E-5/19-16

**REPORT FOR THE HEARING**
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).

## I Introduction

1. By a letter of 4 July 2019, registered at the Court on 5 July 2019, Borgarting Court of Appeal (*Borgarting lagmannsrett*) made a request for an advisory opinion in a criminal case pending before it between the Public Prosecution Office of the National Authority for Investigation and Prosecution of Economic and Environmental Crime (*ØKOKRIM*), as appellant ("the Appellant"), and F and G, as respondents ("the Respondents").

2. The case before the referring court concerns 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 Directive") and certain supplementary Commission legislative acts, incorporated into the EEA Agreement as points 29a, 29d and 29f of Annex IX (Financial services) by Decisions of the EEA Joint Committee No 38/2004, No 103/2004, and No 149/2004.

## II Legal background

*EEA law*

3. 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), which added it as point 29a of Annex IX (Financial services).

4. 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.*

5. 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.*

6. 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.*

7. 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.*

8. Recital 21 of the Directive reads:

*The competent authority may issue guidance on matters covered by this Directive, e.g. definition of inside information in relation to derivatives on commodities or implementation of the definition of accepted market practices relating to the definition of market manipulation. This guidance should be in conformity with the provisions of the Directive and the implementing measures adopted in accordance with the comitology procedure.*

9. Recital 24 of the Directive reads:

*Prompt and fair disclosure of information to the public enhances market integrity, whereas selective disclosure by issuers can lead to a loss of investor confidence in the integrity of financial markets. Professional economic actors should contribute to market integrity by various means. Such measures could include, for instance, the creation of 'grey lists', the application of 'window trading' to sensitive categories of personnel, the application of internal codes of conduct and the establishment of 'Chinese walls'. Such preventive measures may contribute to combating market abuse only if they are enforced with determination and are dutifully controlled. Adequate enforcement control would imply for instance the designation of compliance officers within the bodies concerned and periodic checks conducted by independent auditors.*

10. Recital 25 of the Directive reads:

*Modern communication methods make it possible for financial market professionals and private investors to have more equal access to financial information, but also increase the risk of the spread of false or misleading information.*

11. Recital 27 of the Directive reads:

*Market operators should contribute to the prevention of market abuse and adopt structural provisions aimed at preventing and detecting market manipulation practices. Such provisions may include requirements concerning transparency of transactions concluded, total disclosure of price-regularisation agreements, a fair system of order pairing, introduction of an effective atypical-order detection scheme, sufficiently robust financial instrument reference price-fixing schemes and clarity of rules on the suspension of transactions.*

12. Recital 41 of the Directive reads:

*Since the objective of the proposed action, namely to prevent market abuse in the form of insider dealing and market manipulation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the measures, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.*

13. Recital 42 of the Directive reads:

*Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary to take account of new developments on financial markets. The Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and the Commission acts according to the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC.*

14. 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.*

15. 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).*

16. Article 5 of the Directive reads:

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

17. 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 Agreement on the European Economic Area by Decision of the EEA Joint Committee No 103/2004 of 9 July 2004 (OJ 2004 L 376, p. 31), which added it as point 29d of Annex IX (Financial services), later renumbered as point 29ab ("Implementing Directive 2003/124/EC").

18. Article 4 of Implementing Directive 2003/124/EC reads:

*Manipulative behaviour related to false or misleading signals and to price securing*

*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.*

19. 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 Agreement on the European Economic Area by Decision of the EEA Joint Committee No 149/2004 of 29 October 2004

(OJ 2005 L 102, p. 23), which added it as point 29f of Annex IX (Financial services), later renumbered as point 29c ("Implementing Directive 2004/72/EC").

20. Article 2 of Implementing Directive 2004/72/EC reads:

*Factors to be taken into account when considering market practices*

*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.*

*National law*

Securities Trading Act

21. At the material time, Section 3-8 of the Securities Trading Act read:

*(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.*

22. 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.*

...

Securities Trading Regulation

23. At the material time, Section 3-2 of the Securities Trading Regulation read:

*(1) In the assessment of whether orders to trade given or transactions undertaken constitute market manipulation under point 1 of the second paragraph of section 3-8 of the Securities Trading Act, the following factors shall, inter alia, be taken into account:*

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

*(b) whether or to what extent orders to trade given or transactions undertaken by individuals with a significant buying or selling position in a financial instrument lead to a significant change in the price of the financial instrument or related derivatives or underlying assets 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) whether or to what extent orders to trade given or transactions undertaken include position reversals in a short period and represent a significant proportion of the daily trading volume in the relevant financial instrument on the regulated market concerned, and such orders or transactions may be associated with significant changes in the price of a financial instrument admitted to trading on a regulated market,*

*(e) whether or to what extent 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) whether or to what extent orders to trade given change the best bid or offer prices in a financial instrument admitted to trading on a regulated market, or more generally change the order book available to market participants, and the orders are annulled before they are executed, and*

*(g) whether or to what extent orders to trade are given or transactions are undertaken at or around a specific time when reference prices, settlement prices or valuations are calculated and it leads to price changes that have an effect on such prices or valuations.*

*(2) In the assessment of whether trading orders or transactions constitute market manipulation under point 2 of the second paragraph of section 3-8 of the Securities Trading Act the following factors shall, inter alia, be taken into account:*

*(a) the extent to which a person or related party of such person has disseminated incorrect or misleading information concerning a financial instrument before or after the person concerned has given orders to trade or executed transactions in the financial instrument,*

*(b) the extent to which a person or related party of such person has prepared or distributed an investment recommendation concerning a financial instrument before or after the person concerned has given orders to trade or executed transactions in the financial instrument, and*

*(c) the investment recommendation is erroneous, biased or demonstrably influenced by material interests.*

## III Facts and procedure

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

25. According to the referring court, at issue in the case is whether the Respondents 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 face value totalling NOK 10 million at a price of 77.25.

*The Norwegian bond market*

26. The referring court explains the nature of the bond market on the Oslo Stock Exchange – the sole stock exchange and regulated market for the trading of shares and bonds in Norway. Although both shares and bonds can be listed on the Oslo Stock Exchange, in practice 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. The share trading itself takes place on the stock exchange's systems, where buy and sell orders are entered directly and contract conclusion usually takes place anonymously.

27. On the other hand, no public register is kept for bonds. Thus, the identity of the owner of bonds is not publicly available information. Nor is current price information available. Only the price and volume of transactions actually executed are registered on the stock exchange. That information is usually registered only at 16.00 on the day the transaction is executed.

28. Further, according to the referring court, all trade in corporate bonds is negotiation-based and takes place as "one-to-one" transactions. In order to link up interests in buying with interests in selling, investors must use a broker. Individual brokerage firms obtain information about interests in buying and selling through their own customers. Brokers in an individual brokerage firm often discuss prices and volumes of potential transactions amongst themselves and link any interests together, for example through various internet forums. Parties with interests in buying and selling (investors) often contact several brokerage firms to inquire about trade interests and prices. This gives investors a broader basis for information than if they were to deal with only one broker. The brokers' task, as intermediaries, is to bring interests in buying and interests in selling together, so that a transaction can be executed. The brokers' profits are derived from the difference between the buying and the selling price.

29. For trade in stock exchange-listed bonds, the transaction must be reported to Oslo Stock Exchange as soon as possible after closing of trade on the day on which it is executed, with price and volume and in compliance with the rules laid down by the stock exchange. Individual brokers (stock exchange members) can, in compliance with the rules, request delayed announcement, so that the trade is announced only after the stock exchange has closed (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.

30. Thus, in the assessment of the referring court, the market for corporate bonds is anonymous, closed, illiquid and not very transparent compared with the stock market.

*Timeline of the main events*

31. At the time of the actions described in the indictment, 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 ("the investment advisory company"), while G worked as a bond broker with the brokerage firm.

32. According to the referring court, on 27 June 2014, Oslo Stock Exchange admitted to trading a total of 1 100 negotiable bonds, each having a face value of NOK 1 million, issued by the Norwegian corporation Beerenberg Holdco II AS ("Beerenberg"). When oil prices began to fall in 2014, the oil industry was assessed as being attractive for the bond fund.

33. Beerenberg was engaged in the maintenance of oil platforms on the North Sea. In the spring of 2016 there was to be a call for tenders for Beerenberg's biggest contract, a framework agreement relating to maintenance services on the Ekofisk oil field. Beerenberg had an annual turnover of around NOK 400 million linked to that particular contract, which amounted to 20-25 % of the company's turnover. It was therefore of major significance for Beerenberg's future prospects and thus also for the price of the bonds whether the company would be awarded the contract.

34. The bond fund's investment strategy involved buying bonds with a price discount in relation to the face value that reflected the risk of default, and keeping them until maturity or possible redemption, in order to receive interest earned in addition to the bond's full face value.

35. 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, F prepared an analysis that concluded that it was justifiable to pay up to a price of 90 for the bond, on the condition that Beerenberg's contract for maintenance on Ekofisk was renewed. The analysis concluded that it was justifiable to pay up to a price of 80 if the Ekofisk contract was not renewed.

36. On the basis of the analysis, F, on behalf of the investment advisory company, gave an investment recommendation to the bond fund, to the effect that the bond fund should invest a further EUR 8.7 million in Beerenberg bonds, in addition to the EUR 1.3 million that the bond fund had invested earlier in a bonds loan through the investment advisory company, represented by F. The board of the bond fund approved the investment recommendation on 4 July 2016 and gave the investment advisory company, represented by F, a mandate to buy bonds for them in accordance with the analysis and investment recommendation.

37. On 8 August 2016, Beerenberg announced that the company had not been successful in getting the contract renewed. F considered this a good opportunity for the bond fund to

invest. At the time, Beerenberg bonds had not been subject to a trade since 23 June 2016 and 15 July 2016, when one bond holding with a face value of NOK 15 million was sold at a price of 86.25, and one bond holding with a face value of NOK 1 million was sold at a price of 86.50. There was no trading in the bond in the days after the news of the loss of contract was released.

38. 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 of 75.

39. On 16 August 2016, F made a bid through G on the NOK 50 million holding at a price of 74. That bid did not lead to any trade. In a telephone conversation between F and G at 13.57 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 of 82. In that same conversation, G stated that he had a buyer for a NOK 40 million holding at a price of 75, and a buyer for a NOK 10 million holding at a price of 77.

40. 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 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 16.00 the same day. At 15.44 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. After the ensuing weekend, 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 in the same, delayed, manner as the selling trade. 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.

41. The referring court outlines that, under point 6 of the second paragraph of section 17-3 of the Securities Trading Act, it is a criminal offence to engage in market manipulation as described in the material version of section 3-8 of the Securities Trading Act. The Norwegian prohibition on market manipulation is drafted so as to implement the EEA rules corresponding to Directive 2003/6/EC on market abuse and its supplementary acts. The prohibitions are implemented in their entirety in the form of provisions carrying criminal sanctions, even though Directive 2014/57/EU has not been incorporated formally in the EEA Agreement and hence has also not been implemented in a formal sense. The criminal sanction pursuant to point 6 of the second paragraph of section 17-3 of the Securities Trading Act goes further than what is provided for under Directive 2014/57/EU, inter alia,

as the Directive requires criminal sanctions only where the offence has been serious and intentional.

42. According to the referring court, it is not disputed that the sale of the NOK 10 million holding 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' real interest in buying and selling is relevant for the question of whether market manipulation has occurred. In that respect, the referring court states that, in the Appellant's view, the motive for the selling trade, at a price of 77, was to increase the chances of being able to buy a larger bond holding at a price of 80 or lower, through the sale's sending of a signal to the market that there was real interest in selling at a price of 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 his own offer to more than 74. He wanted, inter alia, to find out whether the buy offer for NOK 10 million at a price of 77 which G told him about was real or a "bluff".

43. The parties have differing views of how certain key provisions are to be interpreted for a finding of market manipulation, both under the Norwegian legislative rules and under the Directive, as incorporated in the EEA Agreement. Accordingly, the referring court decided to seek an advisory opinion from the Court on whether the disputed actions constitute market manipulation, as defined in the Directive, and are thereby prohibited by the Directive as implemented in Norwegian law.

44. By letter of 4 July 2019, the referring court requested the Court to give an advisory opinion and to apply the accelerated procedure provided for in Article 97a of the Rules of Procedure ("RoP"). The following questions were referred:

1. **The first question concerns the 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. **The second question concerns the application of the prohibition on market manipulation to 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. **The third question concerns the application of the prohibition on market manipulation to a transaction 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. **The fourth question concerns 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. **The fifth and final question referred concerns 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?**

45. By order of 19 July 2019, the President of the Court held that the case was not a matter of exceptional urgency and therefore denied the referring court's request to apply the accelerated advisory opinion procedure.

## IV Written observations

46. In accordance with Article 20 of the Statute of the Court and Article 97 RoP, written observations have been received from:

– the Appellant, represented by Inge Svae-Grotli, public prosecutor, and Lars-Kaspar Andersen, police prosecutor;

– F, represented by Anders Brosveet, advokat, and Rasmus Woxholt, advokat, both of the Norwegian Bar;

– G, represented by Pål Hernæs, advokat, Mikkel Toft Gimse, advokat, and Dag Sørlie Lund, advokat, all of the Norwegian Bar;

– the Czech Republic, represented by Martin Smolek, Jiří Vlášic and Iva Gavrilova, acting as Agents;

– the EFTA Surveillance Authority ("ESA"), represented 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.

## V Summary of the arguments submitted

*The Appellant*

47. As regards the first question, the Appellant contends that the sale of bonds is subject to the prohibition on market manipulation, even though it was a genuine transaction, because it was likely to create an erroneous impression that the sale was carried out for an

independent commercial purpose other than to influence price expectations in the bond market.

48. Further, the Appellant continues, the prohibition on market manipulation also covers transactions (buying and selling of bonds) that are genuine, i.e. that actually take place between independent parties, and not just fictitious transactions, for instance where the transaction is a formality or where an agreement has been made that the financial risk will not be transferred. The wording of the first indent of Article 1(2)(a) of the Directive strongly supports this view. The purpose of the provision is also a strong argument against a restrictive interpretation of the term "transaction", as this could permit behaviour that has a misleading effect. Reference is made to the final subparagraph in the definition of "market manipulation" in Article 1(2) of the Directive, which requires the Member States to ensure that the opposite is the case: "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."

49. The Appellant contends further that genuine transactions can also be subject to the prohibition on market manipulation if the transaction price was at an abnormal or artificial level for (at least) one of the parties to the transaction when seen in relation to that party's investment strategy, valuation and/or perception of the pricing at the time of the transaction.

50. As regards the second question, the Appellant considers that an effective trade of bonds, and other securities, requires that the prices which are made available in the market, both order and transaction prices, reflect the underlying real economic value behind the individual securities. If investors make bids or offers, or take part in transactions, at prices that do not serve an independent economic purpose for that investor, based on the investor's investment strategy and own valuation of the relevant financial instrument, the market may form a false perception of the underlying real economic value behind the security and the real supply, demand and price of the security. If investors are allowed to set prices that do not serve an independent economic purpose for that investor, but only serve as a means to influence the price expectations of other investors in the market, so that changing price expectations can help the investor to realise his ultimate and true economic purpose, it can affect the confidence in the market, be perceived as unfair and thus significantly weaken the effectiveness of the trade.

51. Therefore, the Appellant argues, investors must be able to have confidence that trading orders and transactions reflect a genuine interest in buying and selling. The concern for the efficiency of the securities market and complete and good overview of the market, which is a prerequisite for all financial actors when trading in integrated financial markets, are strong arguments in favour of the prohibition on market manipulation including genuine transactions that falsely signal a genuine interest in buying or selling. Orders to trade and transactions that falsely signal a genuine interest in buying or selling are covered

by the wording of Article 1(2)(a) of the Directive as they "… are likely to give false or misleading signals as to the supply of, demand for or price of …" financial instruments.

52. Turning to the third question, the Appellant submits that the issue of whether a price is secured at an "abnormal" or "artificial" level as provided for in the second indent of Article 1(2)(a) of the Directive can be determined on the basis of the individual assumptions of the investors who place an order or make a transaction, including the investors' investment strategies, their valuation of the security in question and their view of the market situation (supply and demand). In addition, account can be taken of whether the order to trade or transaction falsely signals a genuine interest in selling or buying.

53. Further, the Appellant argues that one single order to trade or transaction can establish, and thereby secure, an abnormal or artificial price level, in particular if the order to trade or transaction is conducive to influencing price expectations among investors and particularly if it must be assumed that subsequent orders to trade or transaction prices have actually been influenced.

54. As regards the fourth question, the Appellant submits that, in order for the exemption from the prohibition on market manipulation in Article 1(2)(a) of the Directive to apply in the present case, F and G must substantiate that the transaction had both a legitimate interest and was in accordance with established market practice that was accepted in line with the conditions that must be taken into account under Article 2 of Implementing Directive 2004/72/EC.

55. According to the Appellant, a desire to uncover genuine interest in selling or buying on the part of other investors does not constitute a legitimate interest to engage in transactions or orders to trade regarded as market manipulation, for instance by engaging in behaviour that falsely signals a genuine interest in selling or buying on the person's own part. Further, a desire to exploit the uncertainty of other investors or their lack of information about the genuine interest in buying or selling in the market does not constitute a legitimate interest to engage in transactions or orders to trade regarded as market manipulation, for instance by engaging in behaviour that falsely signals a genuine interest in selling or buying on the person's own part. Finally, a desire to uncover whether there is incorrect information about supply, demand or price does not constitute a legitimate interest to engage in transactions or orders to trade regarded as market manipulation, for instance by engaging in behaviour that falsely signals a genuine interest in selling or buying on the person's own part.

56. In this respect, the Appellant contends that an actual demonstrable effect on price expectations, orders to trade or transactions is not required to determine that conduct constitutes market manipulation. It is sufficient that an activity or action is conducive to giving other investors an erroneous impression of the market situation in order to consider such activity or action market manipulation, for instance if the circumstances and the nature

of the information mean other investors are likely to be misled about the underlying financial realities of the activity or action.

57. Finally, as regards the fifth question, the Appellant submits that Article 1(2)(a) of the Directive must be understood to mean that information has been "disseminated" when an investor has given the information to a broker for further distribution to one or more investors, and certainly when the broker has actually communicated the information to one or more investors, even if the information has not yet been made public or generally available. In his role as intermediary between various potential buyers and sellers of the bond, the broker must be regarded as a representative of all his customers when receiving bids, offers and other information regarding interest in selling and buying from a customer.

58. The Appellant proposes that the Court should answer the questions as follows:

*1. It is 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. It is 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. It is 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, it is 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 and thereby secure such a level.*

*With regard to the question whether a transaction may secure the price, cf. Article 1(2)(a) of the Directive, it is not relevant whether the transaction has come into being through bilateral negotiations or by use of a multilateral trading platform.*

*4. It is not 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 a false information about supply, demand or price in the market.*

*5. It is compatible with Article 1(2)(c) of the Directive to consider information to be "disseminated" when an investor has given the information to a representative of a brokerage house in order for it to be passed on to one or more other investors in the market, even though the information has not yet been passed on to one or more investors or announced or made publicly available.*

*F*

59. As regards the first question, F begins by submitting that the heading of the question is ambiguous, as it can be read to relate to market manipulation as such, and not only to transaction-based, information-based[1] manipulation as defined in the first indent of Article 1(2)(a) of the Directive, as is the actual scope of the question.

60. F contends that there is no way that a genuine / real transaction that has been carried out with full economic effect between the parties can give false or misleading signals. This is because the only signals such a transaction is supposed to carry are the price, volume, and the fact that a willing seller and willing buyer have agreed to transact at the given price and volume. Any consideration of the subjective motivation behind the trade is manifestly incompatible with the express will of the legislature to design objective, effects-based criteria.

61. Further, F submits, an interpretation of the first indent of Article 1(2)(a) of the Directive whereby genuine transactions could be caught as giving false or misleading signals based on what other market participants might or might not assume about the intentions of one or both parties to the trade would be detrimental to the proper functioning of the market, harming the efficient allocation of capital, and thereby contrary to the fundamental aims of the Directive.

[1] Reference is made to Mårten Knuts: *Kursmanipulation på värdepappersmarknaden*, Helsingfors 2010.

62. As regards the second question, F submits that the subjective motivations behind a trade are not to be deemed relevant when applying the Directive's effects-based criteria. Further, there is no obligation to disclose motivation or trading strategies, nor does any infrastructure exist in the anonymous market for conveying such information.

63. Hence, F argues, the question of whether real transactions are carried out with any ulterior motive apart from the single trade in itself must solely be analysed under the objective criteria set out in the second indent of Article 1(2)(a) of the Directive.

64. As regards the third question, F begins by addressing the question in general. F submits that the second indent of Article 1(2)(a) of the Directive sets out two objective criteria – neither of which describes any element of misinformation nor makes any reference to the subjective motivation in order for transactions to be caught by this definition of what is systematically described as "market power manipulation", as the instrument of the manipulator is not misinformation, but the use of market force in order to distort the functioning of the market mechanism.

65. Further, F continues, the instrument to distort the price setting mechanism addressed by Article 1(2)(a) of the Directive is transactions (or orders). The criterion of "securing the price" at an "abnormal or artificial level" does not distinguish between real and fictive transactions, as both can be caught by this alternative. Although, normally, real transactions are necessary in order to "secure" the price by way of transactions.

66. F proceeds to address the issue of "securing the price" and argues that for transaction-based behaviour to qualify as manipulative under this alternative it must first be deemed to "secure the price" for a relevant period of time. How long the relevant period is depends on how long the securing of the price must be maintained in order to take advantage of it. As illustrated by *IMC Securities*,[2] this can be a very short period depending on the specific circumstances of the case.

67. According to F, it must be clear that, by its nature, one single transaction does not have the potential to "secure" the price in such a market context, especially not for a period long enough to take advantage of it. By conducting only one single transaction through only one broker, the supposed manipulator leaves all other potential buyers and sellers free to transact through all the other relevant brokers at prices significantly higher or lower than that of the one single transaction. These other potential transactions can take place during the minutes or hours after, or even at the same time as, that one single transaction, meaning that the criterion of "securing" cannot be met.

68. F asserts that for market behaviour to "secure" the price in an over-the-counter (OTC) / brokered market context without any auction-based trading mechanism, and where

[2] Reference is made to the judgment of 7 July 2011, *IMC Securities*, C-445/09, EU:C:2011:459.

multiple brokers are dealing in the security, the act of "securing" the price will by definition have to involve the coordinated placing of orders and execution of trades with all relevant brokers. Thus, one single transaction with one broker cannot be capable of "securing" the price in such a market context.

69. In addition to the criterion of "securing" the price, F contends that the second indent of Article 1(2)(a) of the Directive demands that the secured price level is "abnormal or artificial" in order to be caught by the prohibition.

70. F submits that the criteria in the second indent of Article 1(2)(a) of the Directive are supposed to be interpreted as objective, effects-based criteria, and hence not based on the actual subjective motives of the market participant in question.

71. In this respect, F submits that as the objective market effect is the core principle of the definition of market manipulation, the market effect must be verifiable in order to assess it. In a context where there has not been any trading for weeks, there is by definition no relevant price level for comparison. More or less firm indications of interest by market participants to brokers – not even in the form of a legally binding bid/offer on a trading platform that could be hit and form the basis for a legally binding trade – can clearly not be deemed to indicate a price level to be used as a reference for considering artificiality. Subjective intentions or motives are clearly stated by the EU legislative bodies not to be relevant as the criteria are supposed to be objective and effects-based.

72. Further, F contends that there is no basis for any general expectation, as described in the question, "that other investors sell and buy at the best prices consistently with their own real interest in buying and selling". This expectation would be the same as demanding that every single transaction has to be an end in itself, not allowing for trading strategies or situations with an ulterior motive. Such a regime would be extremely harmful to the functioning and integrity of the market, and be contrary to the fundamental structure of financial markets. More importantly, the legislature clearly has not designed the criteria to allow for such a counter-productive implementation of the rules.

73. As for the second part of the third question, F argues that it should be clear and undisputed that a single transaction, depending on the market context and objective possibilities of exploiting the situation, can indeed be capable of securing a price at an artificial level. This is the case when a liquid stock is traded on an automated trading platform. A typical situation would be a "marking the close" situation, where one transaction of sufficient size in the closing auction can clearly secure the price for the relevant time (i.e. at the time of the closing auction), and at an artificial level. However, it is not easy to see how such a situation would be possible in a market context without an auction mechanism / trading platform, where all trades are negotiated through a number of different brokers, there is no information available on who holds outstanding bonds, trades are reported with deferred publication (i.e. not in real time) and liquidity is very low.

74. Further, F continues, while it is clearly compatible with the second indent of Article 1(2)(a) of the Directive that one single transaction under a given set of circumstances can amount to securing the price at an artificial level, the lack of an auction-based trading venue as well as the lack of liquidity would call for a very special set of circumstances in order to establish price securing at an abnormal or artificial level. Such circumstances would generally have to include a coordinated effort to secure that all bids or offers over or below a given price are taken out with the relevant broker house, and for such a duration as is necessary, in order to benefit from the securing of the price in one of the situations described in Implementing Directive 2003/124/EC.

75. As regards the fourth question, F submits that the question should be declared inadmissible as no accepted market practices ("AMPs") approved by the Financial Supervisory Authority exist, and hence the Respondents have not asserted any such defence. On F's reading, as the basic definition of market manipulation is purely effects-based and not based on an assessment of motives or intent behind the trading activity, there should be no reason to depart from the clear wording of the Directive in this regard. Hence, the fourth question has no bearing on or relevance to the proceedings in the main action, and should be declared inadmissible.

76. Finally, as regards the fifth question, F submits that the question is only relevant as far as it concerns information given to a broker in order for it to be passed on to a specific counterparty as part of a negotiation. As the word "disseminate" literally means to "spread widely", communication to one party, as part of a price negotiation, clearly falls outside of the definition. Such a situation is also outside the scope of the rules protecting the market as such, while the situation clearly falls under the scope of the regular fraud provisions regulating any relevant misinformation. Given the criminal law context, applying the term "disseminate" to a situation of one-to-one communication carried out through a broker, and without any expectation of further spreading, would be clearly contrary to the principle of legality.

77. F proposes that the Court should answer the questions as follows:

> *1. It is not compatible with the first indent of Article 1(2)(a) of the Directive for real transactions - i.e. transactions that transfer expense and risk with full effect between independent parties - to be caught by the wording "give, or are likely to give, false or misleading signals".*
>
> *2. As the reporting of executed transactions to the market does not and shall not be deemed to carry information on the underlying motives of the parties doing the trade, real transactions are by their very nature not capable of conveying false or misleading signals to the market.*
>
> *3. It is not compatible with the second indent of Article 1(2)(a) of the Directive to determine what is an "abnormal or artificial level" based on subjective elements /*

*individual prerequisites with the investor executing the trade(s). The assessment of whether the price is secured at an "abnormal or artificial level" must be based on actual transactions, and not from price indications referenced by brokers.*

*4. The question should be declared inadmissible.*

*5. It is not compatible with Article 1(2)(c) of the Directive to consider information disseminated when an investor has given the information to a broker in order for it to be passed to one specific counterparty as part of a price negotiation, or when the broker actually has passed on the information to one specific counterparty as part of a price negotiation.*

*G*

78. As a preliminary note, G submits that, as the present case concerns questions of criminal law, the principles of legality, legal certainty and foreseeability must be given due regard and that the interpretation of Article 1(2) of the Directive is subject to certain boundaries and may not depart from the wording of the provision.[3]

79. As regards the first question, G submits that Article 1(2) of the Directive distinguishes between two different types of market manipulation, that is transaction-based manipulation and information-based manipulation.[4] Article 1(2)(a) concerns the former. Further, G submits that, in accordance with the wording of the first indent of Article 1(2)(a), the provision applies to transactions or orders to trade which are more likely than not – in other words, that are probable and with a better chance of occurring than not[5] – to cause a reasonable investor to believe something which is wrong or untrue concerning the supply of, demand for or price of a financial instrument. With that in mind, G submits that a real transaction – which results in a change in the beneficial ownership of a bond and entails for the relevant trader a real market risk – cannot be considered as giving, or being likely to give, false or" misleading signals, given the proper interpretations of those terms,[6] as to the supply of, demand for or price of financial instruments and is therefore incapable of being caught by the first indent of Article 1(2)(a) of the Directive. In this regard, G submits

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[3] Reference is made to Koen Lenaerts and Jose A. Gutierez-Fons: "To say what the law of the EU is: Methods of interpretation and the European Court of Justice", EUI Working Paper, AEL 2013/9, p. 7.

[4] Reference is made to Niamh Moloney: *EU Securities and Financial Markets Regulation*, Third Edition, 2014, p.703, and Sebastian Mock/Marco Ventoruzzi (eds.): *Market Abuse Regulation. Commentary and Annoted Guide*, 2017, p. 35.

[5] Reference is made to Odd-Harald B. Wasenden: *EU Market Abuse Regulation in Energy Markets*, 2008, 172, and Bergo: *Børs- og verdipapirrett*, 4th edition, 2014, p. 308.

[6] As to the interpretation of the term "false or misleading", reference is made to Odd-Harald B. Wasenden: cited above, p. 169-171, and Konstantinos Sergakis: *The Law of Capital Markets in the EU: Disclosure and Enforcement*, 2018, p. 175.

that the term "misleading" must be construed according to its ordinary meaning, that is causing someone to believe something which is wrong or untrue.

80. As regards the second question, G notes that the first indent of Article 1(2)(a) of the Directive adopts an effects-based approach to what constitutes market manipulation[7]. Therefore, the focus is on the actual or likely effects of a transaction or order to trade on the market in question. As the provision contains no reference to the intentions or aims of the person in question, G submits that the motives that a trader may possess for buying or selling a security should not be taken into account when determining whether a transaction or an order to trade amounts to market manipulation, save for the possibility to rebut an otherwise objective finding of an instance of market manipulation.[8]

81. As regards the third question, G submits that as the second indent of Article 1(2)(a) of the Directive, unlike the first indent of that provision, contains no reference to "false or misleading signals", it applies to both real transactions as well as fictitious ones. However, G contends that given the examples of what may constitute market manipulation listed in Article 1(2) of the Directive and the signals provided for in Implementing Directive 2003/124/EC that may indicate that conduct amounts to market manipulation, it will generally take more for a real transaction to be considered to amount to market manipulation than for a fictitious one.[9] This interpretation is supported by the objective of the Directive,[10] which is to ensure the integrity of the financial markets and enhance investor confidence within the EEA. In relation to real transactions, G considers it particularly prudent to exercise caution where a broker may be held liable and sanctioned for market manipulation.[11]

82. G submits that the second indent of Article 1(2)(a) of the Directive requires proof of a causal effect between the transaction or order to trade in question and the abnormal or artificial price of a financial instrument, in that it takes considerably more to secure such a price than to give false or misleading signals as to the price[12]. Moreover, when determining whether a price level has been secured, account must be taken of the relevant market. As the term "secure" suggests a requirement of control over the financial instrument in question, it would require – especially given the nature of the Norwegian market for corporate bonds – a person with a high degree of market power and/or a group of market actors acting in collaboration in order to secure the price on the relevant market.

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[7] Reference is made to Niamh Moloney, cited above, p. 741.

[8] Reference is made to Odd-Harald B. Wasenden, cited above, p. 169-170 and 163, and Guido A. Ferrarini: "The European Market Abuse Directive", *Common Market Law Review*, vol. 41, 2004. pp. 711-741, p. 726.

[9] Reference is made to Niamh Moloney, cited above, p. 703.

[10] Reference is made to Recital 12.

[11] Reference is made to Niamh Moloney, cited above, p. 704.

[12] Reference is made to Odd-Harald B. Wasenden, cited above, p. 169-170, 176, 181.

83. Further, as regards the determination of what constitutes an abnormal or artificial price level, G notes that neither of these terms are defined or explained in the Directive. In G's view, the terms generally refer to a level that deviates from the normal supply and demand situation which must be based on the structure and characteristics, as well as the market situation at the time in question, of the relevant market.[13] In this regard, G notes that Article 4 of Implementing Directive 2003/124/EC mentions a *significant* change in the price of the financial instrument as a signal which has to be taken into account when assessing whether a price is at an abnormal or artificial level.

84. In relation to the first part of the third question, G refers to its arguments on the second question, namely that the second indent of Article 1(2)(a) of the Directive does not refer to the author's intentions or aims. Hence, no account may be taken of an individual investor's prerequisites for executing a trade order or transaction, such as their strategy, valuation of the security in question, and/or assessment of the market situation, and a general expectation that other investors sell and buy at best prices.

85. In relation to the second and third parts of the third question, G submits that whether an individual trade may *per se* secure an abnormal or artificial price level of a financial instrument depends on whether the trade in question indeed caused the price level to move to such a level, and whether it secured the price at that level. In the same vein, G submits that whether a security that is negotiated on a bilateral basis, such as the bond at issue in the main proceedings, is capable of securing such a price level depends on whether the trade prevents other traders from buying the bond at another price, hence securing the price at an abnormal or artificial level.

86. In relation to the fourth question, G submits that in the main proceedings neither Respondent has argued that the exemption provided for in the second indent of Article 1(2)(a) of the Directive applies, as the second condition concerning accepted market practices is not fulfilled, since the relevant competent authority has not, as is required under Article 1(5) of the Directive, adopted any such practices. As the question bears no relation to the actual facts of the case at hand, G contends that it should be rejected as inadmissible.[14]

87. In relation to the fifth question, G observes that Article 1(2)(c) of the Directive concerns information-based market manipulation.[15] Unlike Article 1(2)(a) of the Directive, the provision explicitly states that the author's intent is relevant, and indeed a necessary requirement, for assessing whether the dissemination of information in question amounts to market manipulation. Given the meaning of the word "disseminate", G contends that Article 1(2)(c) applies to the act of spreading the relevant information to a wide audience.

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[13] Reference is made to Odd-Harald B. Wasenden, cited above, p. 176.

[14] Reference is made to the judgment of 10 December 2018, *Wightman*, C-621/18, EU:C:2018:999, Para. 27.

[15] Reference is made to Niamh Moloney, cited above, p. 703.

In G's view, this is also in line with the objectives of the Directive. Moreover, in interpreting the phrase "by any other means" in Article 1(2)(c), regard must be had to the proper meaning of the term "disseminate" and the limits set by the principles of legitimate expectations and legality.[16] Therefore, in G's view, information cannot be considered disseminated when given to a broker for it to be passed on to one investor or when the broker has, after receiving such information, actually passed on this information to one investor, where the information in question has not been published or made publicly available.

88. G proposes that the Court should answer the questions as follows:

*1) The first indent of Article 1(2)(a) of the Directive does not cover real transactions, such as the one in the main proceedings.*

*2) In determining if a real transaction constitutes market manipulation as stated in the first indent of Article 1(2)(a) of the Directive, the author's motives for buying or selling a security cannot be taken into account, save for the possibility to rebut an otherwise objective finding that a transaction or order to trade amounts to market manipulation.*

*3) In determining if a price is "abnormal" or "artificial" as defined in the second indent of Article 1(2)(a) of the Directive, account may not be taken of an individual investor's prerequisites for executing a trade order or transaction, such as their strategy, valuation of the security in question, and/or assessment of the market situation, and a general expectation that other investors sell and buy at best prices.*

*Whether an individual trade per se may fulfil the criteria of securing the price level of a financial instrument at an abnormal or artificial level depends on whether it may be established that the trade in question indeed caused the price level to move to such a level, and whether it secured the price at that level.*

*Similarly, whether a security that is not traded in an auction mechanism, but has been negotiated on a bilateral basis between two broker houses, such as the bond in the main proceedings, is capable of "securing" a price at an "abnormal" or "artificial" level, as stated in the second indent of Article 1(2)(a) of the Directive, depends on whether the trade prevents other traders from buying the bond at another price, hence securing the price at an abnormal or an artificial level.*

*4) The question should be rejected as inadmissible.*

*5) Article 1(2)(c) of the Directive cannot be interpreted so as to consider information as being disseminated when information has been given to a broker for*

[16] Reference is made to Koen Lenaerts and Jose A. Gutierez-Fons, cited above, p. 7.

> *it to be passed on to one investor or when the broker has, following this, actually passed on this information to one investor, where the information in question has not been published or made publicly available.*

*The Government of the Czech Republic*

89. As regards the first and second questions, the Government of the Czech Republic contends that any trade order or transaction, regardless of its nature, may fall within the scope of application of Article 1(2)(a) of the Directive, its first indent included, and may therefore constitute market manipulation. The Government of the Czech Republic submits further that neither the wording of the provision – in this regard the last subparagraph of Article 1(2) providing for a non-exhaustive list of examples which may constitute market manipulation – nor any other provision of the Directive suggest that any distinction should be made between different types of transactions or orders to trade. In this regard, the Government of the Czech Republic contends that were this to be otherwise – that is, were certain transactions or orders to trade to fall automatically outside of the scope of the prohibition – the objectives pursued by the Directive would be undermined. Therefore, a real transaction can fall within the scope of the first indent of Article 1(2)(a) of the Directive.

90. The Government of the Czech Republic contends that this is also the case where a trade order is submitted, or a transaction executed and reported to the market, even with a correct price and volume. It is for the referring court to ascertain whether the conditions of Article 1(2)(a) of the Directive are fulfilled or not in the case before it.

91. As regards the first part of the third question, the Government of the Czech Republic submits that the question should be answered in the affirmative, since, in general, the assessment of whether market manipulation has taken place should be based on an ex post analysis made from a reasonable investor's perspective. In this regard, the Government of the Czech Republic contends that such factors, i.e. whether a given price constitutes a deviation from the market price, are usually taken into account by investors in their assessment.

92. As regards the second part of the third question, the Government of the Czech Republic submits that the question should also be answered in the affirmative, in particular in the case of illiquid markets, such as the corporate bond market. In this regard, the Government of the Czech Republic submits, first, that large individual trade orders or transactions that give rise to an abnormal or artificial level of price do occur in practice, and, second, that the objectives pursued by the Directive would be undermined if conduct, such as that contemplated in the second indent of Article 1(2)(a) of the Directive, were to escape the prohibition solely on the ground that it derives from a single transaction or trade order.

93. As regards the third part of the third question, the Government of the Czech Republic submits that a transaction that has come into being through direct negotiations between two of several brokerage houses can fall within the scope of the second indent of Article 1(2)(a) of the Directive since, as was observed in relation to the first and second questions, any transaction, regardless of the manner of trading, has the potential to secure a price within the meaning of the provision. Furthermore, this is especially the case where the transaction is executed on an illiquid market.

94. As regards the fourth question, the Government of the Czech Republic contends that the two requirements set out in the final subparagraph of Article 1(2)(a) of the Directive – the investor having legitimate reasons for the transaction and the transaction being in conformity with accepted market practices – must be fulfilled cumulatively in order for a transaction or trade order, which satisfies the criteria provided for in Article 1(2)(a) of the Directive, to escape the prohibition. Further, regard must be had to Article 3(3) of Implementing Directive 2004/72/EC, according to which the decisions of national competent authorities regarding accepted market practices on the relevant regulated market must be publicly disclosed and transmitted to the Committee of European Securities Regulators.

95. The Government of the Czech Republic notes that in the present case there is nothing to indicate the existence of any such decision by the competent national authorities. Consequently, in the view of the Government of the Czech Republic, the second requirement – that the transaction or order to trade conforms with accepted market practices – cannot be met. In addition, it argues that the term "legitimate reasons" cannot be interpreted in isolation, as "accepted market practices" and "legitimate reasons" both overlap in their content.[17] In this connection, it contends that the reasons described by the referring court could be considered legitimate, provided that those reasons conform to accepted market practices, which is for the referring court to ascertain.

96. As regards the fifth question, the Government of the Czech Republic submits that it should be answered in the affirmative. In its view, the fact that the information in question has not been announced or made publicly available is irrelevant to the application of Article 1(2)(c) of the Directive. In this regard, it contends, first, that the wording of the provision – that is the reference to "any other means" – suggests that it does not apply exclusively to public dissemination of information, as the determining factors are the possible impact of the information (does it give, or is it likely to give, false or misleading signals) and the knowledge of the person who disseminates the information. Second, according to the Government of the Czech Republic, even information which is only disseminated between two individuals may constitute market manipulation.

[17] Reference is made to Andri Fannar Bergþórsson: *What Is Market Manipulation? An Analysis of the Concept in a European and Nordic Context*, 2018, p. 260, and Rudiger Veil: *European Capital Markets Law*, second edition, 2017, p. 238.

97. Therefore, in the view of the Government of the Czech Republic, the objectives pursued by the Directive would be undermined if the dissemination of information, which gives, or is likely to give, false or misleading signals as to financial instruments, were to fall outside the scope of the prohibition on market manipulation set out in Article 5 of the Directive solely on the ground that the information in question has not been announced or made publicly available.

98. The Government of the Czech Republic proposes that the Court should answer the questions as follows:

*The first indent of Article 1(2)(a) of the Directive must be interpreted as meaning that a real transaction, as well as any other transaction or any order to trade, can fall within the scope of application of that provision, and may therefore constitute market manipulation. That is also the case of a trade order submitted, or a transaction executed and reported to the market, even with a correct price and volume.*

*The second indent of Article 1(2)(a) of the Directive must be interpreted as meaning that the individual prerequisites for the investors, such as their strategy, valuation of the security in question or judgment of the market situation (supply and demand), as well as a general expectation that other investors sell and buy at the best prices consistently with their own real interest, shall be taken into account in order to assess, whether the price is at an abnormal or artificial level.*

*The second indent of Article 1(2)(a) of the Directive must be interpreted as meaning that an individual trade order or transaction can be deemed to establish an "abnormal or artificial level" within the meaning of that provision.*

*The second indent of Article 1(2)(a) of the Directive must be interpreted as meaning that a transaction involving a security that is not traded in an auction, but that has come into being through direct negotiations between two of several brokerage houses, can secure the price within the meaning of that provision. In this respect, the question, to what extent or under which circumstances such a transaction may secure the price concerned, is irrelevant.*

*The term "legitimate reasons" within the meaning of Article 1(2)(a) of the Directive must be interpreted as meaning that it covers a case, when the party who executed a transaction or an order satisfying the criteria in the first and second indents of that provision 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,*

*provided, inter alia, that such reasons conform to the accepted market practices on the regulated market concerned, which is for the national court to ascertain.*

*Article 1(2)(c) of the Directive must be interpreted as meaning that information can be deemed to be "disseminated", even though the information has not yet been announced or made publicly available.*

*ESA*

99. ESA addresses the first two questions together and understands them as essentially concerning whether a real and correctly reported transaction can, in principle, be caught by the definition of market manipulation.

100. First, ESA submits that nothing in the wording of either the first – or, for that matter, the second – indent of Article 1(2)(a) of the Directive indicates that real and/or correctly reported transactions should be excluded as a matter of principle from the notion of market manipulation. Indeed, there is no indication in the wording itself that the objective behaviour it describes needs to be combined with a subjective element, e.g. indicating intent to commit market abuse, such as by executing a transaction that is not real, or incorrectly reported, in order to deceive the market.

101. The terms "false" or "misleading" taken together involve giving the wrong idea or impression and therefore making someone believe something that is not true. In other words they can be taken as conveying an element of intent. However, even if a transaction is real and/or correctly reported, if its intent is to manipulate it would be capable of giving a "misleading" signal. In this respect, ESA observes that the fact that the transactions and orders at issue in *IMC Securities*[18] involved real transactions did not lead the ECJ to exclude them from the notion of market manipulation.

102. ESA submits that the purpose of the Directive, as indicated particularly by recitals 2 and 12 and recognised by ECJ case-law, is to protect the integrity of EU financial markets and to enhance investor confidence in those markets. Therefore, the proper interpretation of Article 1(2)(a) of the Directive may not run counter to this objective, and there does not appear to be any reason of principle as to why real and/or correctly reported transactions should not be capable of misleading investors.

103. Further, ESA argues that having regard to Article 4 of Implementing Directive 2003/124/EC, and in particular point (a) thereof and its description of signals that should be taken into account when evaluating whether market manipulation, within the meaning

[18] Reference is made to the judgment in *IMC Securities*, cited above.

of Article 1(2)(a) of the Directive, has taken place, it would seem clear that duly reported real transactions can be captured by the first indent of Article 1(2)(a).

104. Finally, ESA makes certain additional observations in light of the criminal law nature of the main proceedings. ESA contends that particular care has to be taken to ensure that fundamental principles of EEA law, including the presumption of innocence and legal certainty, are given due consideration, which also entails that the ambit of what is sanctioned as market manipulation should be foreseeable.

105. Turning to the third question, ESA proceeds to address each of the three parts separately.

106. As regards the first part of the third question, ESA understands the question as asking whether it is compatible with the second indent of Article 1(2)(a) of the Directive that the individual prerequisites of the investor(s) conducting transactions can be used to determine whether the price level of trade orders or transactions is “abnormal” or “artificial”.

107. ESA observes that it might be argued that the second indent of Article 1(2)(a) of the Directive is only capable of application in the context of transactions executed on sufficiently liquid and transparent markets where there is a determined or easily determinable market price. Market manipulation of illiquid and non-transparent markets such as the Norwegian bond market could then only be sanctioned under the first indent of Article 1(2)(a) of the Directive.

108. However, according to ESA, such an interpretation would lead to an undue restriction of the notion of market manipulation and run counter to the objectives of the Directive. Certainly, in most situations, the determination of whether a market price has been secured at an “abnormal” or “artificial” level will not be based on the merely inevitable fact that any order placed will in some way impact on the market. Instead it will be made on the basis of an objective assessment of the market conditions, taking into account what the market price would have been but for the transactions or orders to trade in question as well as whether the market price was influenced by the way the transactions or orders to trade were entered into or issued.

109. However, in ESA’s assessment, in some cases, such as the present proceedings, the possibility cannot be precluded that the only factors available to determine the normal price of a bond are the individual prerequisites of an investor on the market. In those circumstances, when it is not possible to determine a normal market price, for example due to the lack of liquidity in the market, it must be possible to take into account the individual motives, prerequisites or knowledge of persons entering into transactions or issuing orders. It may furthermore be possible to look towards the individual prerequisites of all investors within a certain secluded sector of a market, when the market price cannot be determined by generally accepted objective standards. If the market price is determined by negotiations

of individual investors, each working from a specific investment strategy, it could be possible that the market price in that particular market (or sector of the market) can be sufficiently determined by identifying a central tendency and the price spread of those investors' individual prerequisites.

110. As regards the second part of the third question, ESA states that it is compatible with the second indent of Article 1(2)(a) of the Directive that an individual trade order or a transaction can establish a price level that is "abnormal" or "artificial".

111. ESA submits that the objective of the second indent of Article 1(2)(a) of the Directive is to ensure market efficiency by protecting prices from being secured at an "abnormal or artificial level". In *IMC Securities*, the ECJ concluded that prices could be secured at such a level even if the prices did not maintain that level for more than a certain duration which in that particular case "did not last longer than one second".[19] While this judgment concerns the duration of an artificially or abnormally secured price, ESA argues that the ECJ's reasoning is relevant for the present case. The ECJ reasoned that the objectives pursued by the Directive "would be undermined if conduct such as that contemplated in Article 1(2)(a) second indent" could fall outside of the scope of the prohibition only because that conduct "gave rise to a single transaction".

112. In the same vein, ESA submits that objectives pursued by the Directive, such as protecting market integrity, could be undermined if market manipulation were excluded in circumstances where only a single transaction secured the market price at an abnormal or artificial level. In any event, the possibility cannot be precluded that in some circumstances a single transaction can affect the market price of the relevant bond. In ESA's view, this requires an evaluation on a case-by-case basis. In assessing whether the transaction in question affected the market value, the referring court should have regard to factors such as market dominance, the nature and the type of the market, whether the market is liquid or illiquid, whether the market is transparent, the volume of the transaction, the way in which market price is determined as well as the market size.

113. ESA regards the third part of the third question as addressing the extent to which negotiations-based transactions, as opposed to auction-based transactions, between two or more brokerage houses, are capable of securing the price for the purposes of the second indent of Article 1(2)(a) of the Directive.

114. According to ESA, the first issue to be determined in this regard is whether negotiations-based transactions between two or more brokerage houses are at all capable of "securing" the price. ESA submits that this can take place in rare circumstances. By having regard to factors such as market dominance, the nature and the type of the market, whether the market is liquid or illiquid, whether the market is transparent, the volume of

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[19] Reference is made to the judgment in *IMC Securities*, cited above.

the transaction, the way in which market price is determined as well as the market size, it can be determined to what extent and under which circumstances such negotiation-based transactions are capable of securing the market price.

115. In ESA's view, it is difficult to set out in general and abstract terms a clear line separating transactions that are capable of securing the price and those that are not. Rather the answer must be based on a case-by-case analysis. The second indent of Article 1(2)(a) of the Directive does not preclude the possibility, however, that a transaction that has been conducted through direct negotiations between two or more brokerage houses can be found to secure a market price at an abnormal or artificial level.

116. As regards the fourth question, ESA submits that when determining "legitimate reasons" the assessment to be carried out by the courts will vary on a case-by-case basis and that there is no exhaustive list of legitimate transactions that are compatible with the Directive. ESA understands the final subparagraph of Article 1(2)(a) of the Directive as only becoming relevant once it has been established that a particular transaction is caught by the first or second indent of Article 1(2)(a). Prima facie, the provision contains two cumulative criteria, linked by the word "and", which both have to be fulfilled in order for a particular transaction or order to be covered by the exception. ESA refers to the first of these as the "legitimate reasons" criterion. The fourth question focuses on this criterion.

117. With respect to the criterion of "accepted market practices" ("AMPs") , ESA notes that these are defined in Article 1(5) of the Directive as: "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)".

118. ESA notes that, on the basis of the information available to it, there is no indication of any AMPs relevant to the present market having been published or otherwise made available by the Financial Supervisory Authority of Norway ("Finanstilsynet"). This appears to entail that traders cannot fulfil the second criterion. If the provision is interpreted so that both criteria must be fulfilled for the exception to apply, it would indeed appear to be impossible for a trader to execute transactions which are covered by the exception.[20] In other words, in situations such as the main proceedings, where the state has not made AMPs available, this would make the provision inoperable and fundamentally alter the balance it expresses, in which the actions covered by the first and second indents are linked to the exception provided for in the final subparagraph of Article 1(2)(a) of the Directive. While

[20] Reference is made to Panagiotis K. Staikouras: "Four Years of MADness: The New Market Abuse Prohibition Revisited: Integrated Implementation through the Lens of a Critical, Comparative Analysis", *European Business Law Review*, vol. 19, 2008, pp. 775-809, p. 803, Aðalsteinn E. Jónasson: *Markaðssvik*, 2017, p. 512-513, Niamh Moloney, cited above, 750-751, Odd-Harald B. Wasenden: *Om det finansielle kraftmarkedet: En rettslig studie, med vekt på reguleringen av informasjonstilgang og markedsatferd*, 2007, p. 296-301, 367-369, and Andri Fannar Bergþórsson: *What Is Market Manipulation? An Analysis of the Concept in a European and Nordic Context*, 2018, p. 261.

the matter is not expressly raised by the reference, ESA submits that this cannot be a correct understanding of the provision.

119. When it comes to the interpretation of the term "legitimate", ESA notes that the text of the Directive provides no direct guidance. Nonetheless, the subparagraph following the core definition of "market manipulation" given in points (a), (b) and (c) of Article 1(2) of the Directive sets out three instances derived from that definition: "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".

120. ESA contends that these instances are illustrative of reasons for transactions or orders to trade, such as "to secure a dominant position over the supply of or demand for a financial instrument" with a certain effect, which can never be considered a legitimate reason.

121. Conversely, ESA continues, by implication from the definition of AMPs in Article 1(5) of the Directive as "practices that are reasonably expected in one or more financial markets", one can infer that legitimate reasons, if they are to be capable of being usefully invoked in the present context, also must be reasonably expected.

122. More broadly, ESA argues, the ECJ has held that the purpose of the Directive is "to protect the integrity of EU financial markets and to enhance investor confidence in those markets".[21] Therefore, the reference to reasons that are "legitimate" must mean reasons which persons regularly engaging in transactions on the relevant market would consider legitimate and that do not run counter to that purpose.

123. In ESA's view, this involves a dual test. First, the motivation for the transactions or orders to trade cannot have been contrary to the integrity of EEA financial markets and enhancing confidence in those markets. Second, the transactions or orders to trade cannot have caused harm to the integrity of EEA financial markets and confidence in those markets. This dual test is necessary because transactions with the intent to harm can never

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[21] Reference is made to the judgment in *IMC Securities*, cited above.

be legitimate and, likewise, transactions with harmful effect can also never be legitimate.[22] The examples in the referring court's request concerning the wish to "uncover other investors' real interest in buying and 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" need to be examined in the light of these considerations. In principle, according to ESA, they appear capable of constituting legitimate reasons for executing a transaction, as long as the motivation for and effects of those transactions do not defeat the purpose of the Directive, which is for the national court to verify.

124. Finally, as regards the fifth question, ESA notes that Article 1(2)(c) of the Directive indicates that in order for the information to be disseminated this has to take place, inter alia, through the "media" and "internet". It argues that the terms "media" and "internet" indicate means of mass communications and that a certain publication is involved. On the other hand, ESA submits, the provision also allows for dissemination to be conducted "by any other means" which will catch any other form of communication.

125. ESA stresses that the purpose of the Directive is in particular "to protect the integrity of EU financial markets and to enhance investor confidence in those markets". Consequently dissemination of information "by any other means" that harms the integrity of the EEA market and which undermines investors' confidence in those markets will be considered market manipulation under Article 1(2)(c) of the Directive provided that the other provisions of that article are fulfilled.

126. ESA therefore submits that the information can be considered disseminated when an investor has contacted a broker, even though the information has not yet been announced or made publicly available, as well as when the broker actually has passed on the information to one or more investor(s) in the market, provided that the information harms the integrity of the financial markets and undermines the investors' confidence in those markets.

127. ESA proposes that the Court should answer the questions as follows:

*1. The first indent of Article 1(2)(a) of the Directive does not preclude real transactions, being transactions that transfer expense and risk with full effect between independent parties, from being qualified as market manipulation.*

*2. The first indent of Article 1(2)(a) of the Directive does not preclude transactions that are executed and reported to the market with correct price and volume from being qualified as market manipulation.*

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[22] Reference is made to Gina-Gail S. Fletcher: "Legitimate yet Manipulative: The Conundrum of Open-Market Manipulation", *Duke Law Journal*, vol. 68, 2018, p. 479-554.

*3. The second indent of Article 1(2)(a) of the Directive must be interpreted as not precluding that an individual trade order or a transaction can be deemed to establish an abnormal or artificial level. It also does not preclude transactions that have been conducted through direct negotiations between two or several brokerage houses to be capable of securing a market price at an abnormal or artificial level. The determination of whether a market price has been secured at an "abnormal" or "artificial" level would normally be made on the basis of an objective assessment of the market conditions, including an assessment of what a "normal" market price would have been. It is only when it is not possible to determine a normal market price, for example due to the lack of liquidity in the market, that the individual motives, prerequisites or knowledge of persons entering into transactions or issuing orders can be taken into account.*

*4. The second indent of Article 1(2)(a) must be interpreted to the effect that the notion of legitimate reasons for the transaction or orders to trade encompasses any reasons which persons regularly engaging in transactions on the relevant market would consider legitimate and which had neither the object or effect of undermining the integrity of EEA financial markets and the confidence in those markets.*

*5. Article 1(2)(c) of the Directive must be interpreted to the effect that information is to be "disseminated" when an investor has given the information to a broker in the expectation of it being passed on to one or more other investors in the market, even though the information has not yet been announced or made publicly available, provided that the information harms the integrity of the financial markets and undermines the investors' confidence in those markets.*

*The Commission*

128. The Commission understands that, by its five questions, the referring court essentially seeks clarification of the notion of "market manipulation" under Article 1(2) of the Directive in two respects. It wishes to ascertain, first, under what circumstances, if any, a transaction for a sale or purchase for a bond, which is prima facie legitimate, would amount to market manipulation, and, second, whether dissemination of information from an investor to a broker in order for it to be passed on to one or more investors, or where it has been passed on to one or more investors, constitutes dissemination of information amounting to market manipulation.

129. As regards Questions 1 to 3, the Commission contends that Article 1(2)(a) of the Directive must be read in conjunction with Article 4 of Implementing Directive 2003/124/EC concerning the notion of market manipulation – which lists certain non-exhaustive signals which should be taken into account when transactions or orders to trade are examined but which should not necessarily be deemed in themselves to constitute

market manipulation – and Article 2 of Implementing Directive 2004/72/EC concerning the notion of accepted market practices.

130. Also, with regard to Questions 1 to 3, the Commission contends that Article 1(2)(a) of the Directive requires an objective assessment of the constitutive elements of a transaction or order to trade. This analysis includes assessing the effects or impact of the transaction or order to trade in the relevant market by reference to the terms used in Article 1(2)(a), such as "false or misleading", "secure", "price" and "abnormal or artificial level". These terms do not rely on the subjective intention of the person concerned. According to the Commission, this also applies to the notions of "transaction" and "dissemination", which require an examination of the relevant market and behavioural steps involved. This is for the referring court to decide.

131. As regards the first question, the Commission considers that it is not apparent whether the referring court is referring only to the transaction which took place on 19 August 2016, or to the transaction which took place on 22 August 2016 or to both. The Commission submits that the term "transaction" is not limited to fictitious transactions. However, in the absence of collusion between the seller and the buyer, the transaction which results from an acceptance of a bid is prima facie legitimate. This applies to both transactions at issue in the case before the referring court.

132. Further, as regards the transfer of risk and ownership, the Commission notes that according to Article 4(c) of Implementing Directive 2003/124/EC the absence of a change in beneficial ownership is a signal – not apparent in the present case – which can be taken into account when considering whether a transaction amounts to market manipulation. In order for the legitimacy of the transactions to be called into question, and for a finding of what amounts to market manipulation, other constitutive elements of the first indent of Article 1(2)(a) of the Directive, for example, that the transaction does indeed "give, or is likely to give, a false or misleading signal", read in conjunction with Article 4 of Implementing Directive 2003/124/EC, must be present. Therefore, the Commission considers that a transaction which is prima facie legitimate is not of itself excluded from the scope of Article 1(2)(a) of the Directive.

133. As regards the second question, and in light of the answer it proposes to the first question, the Commission contends that a transaction that is considered prima facie legitimate and is reported to the market with the correct price and volume, along with the subsequent reporting to the competent authority and the delayed announcement by the securities exchange, and results from a seller accepting the bid of another market participant can only be held to constitute market manipulation where, nevertheless, it gives, or is likely to give, a false or misleading signal as to the supply of, demand for or price of financial instruments.

134. The Commission notes that the answer to the question whether a transaction gives or is likely to give false or misleading signals within the meaning of the first indent of Article 1(2)(a) of the Directive requires a consideration of all the circumstances in which that transaction is made and the effects – including any harm – it has in the relevant market. In this regard, the Commission contends that any arguments put forward about the motives of the buyer or the seller, for example whether a genuine interest in the transaction is present, would involve a subjective assessment which is not relevant. On the contrary, a conclusion of a transaction which has taken place and conforms to established norms and practices in a relevant market means the transaction as such is considered prima facie legitimate and therefore not false, using the objective meaning of that word.

135. The Commission submits that, were the referring court to find, however, that the relevant transactions were the result of a collusion between the potential buyer posting the bid and the seller accepting it, the transaction would be considered false and consequently also any effects it had on the relevant market. Transactions which do not reflect the genuine interest of the investor concerned can be considered as amounting to market manipulation, for example if these transactions form a part of a trading strategy (see in this regard the first indent of the second subparagraph of Article 1(2) of the Directive). The Commission contends that – even if in most situations this would involve a series of transactions – such a strategy could consist of a single transaction.

136. As to the assessment of what constitutes misleading signals, the Commission submits that this requires a more detailed assessment. Here, regard must be had as to whether the transaction achieves effects which are such as to constitute a significant change on the supply of, demand for or price of the relevant financial instrument. Those effects may also include, but are not limited to, the behaviour or activities mentioned in Article 4 of Implementing Directive 2003/124/EC. The Commission submits that, in the main proceedings, one of the elements to be considered in determining whether the price was misleading is to assess whether respondent F set the price level for the first transaction without any objective consideration of the market concerned.

137. Therefore, the Commission contends that where a trade order is submitted, or a transaction is executed and reported to the market, with correct price and volume, it may only be held to constitute market manipulation where it is found to convey a false or misleading signal as to the supply of, demand for or price of the financial instrument in question. Here, an objective assessment of the effect of the transaction in the relevant market is required.

138. As regards the first part of the third question, the Commission submits that the terms "abnormal" and "artificial" should be interpreted in line with their ordinary meaning. In the case of market manipulation that affects the price of a financial instrument, having regard to Article 4 of Implementing Directive 2003/124/EC, the Commission contends that the price in question should represent a significant deviation from the price the relevant

market would normally expect. In illiquid markets, such as the market at issue in the main proceedings, where there is no actual price information available, the determination of whether a price has been secured at an abnormal or artificial level requires a comparator of a previous price and a comparison in the changes in trading and market conditions relating to the relevant financial instrument.

139. The Commission contends that the price of a security is determined by the interaction between supply and demand. The real test when determining what a security is worth is the price that results from an arms-length transaction in the marketplace, i.e. the price when a posted bid and offer match, both in terms of a price and the volume. According to the Commission, the prerequisites of an investor set out by the referring court allow for an objective assessment of the relevant market for a particular bond. A price obtained in such circumstances – especially in context of the case before the referring court – is unlikely to be artificial or abnormal. Consequently, it is not incompatible 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 investor's individual prerequisites when executing a trade order or transaction, for example those referred to by the referring court.

140. As regards the second part of the third question, the Commission submits that the second indent of Article 1(2)(a) of the Directive is silent as to how many transactions must be executed to secure an abnormal or artificial price level. Therefore, the possibility cannot be precluded that one transaction may be sufficient to secure such price.

141. As regards the third part of the third question, the Commission notes that, according to Article 9 of the Directive, its scope of application covers financial instruments admitted to trading on a regulated market even where they are traded off-venue. Therefore, the prohibition on market manipulation also applies to transactions conducted bilaterally (over-the-counter), following negotiations conducted through brokers. The Commission submits further that a non-collusive interaction between market bids and offers determines the current market value, even if a significant time elapses between transactions.

142. As regards the fourth question, the Commission submits that the application of the final subparagraph of Article 1(2)(a) of the Directive is addressed to the person – natural or legal – who invokes it and requires a subjective assessment of that person's intention and practice. The Commission contends that both conditions – the investor's reasons being legitimate and the transaction conforming to accepted market practices – must be cumulatively satisfied.

143. The Commission notes that Article 1(2)(a) of the Directive does not define specifically what the term legitimate reasons may entail. The nature or content of what may constitute a legitimate reason is therefore not provided for in an exhaustive manner. Therefore, there is nothing to indicate that the first and third reasons provided for by the

referring court would not be considered legitimate, provided the transaction or order to trade conforms to accepted market practices. As regards the second reason, the Commission submits that, taken in isolation, to take advantage of investors' uncertainty might not be considered legitimate, although this must be considered within the specific context of the present case. In this connection, the Commission contends that the word "legitimate" must be afforded its normal meaning, that is as meaning not illegal, or improper, or so unusual as to be considered deviant, or errant or roguish.

144. As regards the second condition, the Commission emphasises that it is the transaction itself – not the reason invoked – which must conform to what are recognised as accepted market practices. The Commission notes that, according to Article 1(5) of the Directive, an accepted market practice is defined as one accepted by the relevant competent authority. In this regard, the Commission refers to Article 2 of Implementing Directive 2004/72/EC which sets out a number of factors to be taken into account when considering market practices.

145. As regards the fifth question, the Commission contends that Article 1(2)(c) of the Directive requires both an objective assessment – as to what constitutes dissemination of information on a particular platform – and a subjective one, as the provision refers to a person's knowledge regarding their actions.

146. The Commission submits that, by its very wording, the prohibition is aimed at a form of public dissemination which aims to influence the market and that the phrase "by any other means" should not be read in isolation as a "catch-all" for different types of communication which are in essence private. Rather, this refers to a forum or a platform that is comparable to the media. In addition, the act of dissemination is not in itself sufficient. The dissemination must give, or be likely to give, false or misleading signals as to financial instruments. According to the Commission, the terms "false" and "misleading" should be assessed in the same manner as in relation to Article 1(2)(a) of the Directive, as set out in its proposed answers to the first and second questions.

147. Therefore, the Commission concludes that there is no dissemination of information within the meaning of Article 1(2)(c) of the Directive in the instances provided for by the referring court in its fifth question.

148. The Commission proposes that the Court should answer the questions as follows:

> *1. Article 1(2)(a) of the Directive does not preclude a transaction which is prima facie legitimate, from being considered a transaction which "gives or is likely to give false or misleading signal" but other constitutive elements of Article 1(2)(a) read in conjunction with Article 4 of Implementing Directive 2003/124/EC must be present in order for there to be a finding of market manipulation.*

*2. For the purposes of the first indent Article 1(2)(a) of the Directive where a trade order is submitted, or a transaction is executed and reported to the market, with correct price and volume, it may only be held to be market manipulation, where it is found to convey a false or misleading signal as to the supply of, demand for or price of the financial instrument in question. In this context, an assessment of the effect of the transaction in the market for the financial instrument concerned would be required.*

*3. It is not incompatible 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 same context, Article 1(2)(a) second indent of the Directive does not preclude that one transaction would be sufficient to secure the price at an "abnormal" or "artificial" level.*

*4. It is not incompatible with the second indent of Article 1(2)(a) of the Directive for a person to establish as a reason for executing a transaction or trade order which satisfies the criteria in the first and second indents, that he executed the transaction or the trade order because he 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,*

*provided that the transactions or order to trade in question conform to accepted market practices on the regulated market concerned.*

*5. There is no dissemination of information 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.*

Páll Hreinsson

Judge Rapporteur