JUDGMENT OF THE COURT

4 February 2020

(Directive 2003/6/EC – Market manipulation – Harmonisation – Real transactions – False and misleading signals – Securing the price at an abnormal or artificial level – Legitimate reasons – Dissemination of information)

In Case E-5/19,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Borgarting Court of Appeal (*Borgarting lagmannsrett*), in criminal proceedings against

F and G,

concerning the interpretation 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: Páll Hreinsson, President (Judge-Rapporteur), Per Christiansen and Bernd Hammermann, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- the Public Prosecution Office of the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("ØKOKRIM"), as appellant, represented by Inge Svae-Grotli, public prosecutor, and Lars-Kaspar Andersen, police prosecutor;
- F, represented by Anders Brosveet and Rasmus Woxholt, advocates;
- G, represented by Pål Sverre Hernæs, Mikkel Toft Gimse and Dag Sørlie Lund, advocates;
- the Czech Republic, represented by Martin Smolek, Jiří Vláčil and Iva Gavrilova, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Ingibjörg-Ólöf Vilhjálmsdóttir, Erlend Møinichen Leonhardsen and Carsten Zatschler, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Tibor Scharf, Legal Adviser, Joan Rius Riu and Julie Samnadda, members of its Legal Service, acting as Agents;

having regard to the Report for the Hearing,

having heard oral argument of ØKOKRIM, represented by Inge Svae-Grotli; F, represented by Anders Brosveet; G, represented by Dag Sørlie Lund; ESA, represented by Ingibjörg-Ólöf Vilhjálmsdóttir and Erlend Møinichen Leonhardsen; and the Commission, represented by Julie Samnadda, at the hearing on 13 November 2019,

gives the following

Judgment

I Legal background

EEA law

1 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) ("the Directive") was incorporated in the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 38/2004 of 23 April 2004 (OJ 2004 L 277, p. 7, and EEA Supplement 2004 No 43, p. 6), which added it as point 29a of Annex IX (Financial services).

2 Recital 2 of the Directive reads:

> *An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.*

3 Recital 12 of 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.*

4 Recital 15 of the Directive reads:

> *Insider dealing and market manipulation prevent full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.*

5 Recital 20 of the Directive reads:

> *A person who enters into transactions or issues orders to trade which are constitutive of market manipulation may be able to establish that his reasons for entering into such transactions or issuing orders to trade were legitimate and that the transactions and orders to trade were in conformity with accepted practice on the regulated market concerned. A sanction could still be imposed if the competent authority established that there was another, illegitimate, reason behind these transactions or orders to trade.*

6 Article 1(2) of the Directive defines "market manipulation" as follows:

> *'Market manipulation' shall mean:*
>
> *(a) transactions or orders to trade:*
>
> > *- which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments, or*
> >
> > *- which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level,*
>
> *unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned;*
>
> *(b) transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance;*
>
> *(c) dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading. In respect of journalists when they act in their professional capacity such dissemination of information is to be assessed, without prejudice to Article 11, taking into account the rules governing their profession, unless those persons derive, directly or indirectly, an advantage or profits from the dissemination of the information in question.*

In particular, the following instances are derived from the core definition given in points (a), (b) and (c) above:

- conduct by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions,

- the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices,

- taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument (or indirectly about its issuer) while having previously taken positions on that financial instrument and profiting subsequently from the impact of the opinions voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way.

The definitions of market manipulation shall be adapted so as to ensure that new patterns of activity that in practice constitute market manipulation can be included.

7 Article 1(5) of the Directive defines "accepted market practices" as follows:

'Accepted market practices' shall mean practices that are reasonably expected in one or more financial markets and are accepted by the competent authority in accordance with guidelines adopted by the Commission in accordance with the procedure laid down in Article 17(2).

8 Article 5 of the Directive reads:

Member States shall prohibit any person from engaging in market manipulation.

9 Article 9 of the Directive reads:

This Directive shall apply to any financial instrument admitted to trading on a regulated market in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market.

Articles 2, 3 and 4 shall also apply to any financial instrument not admitted to trading on a regulated market in a Member State, but whose value depends on a financial instrument as referred to in paragraph 1.

> *Article 6(1) to (3) shall not apply to issuers who have not requested or approved admission of their financial instruments to trading on a regulated market in a Member State.*

10 Article 11 of the Directive reads:

> *Without prejudice to the competences of the judicial authorities, each Member State shall designate a single administrative authority competent to ensure that the provisions adopted pursuant to this Directive are applied.*
>
> *Member States shall establish effective consultative arrangements and procedures with market participants concerning possible changes in national legislation. These arrangements may include consultative committees within each competent authority, the membership of which should reflect as far as possible the diversity of market participants, be they issuers, providers of financial services or consumers.*

11 Article 12 of the Directive reads:

> *1. The competent authority shall be given all supervisory and investigatory powers that are necessary for the exercise of its functions. It shall exercise such powers:*
>
> *(a) directly; or*
>
> *(b) in collaboration with other authorities or with the market undertakings; or*
>
> *(c) under its responsibility by delegation to such authorities or to the market undertakings; or*
>
> *(d) by application to the competent judicial authorities.*
>
> *2. Without prejudice to Article 6(7), the powers referred to in paragraph 1 of this Article shall be exercised in conformity with national law and shall include at least the right to:*
>
> *(a) have access to any document in any form whatsoever, and to receive a copy of it;*
>
> *(b) demand information from any person, including those who are successively involved in the transmission of orders or conduct of the operations concerned, as well as their principals, and if necessary, to summon and hear any such person;*
>
> *(c) carry out on-site inspections;*
>
> *(d) require existing telephone and existing data traffic records;*

(e) require the cessation of any practice that is contrary to the provisions adopted in the implementation of this Directive;

(f) suspend trading of the financial instruments concerned;

(g) request the freezing and/or sequestration of assets;

(h) request temporary prohibition of professional activity.

3. This Article shall be without prejudice to national legal provisions on professional secrecy.

12 Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation was incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 103/2004 of 9 July 2004 (OJ 2004 L 376, p. 31, and EEA Supplement 2004 No 65, p. 22), which added it as point 29d of Annex IX (Financial services), later renumbered as point 29ab ("Implementing Directive 2003/124/EC").

13 Article 4 of Implementing Directive 2003/124/EC entitled "Manipulative behaviour related to false or misleading signals and to price securing" reads:

For the purposes of applying point 2(a) of Article 1 of Directive 2003/6/EC, and without prejudice to the examples set out in the second paragraph of point 2 thereof, Member States shall ensure that the following non-exhaustive signals, which should not necessarily be deemed in themselves to constitute market manipulation, are taken into account when transactions or orders to trade are examined by market participants and competent authorities:

(a) the extent to which orders to trade given or transactions undertaken represent a significant proportion of the daily volume of transactions in the relevant financial instrument on the regulated market concerned, in particular when these activities lead to a significant change in the price of the financial instrument;

(b) the extent to which orders to trade given or transactions undertaken by persons with a significant buying or selling position in a financial instrument lead to significant changes in the price of the financial instrument or related derivative or underlying asset admitted to trading on a regulated market;

(c) whether transactions undertaken lead to no change in beneficial ownership of a financial instrument admitted to trading on a regulated market;

(d) the extent to which orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily volume of transactions in the relevant financial instrument on the regulated

market concerned, and might be associated with significant changes in the price of a financial instrument admitted to trading on a regulated market;

(e) the extent to which orders to trade given or transactions undertaken are concentrated within a short time span in the trading session and lead to a price change which is subsequently reversed;

(f) the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument admitted to trading on a regulated market, or more generally the representation of the order book available to market participants, and are removed before they are executed;

(g) the extent to which orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices and valuations are calculated and lead to price changes which have an effect on such prices and valuations.

14 Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions was incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 149/2004 of 29 October 2004 (OJ 2005 L 102, p. 23, and EEA Supplement 2005 No 20, p. 15), which added it as point 29f of Annex IX (Financial services), later renumbered as point 29c ("Implementing Directive 2004/72/EC").

15 Article 2 of Implementing Directive 2004/72/EC entitled "Factors to be taken into account when considering market practices" reads:

1. For the purposes of applying paragraph 2 of point 1 and point 2(a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the following non exhaustive factors are taken into account by competent authorities, without prejudice to collaboration with other authorities, when assessing whether they can accept a particular market practice:

(a) the level of transparency of the relevant market practice to the whole market;

(b) the need to safeguard the operation of market forces and the proper interplay of the forces of supply and demand;

(c) the degree to which the relevant market practice has an impact on market liquidity and efficiency;

(d) the degree to which the relevant practice takes into account the trading mechanism of the relevant market and enables market participants to react

properly and in a timely manner to the new market situation created by that practice;

(e) the risk inherent in the relevant practice for the integrity of, directly or indirectly, related markets, whether regulated or not, in the relevant financial instrument within the whole Community;

(f) the outcome of any investigation of the relevant market practice by any competent authority or other authority mentioned in Article 12(1) of Directive 2003/6/EC, in particular whether the relevant market practice breached rules or regulations designed to prevent market abuse, or codes of conduct, be it on the market in question or on directly or indirectly related markets within the Community;

(g) the structural characteristics of the relevant market including whether it is regulated or not, the types of financial instruments traded and the type of market participants, including the extent of retail investors participation in the relevant market.

Member States shall ensure that competent authorities shall, when considering the need for safeguard referred to in point (b) of the first subparagraph, in particular analyse the impact of the relevant market practice against the main market parameters, such as the specific market conditions before carrying out the relevant market practice, the weighted average price of a single session or the daily closing price.

2. Member States shall ensure that practices, in particular new or emerging market practices are not assumed to be unacceptable by the competent authority simply because they have not been previously accepted by it.

3. Member States shall ensure that competent authorities review regularly the market practices they have accepted, in particular taking into account significant changes to the relevant market environment, such as changes to trading rules or to market infrastructure.

16 Article 3 of Implementing Directive 2004/72/EC entitled “Consultation procedures and disclosure of decisions” reads:

1. For the purposes of applying paragraph 2 of point 1 and point 2(a) of Article 1 of Directive 2003/6/EC, Member States shall ensure that the procedures set out in paragraphs 2 and 3 of this Article are observed by competent authorities when considering whether to accept or continue to accept a particular market practice.

2. Without prejudice to Article 11(2) of Directive 2003/6/EC, Member States shall ensure that competent authorities, before accepting or not the market practice concerned, consult as appropriate relevant bodies such as

representatives of issuers, financial services providers, consumers, other authorities and market operators.

The consultation procedure shall include consultation of other competent authorities, in particular where there exist comparable markets, i.e. in structures, volume, type of transactions.

3. Member States shall ensure that competent authorities publicly disclose their decisions regarding the acceptability of the market practice concerned, including appropriate descriptions of such practices. Member States shall further ensure that competent authorities transmit their decisions as soon as possible to the Committee of European Securities Regulators which shall make them immediately available on its website.

The disclosure shall include a description of the factors taken into account in determining whether the relevant practice is regarded as acceptable, in particular where different conclusions have been reached regarding the acceptability of the same practice on different Member States markets.

4. When investigatory actions on specific cases have already started, the consultation procedures set out in paragraphs 1 to 3 may be delayed until the end of such investigation and possible related sanctions.

5. A market practice which was accepted following the consultation procedures set out in paragraphs 1 to 3 shall not be changed without using the same consultation procedures.

National law

Securities Trading Act

17 Section 3-8 of the Securities Trading Act reads:

(1) No one may engage in market manipulation in relation to financial instruments.

(2) "Market manipulation" means:

1. transactions or orders to trade which give, or are likely to give, false, incorrect or misleading signals as to the supply of, demand for or price of financial instruments, or which secure the price of one or several financial instruments at an abnormal or artificial level, unless the person or persons who entered into the transactions or issued the orders to trade establish that their reasons for doing so are legitimate and that these transactions or orders to trade conform to conduct accepted by the Financial Supervisory Authority of Norway (Finanstilsynet) as market practice on the market concerned, or

2. transactions entered into or orders to trade given in relation to any form of misleading conduct, or

3. dissemination of information through the media, including the internet, or by any other means, which gives, or is likely to give, false, incorrect or misleading signals as to financial instruments, including the dissemination of rumours and news, where the person who made the dissemination knew, or should have known, that the information was false, incorrect or misleading. If a journalist acting in his professional capacity disseminates such information, the issue is to be assessed with regard to the rules governing their profession, unless the person derives, directly or indirectly, an advantage or profits from the dissemination of the information concerned.

(3) The Ministry may by regulation lay down further rules on market manipulation and accepted market practices.

18 At the material time, Section 17-3 of the Securities Trading Act read:

Section 17-3. Sanctions

(1) Anyone who wilfully or through negligence violates section 3–3(1) or section 3–8, read in conjunction with the regulations enacted pursuant thereto, shall be punished by fine or by imprisonment not exceeding six years.

...

II Facts and procedure

19 On 25 September 2018, F and G were indicted for having undertaken market manipulation and insider dealing in connection with one sale and one purchase, respectively, of bonds listed on Oslo Stock Exchange (*Oslo børs*). Oslo District Court acquitted both F and G. ØKOKRIM has brought an appeal against the acquittals before the referring court.

20 According to the referring court, at issue in the case is whether F and G manipulated the bond market on Oslo Stock Exchange when, on 19 August 2016, F, as advisor and manager of a bond fund ("the bond fund"), through G, as bond broker in a brokerage firm ("the brokerage firm"), sold a bond holding for the bond fund with a nominal value totalling NOK 10 million at a price quote of 77.25 before purchasing a larger bond holding of NOK 50 million at a price quote of 79.625 on 22 August 2016. The seller of the NOK 50 million holding was not informed that the buyer was the same person who had sold the NOK 10 million holding on the previous Friday, 19 August 2016.

The Norwegian bond market

21 Oslo Stock Exchange is the sole stock exchange and regulated market for the trading of shares and bonds in Norway. Both shares and bonds can be listed on Oslo Stock

Exchange. However, there are considerable differences in how the stock market and the bond market function. In the stock market, there are public ownership registers and current price information is publicly available. Transactions in shares take place on the stock exchange's trading systems, where orders are entered directly and contracts concluded anonymously.

22 By contrast, as described by the referring court, the corporate bonds market is characterised as being anonymous, closed, illiquid and not very transparent when compared to the stock market, as there is no public register of bond ownership. As a result, the identity of the owner of bonds is not publicly available information. Current price information is not available as only the price and volume of transactions actually executed are registered on Oslo Stock Exchange. That information must be reported to Oslo Stock Exchange as soon as possible after trading on the day of execution although it may be registered only at 4 p.m. that day if requested. This is known as "delayed announcement". The price reported will usually be a "mid-range price" between what the seller is paid for the bond and what the buyer has paid to the broker.

23 All trade in corporate bonds is negotiation-based and takes place as "one to one" transactions. Buyers and sellers must use a broker and often contact several brokerage firms to inquire about trade interests and prices. Brokers may obtain information from their own clients and discuss this information with other brokers within their firms and in various fora, including Bloomberg Chat. Brokers' role is to bring together interests in buying and selling in order to execute a transaction.

24 Brokers' profits derive from the difference between the buying and the selling price. If the broker conveys a selling price to a buyer that is higher than the offer conveyed from seller to broker, that difference ("the margin") will accrue to the broker. Brokers' margins can vary, but are usually around 0.25 per cent to 0.50 per cent for high-yield bonds.

Timeline of the main events

25 At the material time, F worked as an investment advisor/fund manager with the bond fund and was an employee of an investment advisory company managing the bond fund, while G worked as a bond broker with the brokerage firm.

26 On 27 June 2014, Oslo Stock Exchange listed a total of 1 100 negotiable bonds, each having a nominal value of NOK 1 million, issued by Beerenberg Holdco II AS ("Beerenberg").

27 Beerenberg maintained oil platforms on the North Sea. In spring 2016 there was to be a call for tenders for a very significant contract held by Beerenberg, a framework agreement relating to maintenance services on the Ekofisk oil field.

28 The bond fund's investment strategy was to buy bonds at a discount in relation to the nominal value, reflecting the risk of default. The bond fund would keep the bonds until

maturity or possible redemption in order to earn interest in addition to receiving the bonds' full value upon maturity or redemption.

29 F prepared an analysis that concluded that it was justifiable to pay a price quote up to 90 for the Beerenberg bond on the basis of the bond fund's investment return requirements and a risk estimation as to whether the issuing company could default on the bond. That analysis was based on the condition that Beerenberg's contract for maintenance on Ekofisk was renewed. If it was not renewed, the analysis concluded that it was justifiable to pay a price quote up to 80.

30 On this basis, F, on behalf of the fund's investment advisors, recommended to the bond fund that it should invest a further EUR 8.7 million in Beerenberg bonds. This investment would be in addition to the EUR 1.3 million that the bond fund had already invested in Beerenberg bonds. The board of the bond fund approved the investment recommendation on 4 July 2016 and gave the fund's investment advisors, represented by F, a mandate to buy bonds in accordance with the analysis and investment recommendation.

31 On 8 August 2016, Beerenberg announced that it had been unsuccessful in obtaining the renewal of the Ekofisk contract. F considered this a good opportunity for the bond fund to invest. Beerenberg bonds had not been traded since 23 June 2016 and 15 July 2016, when one bond holding with a nominal value of NOK 15 million was sold at a price quote of 86.25, and another bond holding with a nominal value of NOK 1 million was sold at a price quote of 86.50. There was no trading in the bond in the days after the news of the loss of contract was released.

32 In the period after the loss of the contract, F and G began to discuss the possibility of buying a large bond holding in Beerenberg. On 15 August 2016, G informed F that he had a seller of a large bond holding of NOK 150 million with a price indication in the "low eighties". A price indication is a non-binding statement of the desired price. F expressed an interest in buying NOK 50 million in the "mid-seventies", that is, around a price quote of 75.

33 On 16 August 2016, F made a bid through G on the NOK 50 million holding at a price quote of 74. That bid did not lead to any trade. In a telephone conversation between F and G on 19 August 2016, G stated that, in addition to the seller of the NOK 150 million holding, he had a seller of a NOK 40 million holding at a price quote of 82. In that same conversation, G stated that he had a buyer for a NOK 40 million holding at a price quote of 75, and a buyer for a NOK 10 million holding at a price quote of 77.

34 F then undertook two trades in the bond on behalf of the bond fund. On Friday 19 August 2016, the bond fund sold a NOK 10 million holding at a price quote of 77.25 ("the selling trade"). The selling trade was reported to Oslo Stock Exchange with a delayed announcement the same day and was thus announced just after 4 p.m. At 3.44 p.m. the same day, in a telephone conversation with G, F indicated a willingness to increase his buying offer from 74 to 78.50/79, provided that he got a binding offer from the seller first. On Monday 22 August 2016, F increased his offer on the NOK 50

million holding from 74 to 78. On the same day, the bond fund bought a NOK 50 million holding at a registered price of 79.625 (“the buying trade”). The buying trade was reported to Oslo Stock Exchange with a delayed announcement. F’s broker for both trades was G. The seller of the NOK 50 million holding was not informed that the buyer was the same person who had sold the NOK 10 million holding on the previous Friday 19 August 2016.

35 According to the referring court, it is not disputed that the selling trade was real in the sense that it transferred expense and risk with full effect between independent parties. However, it is disputed whether real transactions are caught by the definition of market manipulation in the first indent of Article 1(2)(a) of the Directive, and whether investors’ underlying interest in the trade is relevant for the question of whether market manipulation has occurred. In that respect, the referring court states that, in ØKOKRIM’s view, the motive for the selling trade at a price quote of 77, was to increase the chances of being able to buy a larger bond holding at a price quote of 80 or lower by sending a signal to the market that there was real interest in selling at 77. According to the referring court, F stated that the motive was to test the market, including an assessment of whether it was justifiable to increase the offer of 74. F wanted, inter alia, to find out whether the buy offer for NOK 10 million at a price quote of 77, which G had told him about, was real or a “bluff”.

36 The parties have different views of how certain key provisions on market manipulation are to be interpreted both under the Directive and domestic law. Accordingly, the referring court decided to seek an advisory opinion from the Court.

37 By letter of 4 July 2019, the referring court made a request under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) and requested an accelerated procedure provided for in Article 97a of the Rules of Procedure (“RoP”). The following questions were referred:

1. *Application of the prohibition on market manipulation to real transactions*

   Is it compatible with the first indent of Article 1(2)(a) of the Directive that transactions that are real, that is to say, transactions that transfer expense and risk with full effect between independent parties, can be caught by the wording ‘give, or are likely to give, false or misleading signals’?

2. *Transactions contrary to a real interest in buying and selling*

   Is it compatible with the first indent of Article 1(2)(a) of the Directive for a trade order submitted, or a transaction that is executed and reported to the market, with correct price and volume, nevertheless to be held to be market manipulation, if it is deemed to convey a false impression of or misleading signals about the real interest in buying and selling the security in question?

3. *Transactions at an abnormal or artificial level*

Is it compatible with the second indent of Article 1(2)(a) of the Directive for the determination of whether a price is at an 'abnormal' or 'artificial' level to be made on the basis of the individual prerequisites for the investor(s) executing a trade order or transaction, including, for example, their strategy, valuation of the security in question and/or judgment of the market situation (supply and demand) and a general expectation that other investors sell and buy at the best prices consistently with their own real interest in buying and selling and thus, for example, do not sell at a lower price than what they are also willing to pay to buy?

In the determination of whether a price is at an 'abnormal' or 'artificial' level, is it compatible with the second indent of Article 1(2)(a) of the Directive for it to be assumed that an individual trade order or transaction can be deemed to establish such a level?

To what extent and under which circumstances will a transaction involving a security that is not traded in an auction (mechanism), but that has come into being through direct negotiations between two of several brokerage houses, be capable of securing the price, see the second indent of Article 1(2)(a) Market Abuse Directive?

4. *Legitimate reasons for the transaction or trade order*

Is it compatible with the second indent of Article 1(2)(a) of the Directive to consider as a 'legitimate reason' for executing a transaction or trade order satisfying the criteria in the first and second indents, that the party who executed the transaction or the trade order wished to:

- uncover other investors' real interest in buying or selling

- take advantage of other investors' uncertainty or lack of information about the real interest in buying and selling on the market, or

- reveal whether there is false information about supply, demand or price in the market.

5. *Dissemination of information*

Is it compatible with Article 1(2)(c) of the Directive to consider information to be 'disseminated' when:

- an investor has given the information to a broker in order for it to be passed on to one or more other investors in the market, or

- the broker actually has passed on the information to one or more other investors in the market, even though the information has not yet been announced or made publicly available?

38 By order of 19 July 2019, the President of the Court held that the case was not a matter of exceptional urgency under Article 97a RoP and therefore denied the referring court's request to apply an accelerated procedure.

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

III Answers of the Court

Introductory remarks

40 As a preliminary observation, the Court notes that the scope of market manipulation cannot be construed so as to cover any action that interferes with market activity. Market manipulation constitutes a form of abuse and, as such, does not cover situations that involve insignificant effects upon the market. Only those actions that actually have the effect of endangering the integrity of financial markets, and investor confidence in those markets, are covered by the legislation addressing market manipulation. The character of the market will be relevant in the assessment of whether market manipulation has occurred. Further, Article 1(2) of the Directive defines the elements constituting "market manipulation" with a view to achieving uniform harmonisation of the law of the EEA States on market manipulation (see, in comparison, the reasoning on insider dealing in the judgment in *Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, paragraphs 35 and 45, and the Opinion of Advocate General Kokott in the same case, EU:C:2009:534, point 81).

41 As a second preliminary observation, the Court notes that the case at hand concerns criminal sanctions under national law introduced in relation to the implementation of the Directive and its rules on prohibiting market abuse. The Court has consistently held that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights, including the presumption of innocence (see Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185, paragraph 23; and Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, paragraph 49), and general principles of EEA law, including legal certainty (see Joined Cases E-10/11 and E-11/11 *Hurtigruten ASA* [2012] EFTA Ct. Rep. 758, paragraphs 280-281). These fundamental principles of EEA law must guide the referring court in its assessment of criminal responsibility in the case before it.

42 As a third preliminary observation, the Court notes that the Directive is supplemented by implementing directives 2003/124/EC, concerning the definition of market manipulation, and 2004/72/EC, concerning accepted market practices. Article 4 of Implementing Directive 2003/124/EC provides a non-exhaustive list of signals that should be taken into account when assessing whether transactions or orders to trade constitute market manipulation, within the meaning of Article 1(2)(a) of the Directive.

43 It is in the light of these preliminary observations and findings that the questions raised will be examined under EEA law.

The first and second questions

44 By its first question, the referring court asks whether real transactions, in the sense that they transfer expense and risk with full effect between independent parties, are caught by the definition of market manipulation in the first indent of Article 1(2)(a) of the Directive. The parties in the main proceedings do not appear to dispute that the transaction at hand must be seen as a real transaction in this sense.

45 The second question concerns whether transactions that are executed and reported with correct price and volume may be considered to be market manipulation should they give false or misleading signals, within the meaning of the first indent of Article 1(2)(a) of the Directive, as to the "real interest" behind such transactions.

46 Given the close relationship between a real transaction and the execution and correct reporting of such transactions, the Court will deal with these issues together in its answer to the first question and the first issue of the second question. The Court will then address the issue of whether the "real interest" behind a transaction is relevant for determining whether a transaction gives false or misleading signals.

47 As regards the classification of a real transaction that is correctly reported, the first indent of Article 1(2)(a) of the Directive provides that market manipulation occurs where transactions or orders to trade are undertaken, which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments. Thus, on its wording, the first indent of Article 1(2)(a) does not exclude real and correctly reported transactions from its scope.

48 The same applies when the first indent of Article 1(2)(a) of the Directive is interpreted in the context of Article 1(2) as a whole and in the context of the legal framework applicable to market manipulation, in particular Implementing Directive 2003/124/EC. The second indent of the second subparagraph of Article 1(2) of the Directive states that "the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices" constitutes market manipulation. It follows that real, executed, and correctly reported transactions are capable of giving misleading signals.

49 Further, one of the primary objectives of the Directive is to ensure the integrity of financial markets and enhance investor confidence in those markets. Such an objective would be undermined if real transactions were not covered by the first indent of Article 1(2)(a) of the Directive (see recital 12 of the Directive and compare the judgment in *IMC Securities*, C-445/09, EU:C:2011:459, paragraph 29).

50 Finally, Article 4 of Implementing Directive 2003/124/EC provides a non-exhaustive list of signals that should be taken into account when assessing whether transactions or orders to trade constitute market manipulation, within the meaning of Article 1(2)(a) of the Directive. These signals do not distinguish between transactions depending on whether they are real or not, and can be equally applied to both kinds of transaction,

with the exception of those set out in points (c) and (f) of Article 4, which are confined, respectively, to transactions with no change in beneficial ownership and orders to trade.

51 Thus, real and correctly reported transactions are not excluded from the scope of market manipulation under the first indent of Article 1(2)(a) of the Directive. Such transactions are, in principle, capable of giving false or misleading signals as to the supply of, demand for, or price of financial instruments. This may occur, for instance, where such transactions are made at the close of the market, or where transactions undertaken include position reversals in a short period, as identified in the signal provided for in point (d) of Article 4 of Implementing Directive 2003/124/EC.

52 However, the determinative issue, when assessing whether a transaction abuses the market as provided for in the first indent of Article 1(2)(a) of the Directive, is not whether the transaction may be considered "real" but whether a "real transaction" may be considered manipulative because it fulfils the criteria of that provision.

53 In this respect, the Court notes that the determination of whether a transaction "give[s], or [is] likely to give," a "false" or "misleading" signal must be based on the market effect of the transaction. This effect must be analysed, in particular, in the context of the market conditions that apply to a financial instrument. A transaction, which in one market may give a "false" or "misleading" signal, may in another market have no or little effect. For example, in a liquid market, characterised by abundant supply and demand and a high number of transactions, a transaction is less likely to send a "false" or "misleading" signal than in an illiquid market with low demand and supply and a low number of transactions. Therefore, the characteristics of the market have an impact on the legal assessment of what constitutes market manipulation in a specific case.

54 However, a "real transaction" changes the beneficial ownership and, in particular, entails a transfer of risk in relation to the relevant financial instrument. The threshold for a real transaction to be caught by the first indent of Article 1(2)(a) of the Directive must be determined having regard to the need to prevent an interpretation and application that deters market participants from engaging in normal market activity and transactions in financial instruments that do not endanger market integrity and investor confidence. That would extend the scope of the prohibition of market manipulation beyond what is appropriate and necessary to attain the goals pursued by that Directive (see recitals 2 and 12 of the Directive and compare the judgment in *Spector Photo Group and Van Raemdonck*, cited above, paragraph 46). An imbalanced approach in this regard could lead to diminished market efficiency and increased difficulties in raising capital.

55 By its second question, the referring court essentially asks whether the "real interest" behind an executed and correctly reported transaction is relevant for determining whether a transaction gives false or misleading signals. The Court notes that whilst the question refers to the term "false impression", the Court understands the question to concern the term "false or misleading signals" within the meaning of the first indent of Article 1(2)(a) of the Directive.

56 This issue concerns in essence a subjective element, the intention or aim behind buying or selling the financial instrument in question.

57 In this respect, the Court notes that Article 1(2) of the Directive harmonises the constitutive elements needed to determine that market manipulation has occurred, including those found in the first indent of Article 1(2)(a). On a literal interpretation of the wording – "transactions" which "give" "false" or "misleading" "signals" – it is apparent that no subjective element is required to find that a transaction or an order to trade constitutes market manipulation. Thus, there is no subjective element, including a "real interest", among the elements of the definition of market manipulation under the first indent of Article 1(2)(a).

58 This is in accordance with the logic underlying the definition of market manipulation, which relies on the behaviour of market participants and not their intention or aim (see the Explanatory Memorandum to the Commission Proposal for the Directive COM(2001) 281 final). Intent does not serve as a constitutive element and is not necessary for the finding of market manipulation. The presence of the constitutive elements in the first indent of Article 1(2)(a) of the Directive is sufficient. By the same token, it follows from the harmonisation that subjective elements, such as intent, are not, by themselves, sufficient for a finding of market manipulation under the first indent of Article 1(2)(a).

59 Furthermore, it should be noted that to determine whether market manipulation has occurred, i.e. whether the constitutive elements are present, the examples provided for in the second subparagraph of Article 1(2) of the Directive and Article 4 of Implementing Directive 2003/124/EC must be taken into account. The Court notes that examples of such signals rely on objective manifestations, such as a "significant proportion of the daily volume" and "significant changes in the price of the financial instrument". The Court also observes that, at least by way of example, "the buying or selling of financial instruments at the close of the market with the effect of misleading investors acting on the basis of closing prices" can be interpreted as an expression of a person's strategy, thereby revealing the subjective considerations of the person. However, this alone is not sufficient to determine the existence of a subjective element behind the substantive provisions in question, especially as the legislation is aimed at considering the effect of such actions.

60 It must be noted, however, that the list of signals provided for in Article 4 of Implementing Directive 2003/124/EC is non-exhaustive. A competent national authority or a court is therefore not, in principle, precluded from finding that a subjective element, such as a "real interest" in buying or selling, indicates the existence of the constitutive elements in the first indent of Article 1(2)(a) of the Directive. However, the existence of a "real interest" is not the prerequisite for determining whether market manipulation has occurred, rather what is necessary is a consideration of the results of a transaction and its effects, which must be analysed in the context of the market conditions that apply to the financial instrument in question. Given the specific characteristics of real transactions, a national authority must take into account any signals or indications that occur from the moment the transaction is completed, the

first of which is the reporting of the price. The determination as to whether it is “false” or “misleading” must be assessed, inter alia, by subsequent conduct, including any following trades. Subjective elements such as a “real interest”, while not, in and of itself, a necessary or sufficient element in finding market manipulation, can be taken into account in the assessment of a national competent authority or a court. Nevertheless, a finding of market manipulation under the first indent of Article 1(2)(a) is always subject to the presence of the constitutive elements set out in the first indent.

61 The answer to the first and second questions is therefore that transactions that are executed, transferring expense and risk with full effect between independent parties, and correctly reported to the market, may be capable of giving false or misleading signals as to supply of, demand for or price of financial instruments, within the meaning of the first indent of Article 1(2)(a) of the Directive. An assessment of whether market manipulation under the first indent of Article 1(2)(a) of the Directive has occurred must be based on objective factors and consideration of the results of transactions and their effect. However, in examining whether a transaction conveys false or misleading signals, the real interest in buying and selling the security in question may support a finding of such objective factors.

The third question

62 By its third question, concerning the second indent of Article 1(2)(a) of the Directive, the referring court essentially asks, first, whether individual prerequisites of investors can be taken into account when determining whether the price is at an abnormal or artificial level; second, whether an individual transaction can establish such a level; and third, to what extent and under which circumstances an individual transaction that has taken place in a non-auction mechanism through negotiations between brokers can be deemed to secure the price, within the meaning of the same indent.

63 The second indent of Article 1(2)(a) of the Directive provides that market manipulation occurs where transactions or orders to trade have been undertaken, which secure, by a person, or persons acting in collaboration, the price of one or several financial instruments at an abnormal or artificial level.

64 Neither the Directive nor its implementing directives provide definitions of the terms “abnormal” or “artificial”, or specific guidance on what is meant by securing the price. This includes the fact, as correctly noted by the Commission, that the second indent of Article 1(2)(a) of the Directive is silent on matters such as the number of transactions needed to secure the price.

65 As regards the first part of the third question, concerning whether individual prerequisites of investors can be taken into account in determining whether the price is at an abnormal or artificial level, the Court acknowledges that the referring court may find it difficult to verify that the price has been secured at an abnormal or artificial level in the context of an individual and negotiation-based transaction. This holds particularly true in cases, such as that at issue in the main proceedings, where the financial

instrument in question has not been subject to a trade for an extended period, leading to a lack of relevant price references.

66 Moreover, this does not mean that an objective assessment of the level of price secured, that is the assessment of whether the price level is abnormal or artificial, can be substituted for an assessment based on subjective elements such as the investors' prerequisites and strategy. The wording of the second indent of Article 1(2)(a) of the Directive does not contain among its constitutive elements subjective elements such as individual prerequisites for the investors conducting a transaction. In addition, the particular assessment of the constitutive elements "abnormal" or "artificial" needs to be based upon objective factors as to the relevant market and financial instrument in question.

67 Market manipulation, within the meaning of the second indent of Article 1(2)(a) of the Directive, cannot have occurred without a verification of the level of the price. To allow subjective elements particular to an investor to be the determining factor in finding whether the level of price was abnormal or artificial would be liable to capture market transactions which do not necessarily infringe the interest protected by the Directive (compare the judgment in *Spector Photo Group and Van Raemdonck*, cited above, paragraph 46).

68 The answer to the first part of the third question is therefore that it is not compatible with the second indent of Article 1(2)(a) of the Directive for the determination of whether a price is at an "abnormal" or "artificial" level to be made on the basis of the individual prerequisites for the investor executing a transaction.

69 As regards the second and third parts of the third question, in the assessment of whether the price level established by one transaction or order to trade or by transactions that have taken place through negotiations is "abnormal or artificial", the objectives of the Directive have to be taken into account. In this regard, it should be kept in mind that achieving the objectives of ensuring market integrity and enhancing investor confidence, depends, inter alia, on investors being placed on an equal footing and protected against the improper use of insider information and price manipulations (compare the judgment in *Spector Photo Group and Van Raemdonck*, cited above, paragraph 47, and the judgment in *IMC Securities*, cited above, paragraph 27). These objectives would be undermined if conduct could fall outside the scope of the second indent of Article 1(2)(a) of the Directive, and thereby the prohibition of market manipulation in Article 5, solely on the ground that it gave rise to a single transaction and a single listing without the price of the financial instrument at issue maintaining an abnormal or artificial level for more than a certain duration (compare the judgment in *IMC Securities*, cited above, paragraph 29). Thus, individual transactions can, in principle, secure the price at an abnormal or artificial level, within the meaning of the second indent of Article 1(2)(a).

70 The price would be secured within the meaning of the second indent of Article 1(2)(a) of the Directive where the price of a transaction, such as the selling trade in the case at

hand, has a determining influence on the price agreed in subsequent transactions, such as the buying trade in this case.

71 The Directive applies, pursuant to Article 9 thereof, to any financial instrument traded on a regulated market in an EEA State. In terms of the definition of market manipulation, the Directive and its implementing directives do not make any distinction or other categorisation based on the type of regulated market, financial instrument, or the liquidity of a particular market or a financial instrument. Accordingly, when assessing whether market manipulation has occurred, both the instances derived from the core definition of market manipulation in points (a) to (c) of Article 1(2) provided for in the second subparagraph of Article 1(2) of the Directive and the signals mentioned in Article 4 of Implementing Directive 2003/124/EC are to be taken into account. This applies irrespective of the type of market and financial instrument, and their relevance for the assessment is not precluded solely on the basis that the conduct in question entails only one or few transactions. It is for the referring court to apply the instances and signals provided for in the Directive and Implementing Directive 2003/124/EC to the facts of the case and determine whether one or more of the instances and signals are relevant for the assessment of potential market manipulation.

72 It must be remembered that the signals listed in Article 4 of Implementing Directive 2003/124/EC are non-exhaustive and not necessarily, in and by themselves, sufficient to establish market manipulation. As regards the second indent of Article 1(2)(a) of the Directive and, specifically, the issue of securing the price, objective factors for the assessment of market manipulation are, for example, the nature and type of the market in question, including the type and pricing of financial instrument traded on the market, whether the market is marked by low liquidity in trading (both in general and in terms of the financial instrument in question), as well as the information available to market participants, including the means by which information on trades is made available.

73 F and G argue that it is not possible to secure the price within the meaning of the second indent of Article 1(2)(a) of the Directive without controlling the pricing of the financial instrument in question, either through market power or through collaboration and coordinated practices. Factors such as a high degree of market power, which might manifest itself through coordinated practices, collaboration, and high frequency and volume of trades, might facilitate manipulation. However, such factors are not preconditions for the application of the second indent of Article 1(2)(a) of the Directive. That provision can, in principle, apply to securing the price by an individual transaction without requiring the price to be secured for a certain duration (compare the judgment in *IMC Securities*, cited above, paragraph 29).

74 It is for the referring court to determine, in the light of the facts of the main proceedings, which signals and factors are relevant for an objective assessment of whether market manipulation, within the meaning of the second indent of Article 1(2)(a) of the Directive, has occurred, assess how they relate to one another and determine whether they can lead to the price having been secured at an “abnormal” or “artificial” level. In this respect, and insofar the referring court deems one or more of the signals mentioned in Article 4 of Implementing Directive 2003/124/EC relevant for its assessment, the

Court notes that several of the signals in that provision require, for the price to be assessed as “abnormal” or “artificial”, not only that a price change has occurred but that the change in price is “significant”. In the light of the dispute in the main proceedings, which concerns a security marked by low trading liquidity in a market where current price information is lacking, the relevant factors for assessment are, for example, comparisons with previously reported prices and changes in trading and market conditions relating both to the market in question and the relevant financial instrument and its issuer. For this purpose, a price analysis conducted before a transaction took place, detailing expectations of prices depending on market conditions, may also be of relevance.

75 The answer to the second part of the third question is therefore that the determination of an “abnormal” or “artificial” price within the meaning of the second indent of Article 1(2)(a) of the Directive may be established on the basis of an individual transaction. It is for the referring court to assess and determine which signals and factors are relevant for the assessment. Such factors may include comparisons with previously reported prices and changes in trading and market conditions, both in terms of the relevant market, the financial instrument and its issuer.

76 The answer to the third part of the third question is therefore that a price can be secured within the meaning of the second indent of Article 1(2)(a) of the Directive in a transaction involving a security that is not traded in an auction mechanism, but that has come into being through direct negotiations between two of several brokerage houses, as in the present case. It is for the referring court to determine, in the light of the facts of the main proceedings, whether the price has been secured, taking into account factors such as the nature and type of the market in question, including the type and pricing of financial instrument traded on the market, whether the market and the relevant financial instrument is characterised by low liquidity in trading, as well as the information available to market participants, including the means by which information on trades is made available.

The fourth question

77 By its fourth question, the referring court asks whether certain reasons related to uncovering the market situation as to supply of, demand for, and price of a financial instrument, or taking advantage of other investors’ uncertainty in this regard, can constitute legitimate reasons within the meaning of the second subparagraph of Article 1(2)(a) of the Directive.

Admissibility

78 F and G argue that the fourth question is inadmissible, as neither of them has argued that the defence, provided for in the second subparagraph of Article 1(2)(a) of the Directive, applies in the main proceedings before the referring court as no accepted market practices have been published or made otherwise known by a relevant competent authority. Therefore, the question is purely hypothetical and should be rejected as such.

79 The Court recalls that the purpose of Article 34 SCA is to establish cooperation between the Court and national courts and tribunals. This is intended to ensure the homogenous interpretation of EEA law, by assisting national courts and tribunals in the EFTA States when they have to apply provisions of EEA law in cases before them (see Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 53 and 54, and case law cited; and Case E-21/16 *Pascal Nobile* [2017] EFTA Ct. Rep. 554, paragraph 23, and case law cited).

80 It is settled case law that questions on the interpretation of EEA law referred by national courts and tribunals enjoy a presumption of relevance. It is for the referring court to determine the factual and legal context of the case before it, and thus to decide which questions to refer to the Court. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have the factual or legal material before it necessary to answer the questions submitted to it in a useful manner (see *Pascal Nobile*, cited above, paragraph 24).

81 In the present case it must be noted that, although F and G have not raised the national provisions implementing the second subparagraph of Article 1(2)(a) of the Directive as a defence to the charge of market manipulation, F has disputed ØKOKRIM's arguments. ØKOKRIM has argued that F intended to manipulate the market. F has argued that the real motive was to test the market, in particular to uncover whether buyers of the bond in question existed, and what price other interested buyers were willing to pay for the bonds. The referring court has asked whether these justifications, raised by F, could constitute "legitimate reasons" within the scope of the second subparagraph of Article 1(2)(a) of the Directive. The Court finds, therefore, that it is not obvious that the interpretation of EEA law sought bears no relation to the actual facts of the main action or its purpose, the problem is not hypothetical, and the Court has the factual and legal material necessary to answer the question submitted in a useful manner. The question arises from arguments regarding the transaction in question explicitly raised by F, even if F has not argued that the transaction is within the scope of the second subparagraph of Article 1(2)(a) of the Directive. Further, the Court notes that both ESA and the Commission have submitted to the Court that the lack of a formal determination of accepted market practices would not preclude parties from raising the defence under the second subparagraph of Article 1(2)(a) of the Directive. Accordingly, the Court holds that the fourth question, on the interpretation of "legitimate reasons", is admissible.

Substance

82 The Court notes that the referring court refers to "legitimate interests" for performing a transaction within the meaning of the second subparagraph of Article 1(2)(a) of the Directive. The Court also notes that the Norwegian translation of the Directive refers to "lawful reasons". Regardless of these variations in terminology, the Court understands that the fourth question concerns "legitimate reasons" for performing a transaction.

83 Under the second subparagraph of Article 1(2)(a) of the Directive, a transaction, which would otherwise fall within the first or second indent of Article 1(2)(a), does not constitute market manipulation if the investor establishes that the reasons for the transaction are legitimate and the transaction conforms to accepted market practices on the regulated market concerned.

84 By its wording, it is clear that the second subparagraph of Article 1(2)(a) of the Directive requires two conditions for its application. Transactions or orders to trade must be undertaken for legitimate reasons and have to conform to accepted market practices. Article 1(5) defines accepted market practices as practices that are " … reasonably expected in one or more financial markets and are accepted by the competent authority … ".

85 As regards the condition of accepted market practices, it follows from Articles 11 and 12 of the Directive that competent authorities must be given all necessary supervisory powers to ensure the application of the Directive, which includes the assessment of market practices. According to Article 12(2)(e) of the Directive, a competent authority may require the cessation of certain practices, while Article 2(2) of Implementing Directive 2004/72/EC allows a competent authority to accept "new and emerging" market practices. Thus, under the Directive and Implementing Directive 2004/72/EC, a practice can emerge on a market and, at a later date, be accepted by the relevant competent authority. It is for the referring court to assess and determine whether an accepted market practice, applicable to the market and financial instrument in question, exists.

86 Application of the defence in the second subparagraph of Article 1(2)(a) of the Directive requires, in addition, that the reasons for the transactions were legitimate. However, the Directive does not provide any definitions or guidelines as to what constitutes a legitimate reason.

87 While the condition of accepted market practices is objective in nature, the condition of legitimate reasons pertains to reasons particular to the investor in question, including the aim or motive behind the transaction or order to trade. As correctly pointed out by the Commission, it is not the legitimate reasons of a person that must conform to accepted market practices but the transaction or order to trade, based upon those reasons.

88 Accordingly, reasons for executing a trade, such as uncovering other investors' real interest in buying or selling, taking advantage of other investors' uncertainty or lack of information about the real interest in buying and selling on the market, or revealing whether there is false information about supply of, demand for or price in the market are not, prima facie, in and by themselves, illegitimate. Moreover, they need to be assessed in the context of the investor's conduct as a whole, including relevant subsequent conduct. As also stated in recital 20 of the Directive, sanctions could still be imposed if there are other "illegitimate reason[s] behind these transactions".

89 Moreover, although the current legal framework concerning market manipulation does not provide a definition or an explanation of legitimate reasons, the Directive provides indications of what reasons cannot be considered legitimate for the purposes of the second subparagraph of Article 1(2)(a).

90 If the reasons behind a transaction or order to trade are shown to be contrary to the Directive's objectives of ensuring market integrity and investor confidence they cannot constitute legitimate reasons within the meaning of the second subparagraph of Article 1(2)(a) of the Directive. It is for the referring court to assess reasons raised by the investor in the light of the abovementioned considerations and to determine whether they constitute reasons that are legitimate within the meaning of the second subparagraph of Article 1(2)(a).

91 The answer to the fourth question is therefore that reasons related to uncovering the market situation as to supply of, demand for, and price of a financial instrument, or taking advantage of other investors' uncertainty in this regard, can, in principle, constitute legitimate reasons within the meaning of the second subparagraph of Article 1(2)(a) of the Directive, provided that they are not contrary to the objectives of the Directive. This is for the national court to assess in light of the investor's behaviour as a whole. It is also for the national court to assess whether an accepted market practice, applicable to the market and financial instrument in question, exists. Both the condition of a legitimate reason and the transaction's conformity with an accepted market practice need to be fulfilled for an investor to benefit from the defence in the second subparagraph of Article 1(2)(a).

The fifth question

92 By its fifth question, the referring court asks whether information can be considered disseminated, within the meaning of Article 1(2)(c) of the Directive, when an investor has given the information to a broker in order for it to be passed on to one or more other investors in the market, or the broker actually has passed on the information to one or more other investors in the market, even though the information has not yet been announced or made publicly available.

93 Article 1(2)(c) of the Directive provides that market manipulation occurs where information is disseminated through the media, including the Internet, or by any other means, and the information gives, or is likely to give, false or misleading signals as to financial instruments, including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.

94 The definition of market manipulation in Article 1(2) of the Directive follows a structure, which broadly may be divided in two categories based on the type of manipulation in question. While Article 1(2)(a) of the Directive covers manipulation based on transactions or orders to trade, Article 1(2)(c) concerns manipulation based on the dissemination of information. The mere fact that a transaction has taken place and this becomes known in the market cannot in itself constitute the dissemination of

information. Parallel to the manipulation based on transactions, the manipulation based on dissemination is dependent on an effect on the market in question.

95 In Article 1(2)(c) of the Directive, the term “dissemination” is qualified by “through the media ... or by any other means”. The phrase “any other means” should not be read in isolation so as to catch all types of communication, such as direct communication between a broker and a trader, but must be read in conjunction with the term “media”. This implies that the information must be spread to an extended audience in a way so as to have an effect on the market. Moreover, “any other means” should be regarded as referring primarily to means of communication that are comparable with the media, such as forums or platforms. Thus, the dissemination of information within the meaning of Article 1(2)(c) implies that the information must have been spread in a wider sense than in the normal exchange of information in relation to a potential transaction in which information on buying or selling interests or orders to trade are passed through a broker.

96 A contrary interpretation would be liable to prevent brokers from passing on information to investors in the ordinary course of business, with the effect that market participants refrain from providing and gathering information as to supply and demand of financial instruments, to the eventual detriment of market liquidity and the efficient functioning of markets. Accordingly, even though protecting market integrity and investor confidence from possible market abuse are amongst the core objectives of the Directive, these objectives cannot lead to an interpretation of Article 1(2)(c) of the Directive so extensive that it captures individual exchanges of information in relation to potential transactions, such as that at issue in the main proceedings.

97 The answer to the fifth question is therefore that it is not compatible with Article 1(2)(c) of the Directive to consider information to be disseminated where, in a situation such as that at issue in the main proceedings, an investor has given information regarding a potential transaction to a broker in order for it to be passed on to one or more other investors in the market, or the broker actually has passed on such information.

IV Costs

98 The costs incurred by the Czech Republic, 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 national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Borgarting Court of Appeal (Borgarting lagmannsrett) hereby gives the following Advisory Opinion:

1. **Transactions that are executed, transferring expense and risk with full effect between independent parties, and correctly reported to the market, may be capable of giving false or misleading signals as to supply of, demand for or price of financial instruments, within the meaning of the first indent of Article 1(2)(a) of Directive 2003/6/EC. An assessment of whether market manipulation under the first indent of Article 1(2)(a) of Directive 2003/6/EC has occurred must be based on objective factors and consideration of the results of transactions and their effect. However, in examining whether a transaction conveys false or misleading signals, the real interest in buying and selling the security in question may support a finding of such objective factors.**

2. **It is not compatible with the second indent of Article 1(2)(a) of Directive 2003/6/EC for the determination of whether a price is at an “abnormal” or “artificial” level to be made on the basis of the individual prerequisites for the investor executing a transaction.**

   The determination of an “abnormal” or “artificial” price within the meaning of the second indent of Article 1(2)(a) of Directive 2003/6/EC may be established on the basis of an individual transaction. It is for the referring court to assess and determine which signals and factors are relevant for its assessment. Such factors may include comparisons with previously reported prices and changes in trading and market conditions, both in terms of the relevant market, the financial instrument and its issuer.

   A price can be secured within the meaning of the second indent of Article 1(2)(a) of Directive 2003/6/EC in a transaction involving a security that is not traded in an auction mechanism, but that has come into being through direct negotiations between two of several brokerage houses. It is for the referring court to determine whether the price has been secured, taking into account factors such as the nature and type of the market in question, including the type and pricing of financial instrument traded on the market, whether the market and the relevant financial instrument is characterised by low liquidity in trading, as well as the information available to market participants, including the means by which information on trades is made available.

3. **Reasons related to uncovering the market situation as to supply of, demand for, and price of a financial instrument, or taking advantage of other investors' uncertainty in this regard, can, in principle, constitute legitimate reasons within the meaning of the second subparagraph of Article 1(2)(a) of Directive 2003/6/EC. This is provided that they are not contrary to the objectives of the Directive. This is for the national court to assess in light of the investor's behaviour as a whole. It is also for the national court to assess whether an accepted market practice, applicable to the market and financial instrument in question, exists. Both the condition of a legitimate reason and the transaction's conformity with an accepted market practice need to be fulfilled for an investor to benefit from the defence in the second subparagraph of Article 1(2)(a).**

4. **It is not compatible with Article 1(2)(c) of Directive 2003/6/EC to consider information to be disseminated where, in a situation such as that at issue in the main proceedings, an investor has given information regarding a potential transaction to a broker in order for it to be passed on to one or more other investors in the market, or the broker actually has passed on such information.**

Páll Hreinsson | Per Christiansen | Bernd Hammermann

Delivered in open court in Luxembourg on 4 February 2020.

Ólafur Jóhannes Einarsson
Registrar

Per Christiansen
Acting President