

EFTA COURT

Request for an Advisory Opinion from the EFTA Court by Borgarting lagmannsrett dated 4 July 2019 in criminal proceedings against F and G

(Case E-5/19)

A request has been made to the EFTA Court dated 4 July 2019 from Borgarting lagmannsrett (Borgarting Court of Appeal), which was received at the Court Registry on 5 July 2019, for an Advisory Opinion in criminal proceedings against F and G on the following questions:

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 Market Abuse 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 Market Abuse 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 Transaction at an abnormal or artificial level

Is it compatible with the second indent of Article 1(2)(a) of the Market Abuse 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 Market Abuse

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) MAD?

4 Legitimate reasons for the transaction or trade order

Is it compatible with the second indent of Article 1(2)(a) of the Market Abuse Directive to consider as 'legitimate reason' for executing a transaction or trade order satisfying the criteria in the first and second indent, 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 Market Abuse 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?