by the Administrative Court of the Principality of Liechtenstein in its decision of 21 October 2013. In the alternative, ESA proposes that the Court answer the question as follows:

> *An authority making a request to the competent authority of another EEA State in accordance with Article 16 of Directive 2003/6/EC is not obliged to 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.*

The Commission

Admissibility of the request

98. The Commission questions whether the request is admissible.

99. The Commission submits that it seems that the effect of Articles 27c(3) and 27d of the FMA Act is that, under Liechtenstein law, a request for assistance must include “at least an outline description of the initial suspicion”.

100. Furthermore, it seems that the FMA took the view that the request from HCMC did comply with the requirements of Liechtenstein law and adequately set out the background to the request. Indeed, it was on this basis that the FMA launched the procedure under Article 27g of the FMA Act for consent from the Administrative Court to provide the assistance. Although Article 27g(2) of that Act also requires the

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[13] Reference is made to recital 38 of the preamble to the Directive, and to Case C-45/08 *Spector Photo Group* [2009] ECR I-12073, paragraph 45, which refers to “an effective and uniform system to prevent and sanction insider dealing”.

competent judge to examine whether the underlying requirements are satisfied, no information has been provided that casts doubt on the FMA's initial assessment. The question referred thus appears to be general in nature rather than linked to the specific procedure at issue, and the Commission accordingly queries whether it is not hypothetical and thus inadmissible.[14]

101. 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 he "is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature".[15]

102. In the Commission's view, the national judge, who has been consulted in accordance with Article 27g of the FMA Act, appears to be taking a purely administrative decision, as it is simply the final step in the administrative procedure set up to answer a request for assistance. There is no legal dispute to be decided, and for this reason the national judge cannot be regarded as exercising a judicial function.[16]

103. The Commission notes in particular that Article 27g(2) of the FMA Act expressly states that approval of the assistance by the judge does not result in the issuing of any special order (by way of contrast, if a request were to be refused, the FMA would presumably be able to seek judicial review of any refusal decision – and it is at this point that a legal dispute would arise). Finally, the Commission would add that, as far as it is aware, the provision of assistance to a requesting authority under Article 16 of the Directive is not subject to judicial approval in any other EEA State, this being purely a matter for the administrative authorities. In all these circumstances, the Commission would express serious doubts as to the admissibility of the present request for an Advisory Opinion.

The substance of the question

104. The Commission submits that the cooperation obligation placed upon the competent authorities by Article 16(1) of the Directive is very broadly worded, and must take place "whenever necessary" for the purpose of carrying out their duties. The second sentence of Article 16(1) further reinforces this through a general obligation to render assistance to the competent authorities of other Member States. As is emphasised by the final sentence of Article 16(l), an essential part of such assistance is the exchange of information and cooperation on investigation activities. This is logical given the cross-border nature of the financial activities falling within the scope of the Directive.

105. The Commission contends that, unless information relevant to the investigation and sanction of market abuse is easily available to the competent authorities, there is clearly a serious risk that the Directive's primary objective of combatting market abuse

[14] Reference is made to Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 21.

[15] Reference is made to Case C-363/11 *Epitropos tou Elegktikou Synedriou*, judgment of 19 December 2012, not yet reported, paragraph 19.

[16] Reference is made to *Job Centre*, paragraph 11, and *Bengtsson*, paragraph 19, both cited above.

throughout the EEA will be undermined. It is the exchange of information and participation in investigations that forms the "backbone" of the cross-border system set up by the Directive.[17]

106. According to the Commission, 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 legislator 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.

107. This is further illustrated by the wording of Article 16(2), which requires a competent authority to supply "immediately" any information required, and, similarly, to "immediately" 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.

108. Only three exceptions to the obligation to exchange information are envisaged, and these are expressly set out in the second subparagraph of Article 16(2). In the Commission's view, 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.

109. 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. The description given in the request from HCMC in the present case could be an example. However, the Commission points out that this is quite different from an interpretation of Article 16 that permits the requested authority to dictate a certain format or content, and to reject a request which does not comply.

110. Moreover, the Commission submits that general legal principles, such as proportionality, data protection and human rights legislation (especially Article 8 of the European Convention on Human Rights ("ECHR"), which enshrines the right to respect for private and family life, home and communications), were already taken into account by the legislator at the time 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. This is illustrated not only by the reference, in its recitals 41 and 44, to proportionality and respect for ECHR principles, but also by the terms of Article 16 itself.

111. 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

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[17] Reference is made to recital 35 of the preamble to the Directive, which explains that establishing a level playing field in EEA financial markets requires "wide geographical application" of its provisions.

been undertaken by the requesting authority prior to the sending of a request, with the result that no additional control is needed by the requested authority.

112. The Commission also draws attention to the safeguards concerning the use of information by the requesting authority contained in Article 16(2). Use is specifically restricted to "the exercise of their functions within the scope of [the Directive]" and "the context of administrative or judicial proceedings specifically related to the exercise of those functions". In addition, the final sentence of Article 16(2) makes it clear that any use for other purposes or transmission to other competent authorities requires the consent of the competent authority that communicates the information. Finally, it should be noted that information supplied to a requesting competent authority is expressly stated to be covered by the obligation of professional secrecy to which its employees (or former employees) are subject.

113. Furthermore, the Commission considers that 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 is essentially formal. It 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 the use and application of the information received.

114. In this regard, the Commission draws a parallel with the mutual assistance obligations set up in the taxation field by Directive 77/799/EEC[18] (now replaced by Directive 2011/16/EU[19]). A request for assistance made by the tax authorities under Directive 77/799/EEC is simply part of the process of collecting information, with the result that, for example, the fundamental right to be heard does not require that the taxpayer should be involved in the request for information, or heard at the preliminary stage when inquiries are carried out in the requested Member State.[20]

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[18] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15).

[19] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

[20] Reference is made to *Sabou*, cited above, paragraph 40, where it was held that a distinction must be drawn between the initial investigation stage "during which information is collected and which includes the request for information by one tax authority to another" and any subsequent contentious stage between the tax authorities and the taxpayer. Reference is also made to paragraphs 42, 44 and 46 of that judgment.

115. The Commission proposes that the Court answer the question as follows:

Article 16 of Directive 2003/6 cannot be interpreted as requiring a requesting competent authority to set out the facts giving rise to a suspicion of market abuse in its request for information under the mutual cooperation procedure established by that article.

Per Christiansen
Judge-Rapporteur