Case No: 80591
Document No: 922045
Decision No: 068/19/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 25 September 2019

closing a complaint case arising from an alleged failure by Iceland to implement Directive 2003/6 and to request an advisory opinion

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"), in particular Article 31 thereof,

Whereas:

On 3 April 2017 , the EFTA Surveillance Authority ("the Authority") received a complaint against Iceland alleging that *Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)*[1] ("Directive 2003/6" or "the Directive") was wrongly implemented into Icelandic legislation, namely Act no. 108/2007 ("the Act" or "the Securities Act"), due to the Supreme Court's interpretation of the Directive in its judgment no. 3/2017 and its refusal to refer the case to the EFTA Court for an advisory opinion.[2]

1 Introduction

According to the complaint, the Supreme Court's interpretation, in judgment no. 3/2017, of Article 117 of the Securities Act on the definition and prohibition of market abuse, was contrary to Directive 2003/6. The complainants alleged that the trades they were charged for manipulating were automatically and in themselves found to be market abuse prohibited under Article 117 of the Securities Act for the sole reason that the trades fell outside the scope of the safe harbour rules. The complainants consider that this interpretation demonstrates that Directive 2003/6, as further implemented by *Commission Regulation (EC) no. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC*

[1] OJ L 96, 12.4.2003, p. 16–25.
[2] Supreme Court Case no. 3/2017 of 13 January 2017, which confirmed the District Court of Reykjavik's ruling of 21 December 2016.

of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments[3] ("Regulation no. 2273/2003"), is insufficiently implemented into the national legal order, contrary to Iceland's obligations pursuant to Articles 3 and 7 of the EEA Agreement.

The complainants further maintain that the Supreme Court's refusal to seek an advisory opinion of the EFTA Court in judgment no. 3/2017 was not in line with Article 3 of the EEA Agreement and their fundamental right of access to courts. The Supreme Court rejected the complainants' request as the issue had already been decided by Icelandic courts in Cases no. 842/2014 ("*Landsbankinn*") and no. 498/2015 ("*Kaupthing*").[4]

The complainants were charged with market manipulation for trading shares, which gave or were likely to give false or misleading signals as to the supply of, demand for or price of the shares, as per Article 55(1) of Act no. 33/2003, later Articles 117(1) (a)-(b) of the Securities Act (no. 108/2007). The District Court of Reykjavík handed down a judgment on 2 March 2018, in which they were convicted of the aforementioned conduct. Two of the complainants appealed the judgment to Landsréttur Appeal Court in March 2018, but no trial proceedings have taken place at this point.

2 Correspondence

By letter of 24 April 2017, the Authority's Internal Market Affairs Directorate ("the Directorate") informed the Icelandic Government of the receipt of the complaint.[5] In a letter of 26 June 2017, the Directorate asked the Government to provide information concerning the complaint.[6] The Icelandic Government replied by letter dated 7 September 2017, stating that it disagreed with the complainants' interpretation of the cited *Landsbankinn* and *Kaupthing* judgments.[7] In contrast to the allegations of the complainant, the Icelandic Government's view was that the Supreme Court had, in each of the cases referred to, evaluated the conduct in question under the relevant market abuse rules and found the trading to be in breach of Article 117(1) of the Securities Act.

The complainants submitted additional comments to the Directorate by letter dated 14 December 2017, in which they stated that the Icelandic Government's response did not correctly reflect the Supreme Court's interpretation and application of the relevant rules in the *Landsbankinn* and *Kaupthing* judgments.[8]

3 Relevant law

3.1 Relevant EEA law

According to recital 12 of Directive 2003/6, its aim is "*to ensure the integrity of Community financial markets and to enhance investor confidence in those markets*." According to recital 33 of Directive 2003/6, the safe harbours for buy-back programmes under Article 8 are legitimate "*in certain circumstances, for economic reasons and should not, therefore, in themselves be regarded as market abuse*."

[3] OJ L 336, 23.12.2003, p. 33–38.
[4] The request for an advisory opinion was submitted to the District Court of Reykjavik in the proceedings of District Court Case no. S-193/2016.
[5] Document No. 853009.
[6] Document No. 862849.
[7] Document No. 872691.
[8] Document No. 891678.

The relevant part of the definition of market manipulation is provided in Article 1(2) of Directive 2003/6:

"*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;
[…]"

The general ban on market manipulation is set out in Article 5 of the Directive, which provides that Member States shall *"prohibit any person from engaging in market manipulation*."

However, Article 8 of the Directive provides for certain exemptions or safe harbours:

"*The prohibitions provided for in this Directive shall not apply to trading in own shares in "buy-back" programmes … provided such trading is carried out in accordance with implementing measures adopted in accordance with the procedure laid down in Article 17(2)*".

Recitals (2)-(3) of the preamble to Regulation no. 2273/2003 state that:

"*Activities of trading in own shares in "buy-back" programmes […] which would not benefit from the exemption of the prohibitions of Directive 2003/6/EC as provided for by Article 8 thereof, should not in themselves be deemed to constitute market abuse […]*

On the other hand, the exemptions created by this Regulation only cover behaviour directly related to the purpose of the buy-back and stabilisation activities. Behaviour which is not directly related to the purpose of the buy-back and stabilisation activities shall therefore be considered as any other action covered by Directive 2003/6/EC and may be the object of administrative measures or sanctions, if the competent authority establishes that the action in question constitutes market abuse."

Article 3 of Regulation no. 2273/2003 sets out the criteria for buy-back programmes to be exempted under Article 8 of Directive 2003/6:

"*In order to benefit from the exemption provided for in Article 8 of Directive 2003/6/EC, a buy-back programme must comply with Articles 4, 5 and 6 of this Regulation and the sole purpose of that buy-back programme must be to reduce the capital of an issuer (in value or in number of shares) or to meet obligations arising from any of the following:*
(a) debt financial instruments exchangeable into equity instruments;
(b) employee share option programmes or other allocations of shares to employees of the issuer or of an associate company."

Further requirements for the programme, its disclosure and trading conditions – e.g. on purchase prices, transparency, trade volume and prohibition of trading in own shares

during the life of the programme – are set out in Articles 4, 5 and 6 of Regulation no. 2273/2003.[9]

Article 3 of the EEA Agreement provides:

"*The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations of this Agreement.*
They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement […]"

Article 7 of the EEA Agreement provides:

"Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows : […] (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation"

Article 34(2) of the SCA provides:

"*Where such a question [on the interpretation of the EEA Agreement] is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion*."

3.2 Relevant national law

The Authority notes that Directive 2003/6 and Regulation no. 2273/2003 were implemented into the Icelandic legal system by Act no. 31/2005[10], which amended Act no. 33/2003, and which was subsequently replaced by the Securities Act (no. 108/2007).[11]

Article 117(1) (a)-(b) of the Securities Act contains the definition of and prohibition against market abuse, stating that market abuse is prohibited and is defined as:

"*Market abuse is prohibited. "Market abuse" shall mean:*
1. Transactions or orders to trade which:
a. Give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments; or
b. Secure the price of one or more financial instruments at an abnormal or artificial level, unless the party that conducted the transactions or issued the orders to trade can demonstrate that there were legitimate reasons for so doing and that these transactions or orders to trade conform to accepted market practices on the regulated market in question;"[12]

In addition to the general exclusion from the definition of market abuse in Article 117(1)(b) of the Act (cf. the wording "*unless*"), an exemption from the general prohibition

[9] In addition, recitals (5)-(7) of the preamble to Regulation no. 2273/2003 record further conditions for the application of the "buyback" exemption of Article 8 of Directive 2003/6.
[10] Article 26 of amending Act No. 31/2005. Article 31 of the same Act implements the market abuse definition of Directive 2003/6/EC into national law.
[11] Article 79 of Act No. 33/2003 and Article 149(2) of Act No. 108/2007.
[12] Translation by the Icelandic Government available here: https://www.government.is/media/fjarmalaraduneyti-media/media/skjal/Act_No_108_2007_on_Securities_Transactions.pdf.

in Article 117 can also be found in Article 115(3), where it is stated that the ban on market abuse in Article 117 shall not apply when trading own shares "*in buy-back programmes or for stabilisation of financial instruments*", provided the trading is carried out in accordance with a regulation adopted on the basis of Article 118 of the Act.

Regulation no. 630/2005 on inside information and market abuse further sets out the conditions for the exemptions for buy-back programmes and stabilisation measures, as per Article 118 of the Act.[13]

Article 3 of Annex I to Regulation no. 630/2005 provides that in order to benefit from the exemption provided for in Article 115 of the Act, "*a buy-back programme must comply with the provisions of Articles 4, 5 and 6 of this Annex and the sole purpose of that buy-back programme must be to reduce the share capital of an issuer […] or to meet obligations arising from […] a) Debt financial instruments exchangeable into shares, b) Employee share option programmes or other allocations of shares to employees of the issuer or of an associate company."*

Article 4 states that an issuer has certain disclosure and reporting obligations prior to the commencement of the buy-back program and Article 5 sets out certain price conditions. Article 6 sets out certain restrictions in order to benefit from the exemption of Article 115(3) of the Act, e.g. the issuers shall not engage in selling of own shares.

4 Assessment

4.1 Access to the EFTA Court

4.1.1 The obligations set out in Article 34 of the Surveillance and Court Agreement

The Authority takes the view that national courts in the EFTA States are not under an EEA law obligation to refer questions to the EFTA Court for an advisory opinion.[14] Under Article 34 SCA, a national court faced with a question of EEA law may refer that question to the EFTA Court. Therefore, the wording of Article 34 SCA makes it clear that that article does not create an obligation on any court (including a court of last instance) to refer a question of EEA law to the EFTA Court for an advisory opinion.

The second paragraph of Article 267 of the Treaty on the Functioning of the European Union ("TFEU") provides that a national court or tribunal in the EU "*may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon*". However, under the third paragraph of Article 267 TFEU "*a court or tribunal of a member state against whose decision there is no judicial remedy under national law*" is obliged to make a reference.[15]

Article 34 SCA imposes no corresponding obligation for a national court of last instance to request an advisory opinion. This difference is highlighted in case E-18/11 *Irish Bank Resolution Corporation Ltd* v *Kaupthing Bank hf ("Irish Bank"),* in which the EFTA Court states:

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[13] Translation by the Icelandic Government available here: https://www.stjornarradid.is/media/fjarmalaraduneyti-media/media/skjal/regulation_no_887_2008.pdf.

[14] See also College Decision 491/15/COL to close a complaint against Norway concerning payment of damages for taxes levied contrary to EEA law (Doc No 756320).

[15] The extent of this duty has been further clarified in the case law, see in particular Case C-283/81 *CILFIT* EU:C:1982:335, paragraph 21, and Case C-160/14 *Ferreira da Silva*, EU:C:2015:565, paragraphs 37-45.

"*When drafting Article 34 SCA, the EFTA States were inspired by Article 267 TFEU. There are, however, differences. According to the wording of Article 34 SCA, there is, in particular, no obligation on national courts against whose decisions there is no judicial remedy under national law to make a reference to the Court. This reflects not only the fact that the depth of integration under the EEA Agreement is less far-reaching [than] that under the EU treaties […]. It also means that the relationship between the Court and the national courts of last resort is, in this respect, more partner-like."*[16]

The Authority observes that the judicial bodies falling within the scope of Article 34 SCA, much like those falling within the scope of the second paragraph of Article 267 TFEU, have discretion as to when to make a request.[17]

The CJEU has repeatedly emphasised the discretion of the national courts in respect of whether a preliminary ruling is necessary and of the relevance of the questions referred.[18] In interpreting Article 34 SCA, the EFTA Court has mirrored the CJEU's case-law on the second paragraph of Article 267 TFEU.[19]

The EFTA Court has commented on the cooperative relationship between the EFTA Court and the national courts. In *Irish Bank* it stated:

"According to the Court's settled case-law, Article 34 SCA establishes a special means of judicial cooperation between the Court and national courts with the aim of providing the national courts with the necessary interpretation of elements of EEA law to decide the cases before them."[20]

However, the Court went on to highlight the discretion of the national courts:

"It is solely for the national court … to determine in the light of the particular circumstances of the case both the need for an Advisory Opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."[21]

The Authority also observes that in *Irish Bank*, the EFTA Court – while noting that there is no obligation under Article 34 SCA on national courts against whose decisions there is no judicial remedy under national law to refer cases, in contrast with the obligations set out in the third paragraph of Article 267 TFEU – interpreted Article 34 SCA to signify *"that the relationship between the Court and the national courts of last resort is, in this respect, more partner-like."*[22]

[16] See Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 57, emphasis added.
[17] See, for example, the Opinion of Advocate General Jacobs in Case C-338/95, *Wiener SI* EU:C:1997:352, paragraph 20. See also Case C-495/03 *Intermodal Transports* EU:C:2005:552, paragraphs 31 and 33.
[18] See, for example, C-348/89 *Mecanarte* EU:C:1991:278, paragraphs 47 and 49; Opinion of Advocate General Mazák in Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* EU:C:2010:319, paragraphs 67 and 70; Case C-555/07 *Kücükdeveci* EU:C:2010:21, paragraphs 54-55.
[19] See, for example, Case E-10/04 *Paolo Piazza* [2005] EFTA Ct. Rep. 79, paragraph 23.
[20] Case E-18/11 *Irish Bank*, cited above, paragraph 53.
[21] Case E-18/11 *Irish Bank*, cited above, paragraph 55. See also Case E-13/11 *Granville* [2012] EFTA Ct. Rep. 400, paragraph 18; Case E-17/11 *Aresbank* [2012] EFTA Ct. Rep. 916, paragraph 43, and Case E-10/12 *Askar Capital* [2013] EFTA Ct. Rep. 204, paragraph 38.
[22] Case E-18/11 *Irish Bank Resolution*, cited above, paragraph 57.

The Authority concurs with this description, and with the EFTA Court's comments on the benefits of this system of cooperation set out in *Jonsson.*[23] Where EEA law lacks clarity, a reference to the EFTA Court can help to avoid "*unnecessary mistakes in the interpretation and application of EEA law"*.[24] The system of references is useful – indeed essential – for ensuring the coherence and homogeneity of EEA law across the three EFTA States. Moreover, the need for coherence and authoritative interpretation of the applicable law in a centralised forum open to all concerned EEA stakeholders is also the key reason behind the system of references in the EEA.

Accordingly, although the national courts of the EFTA States have a discretion on whether or not to make a reference, they should exercise that discretion in a way which is consistent with the obligations of the State under EEA law. Where a reference is not made on a point of EEA law, and where the interpretation of that law is not clear, the State risks making an incorrect interpretation on the substance of that point of law. Such a misinterpretation would amount to a breach of the State's substantive obligations under EEA law.

An EFTA State's failure to fulfil its obligations under EEA law may be established under Article 31 SCA whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution such as the Supreme Court.[25]

Hence, the Authority may initiate proceedings under Article 31 SCA against the EFTA States for an infringement of EEA law attributable to national courts.

However, this does not alter the fact that Article 34 SCA does not impose any obligation on the Icelandic Supreme Court to refer questions to the EFTA Court and that the Authority does not consider there to have been a breach of Article 34 SCA itself.

4.1.2 Outcome not affected by the loyalty obligation, nor by the principle of reciprocity

The complaint also refers to a possible infringement of Article 3 EEA.

The Authority is of the opinion that the loyalty obligation set out in Article 3 EEA cannot be interpreted as either creating any new *substantive* obligations for the national courts to make references for advisory opinions, or curtailing the discretion in Article 34 SCA. The complaint maintains that the Icelandic Supreme Court has failed to fulfil its duty of loyalty under Article 3 EEA by rejecting the complainants' request for an advisory opinion. However under Article 34 SCA, although the Supreme Court is *entitled* to make a reference to the EFTA Court and *"will take due account of the fact that [it is] bound to fulfil [its] duty of loyalty under Article 3 EEA"*[26], it is not *required* to make a reference.

Therefore, the EEA loyalty obligation pursuant to Article 3 EEA cannot in itself serve as a basis for establishing an obligation to make a reference to the EFTA Court.

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[23] Case E-3/12 *Stig Arne Jonsson*, [2013] EFTA Ct. Rep. 136.
[24] *Jonsson*, cited above, paragraph 60.
[25] See Case C-129/00 *Commission* v *Italy* EU:C:2003:656 , paragraph 29 and Case C-154/08 *Commission v Spain* EU:C:2009:695.
[26] Case E-18/11 *Irish Bank Resolution*, cited above, paragraph 58.

4.1.3 Outcome not affected by fundamental right of access to courts / Article 6 of the ECHR

The complaint also makes an implicit reference to Article 6(1) of the European Convention on Human Rights ("ECHR"), in invoking the fundamental right of access to courts. The Authority observes that the European Court of Human Rights ("ECtHR"), in the *Ullens de Schooten and Rezabek* case,[27] found that the *"Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling [...]*".[28] The starting point under the Convention is thus that Article 6(1) ECHR guarantees no right to a reference for a preliminary ruling or similar.[29]

The Authority notes that the *Ullens* case concerned "*the specific context of the third paragraph of [what is now Article 267 TFEU]*"[30], which has no equivalent in EEA law. Nevertheless, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for referral may, in certain circumstances, infringe the fairness of proceedings, even if that court is not ruling in the last instance: for example, if the refusal is arbitrary or has not been properly reasoned.[31] The ECtHR in *Ullens* thus went on to find that Article 6(1) imposes an obligation on domestic courts to give reasons, in the light of the applicable law, for any decisions in which they refuse to refer a preliminary question.[32]

In the present case, the Authority notes that the Icelandic Supreme Court in judgment no. 3/2017 gave reasons for its decision not to refer the matter to the EFTA Court: *inter alia*, it referred to its earlier jurisprudence, in which the legal issue had already been interpreted, namely *Kaupthing* and *Landsbankinn* judgments, and to the reasoning of the District Court, which had stated that the legal issue was clear and had been interpreted with regard to Directive 2003/6.

It follows from the above that since there is no obligation under Article 34 SCA to refer, which corresponds with the one under Article 267(3) TFEU, the reasoned refusal of the Supreme Court in this case to make a reference does not in itself raise an issue with the principle of effective judicial protection, including the right to a fair trial, which is a fundamental right guaranteed under the EEA Agreement. Moreover, there is nothing in the complaint that suggests that any specific procedural guarantees laid down in Article 6 ECHR have been disregarded in the proceedings before the Icelandic courts.

Accordingly, the Authority sees no grounds for considering there to have been a breach of the obligation to respect the fundamental rights of access to courts guaranteed under EEA law.

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[27] See judgment of 20 September 2011 in the case of *Ullens de Schooten and Rezabek v. Belgium* (Applications Nos. 3989/07 and 38353/07).

[28] *Ullens de Schooten and Rezabek*, cited above, paragraph 57. See also Decision of 13 February 2007 in the case of *Lutz John v Germany* (Application no. 15073/03), p.5.

[29] Given the conclusion reached in this section, the Directorate considers it unnecessary to examine whether the Authority would be competent to initiate infringement proceedings under Article 31 SCA for a breach of the ECHR.

[30] *Ullens de Schooten and Rezabek*, cited above, para. 62. See also cases *Dhahbi c. Italy* (no. 17120/09, 8 April 2014) and *Schipani and Others* v. Italy (no. 38369/09, 21 July 2015).

[31] *Ullens de Schooten and Rezabek*, cited above, paragraph 59.

[32] *Ullens de Schooten and Rezabek*, cited above, paragraph 60 (this applies especially where the applicable law allows for such a refusal only on an exceptional basis); and *Lutz John*, cited above, p.7.

4.2 The implementation of the Directive in Iceland

At the outset, the Authority notes that it has previously carried out an assessment of the implementation of the Directive into Icelandic law.[33] Following an exchange of information and a table of correspondence[34] between the Authority and the Icelandic Government, the Authority, on 6 April 2010, closed the case, having concluded that the Directive had been fully and adequately implemented into the Icelandic national legal order.

In this respect, the complaint is focused on the conclusion in Supreme Court judgment no. 3/2017. In this judgment the Court decided not to refer the case to the EFTA Court for an advisory opinion, which according to the complainant is based on a misinterpretation of the conclusions in previous cases no. 842/2014 (*Landsbankinn*) and 498/2015 (*Kaupthing*). The complainants allege that the Court's interpretation of Section XII of the Securities Act in these two cases is contrary to Directive 2003/6 and Regulation no. 2273/2003, namely that the Supreme Court failed to apply the Act in accordance with the aims of the Directive, recital 33, along with Articles 1(2), 5 and 8 of the Directive, cf. also recital 2 of Regulation no. 2273/2003.

4.3 The Supreme Court's interpretation of the trades and applicable law

According to the complainants, the Supreme Court's interpretation of the *Landsbankinn* and *Kaupthing* judgments and of the relevant law entails that trading in own shares is automatically considered market abuse if such trading does not fall within the scope of the safe harbours. The complaint states that "*based on the Supreme Court's conclusion in these two cases, the trading that the Complainants have been charged for is prohibited under Article 117 of the Securities Acts for the sole reason that it falls outside the scope of the safe harbour rules*."[35]

The Icelandic Government, in its letter dated 7 September 2017, states that it does not agree with the complainants' interpretation of the Supreme Court's findings in *Landsbankinn* and *Kaupthing*. It points out that the Court evaluated the conduct and trading in question: the "*vast number of offers and extensive trading that occurred during the period in question gave, or was at least likely to give, a misleading or incorrect picture of the demand and value of shares in the banks*." In the Icelandic Government´s view, the Court then went on to find that the conduct did not fall under "*formal market making as explained in Art. 116 of the Securities Act. On those grounds and after an interpretation of the Securities Acts the Court decided that the trading in question constituted a substantial infringement to Art. 117(1).*"[36]

4.3.1 The Landsbankinn judgment

In relation to the *Landsbankinn* case, the Authority reiterates its summary and assessment in Chapter 4.1-4.2 of its pre-closure letter, dated 9 May 2018. As stated therein, the Supreme Court firstly referred to the aim of the Securities Act, which is to promote normal price levels of financial instruments.

In its subsequent reasoning, the Supreme Court referred to the definition of market abuse according to Article 117 of the Securities Act. It noted that when implementing Directive 2003/6, "*the definition of market abuse was changed to its current form as stated in*

[33] Case No. 55487.
[34] Document No. 492826.
[35] Document No. 852530, paragraph 21.
[36] Document No. 872691, page 2.

Article 117(1)" and that the provisions on market abuse are not applicable when conduct falls under the exemptions that are "*now*" set out in the law under Articles 115(3) and 116 of the Securities Act, after implementation.[37]

Moreover, the Supreme Court noted that the market abuse definition in Article 117(1)(b) of the Act, on transactions that are carried out to establish an abnormal price of securities, should be interpreted in light of the definition in Article 1(2)(a) of the Directive. It added that that the exclusion from the scope of market abuse in Article 1(2)(a) should also cover the conduct mentioned in Article 117(1)(a) of the Act (thus not just the conduct mentioned in Article 117(1)(b)):

"Section 2(a) of Article 1 of the aforementioned Directive [2003/6/EC], where the concept of market abuse is defined, contains provisions that correspond to those in subsection 1(a) and (b) of Article 117 of Act no. 108/2007. The difference between these provisions is that the exemption in the Directive refers to the conduct as described in both subsections of Act no. 108/2007, while the exemption from the scope of Article 117 is merely stated in subsection 1(b) of Act no. 108/2007. Therefore, Article 117 should be interpreted so that trades or trade offers, which give or are likely to give a false indication of supply, demand or prices of securities, are not to be considered market abuse if the trading party can offer lawful reasons for the trade or if the trades were in line with general market practice of regulated securities markets."[38]

The Supreme Court therefore set out the market abuse definition of Directive 2003/6 as the starting point of its assessment. It correctly interpreted the legitimate exemptions or exclusions from the definition as applying also to subsection (a) of Article 117(1) of the Securities Act.[39]

In its judgment, the Court addressed the defendants´ further argument that the conduct constituted "*informal market making*", which would fall within the scope of Article 116 of the Securities Act, and therefore outside the scope of the prohibition in Article 117(1) of the Act. The Court found that the trades did not fall within Article 116, *inter alia* as there was no formal market making contract in place, according to the accused´s testimony. Further, the trades were not publicly reported.

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[37] Unofficial translation by the Authority. Original wording of Chapter IV.2 of the reasoning: "*Gagngerar breytingar voru síðan gerðar […] þegar tilskipun Evrópusambandsins, nr. 2003/6/EB, um innherjaviðskipti og markaðsmisnotkun (markaðssvik) var innleidd hér á landi. Við það var skilgreiningunni á markaðsmisnotkun breytt í það horf, sem nú er kveðið á um í 1. mgr. 117. gr. laga nr. 108/2007, auk þess sem tekið var fram eins og nú er gert í 1. tölulið 3. mgr. 115. gr. laganna að ákvæðin um markaðsmisnotkun ættu ekki við þegar um væri að ræða viðskipti með eigin hluti í endurkaupaáætlun eða við verðjöfnun fjármálagerninga. Eftir þessar breytingar á lögum um verðbréfaviðskipti verða ákvæði XII. kafla laga nr. 108/2007 um verðmyndun á skipulegum verðbréfamarkaði skýrð á þann hátt með gagnályktun frá 1. tölulið 3. mgr. 115. gr. og 116. gr. þeirra að fjármálafyrirtækjum, sem hafa heimild til verðbréfaviðskipta, sé óheimilt að stunda viðskipti með eigin hluti á slíkum markaði í því skyni að greiða fyrir að markaðsverð skapist á þeim, sbr. niðurlag 1. mgr. 116. gr., nema um sé að ræða viðskipti í endurkaupaáætlun eða við verðjöfnun fjármálagerninga, sbr. 1. tölulið 3. mgr. 115. gr.*"

[38] Unofficial translation by the Authority. Original wording in Chapter 2 of the Court„s reasoning: "*Í a. lið 2. töluliðar 1. gr. fyrrgreindrar tilskipunar, þar sem hugtakið markaðsmisnotkun er skilgreint, eru ákvæði sem svara til a. og b. liða 1. töluliðar 1. mgr. 117. gr. laga nr. 108/2007. Þó er sá munur á að eftir tilskipuninni nær undantekningarákvæðið, sem er í síðari hluta b. liðarins, til þeirrar háttsemi sem lýst er í báðum stafliðunum. Af þeim sökum er rétt að skýra 1. tölulið svo að það að eiga viðskipti eða gera tilboð, sem gefa eða eru líkleg til að gefa framboð, eftirspurn eða verð fjármálagerninga ranglega eða misvísandi til kynna, teljist ekki markaðsmisnotkun ef sá, sem í hlut á, getur sýnt fram á að ástæður að baki viðskiptunum eða fyrirmælum um þau séu lögmætar og að viðskiptin eða fyrirmælin hafi verið í samræmi við viðurkennda markaðsframkvæmd á skipulegum verðbréfamarkaði.*"

[39] Case E-28/13 Merrill Lynch [2014] EFTA Ct. Rep. 970, paragraph 42.

The Court further referred to Articles 4 and 9 of the Annex to Regulation no. 630/2005 on transparency by publishing to the public at large a description of a buy-back programme before the commencement of trading.[40] The Supreme Court also noted the following, regarding the transparency requirement of Article 115(3) of the Securities Act:

"The provisions of Act no. 108/2007 are interpreted, as has been stated previously, such that there is a ban on such an undertaking trading in own shares for the purposes of facilitating a market price for the shares, unless for the explicit purposes stated in Article 115(3) of the Act, and by announcing it publicly.

There is nothing in the case that suggests that Landsbanki Islands hf. announced, formally or informally, that it conducted trading in own shares with the before mentioned purpose. To the contrary, the case documents and the accused's testimonies suggest that the bank tried to keep the extensive trading secret for those that were involved in trading with the shares in the market […] No concrete explanation has been given for such compelling reasons to avoiding flagging of the trades"[41]

The Court established that the activity in question constituted trading in own shares, which was executed in contradiction with the transparency requirements, and thus that the exemption in Article 115(3) of the Act was not applicable.

Lastly, the Court conducted an assessment of whether the material elements of the market abuse definition were present. It considered whether the trades fell within the exclusions provided for in Article 117(1) of the Act, namely whether, despite the fact that the trade orders or transactions secure the price of a financial instrument at an abnormal level, they could be justified on the basis that there were "*lawful*" reasons behind the trading or that the trades were "*in accordance with general market practice*". The Court´s reasoning in Chapter 6 was as follows:

"As has been previously stated, the bank, as a financial undertaking trading securities, was not authorized under Act. no. 108/2007 to trade its own shares on a regulated market, like the stock exchange, unless certain exemptions applied, which is not the case here. The said trades were therefore unlawful"[42] *[…] "There is no doubt that the vast numbers of trades and the extensive trading that the accused had part in executing, gave or at least*

[40]Unofficial translation by the Authority of reasoning in Chapter IV.2 of the judgment: "*Í 4. gr. viðauka við reglugerð nr. 630/2005 um innherjaupplýsingar og markaðssvik er mælt svo fyrir að áður en viðskipti hefjast með eigin hluti í endurkaupaáætlun skuli birta almenningi ítarlega lýsingu á áætluninni. Með hliðstæðum hætti segir í 9. gr. viðaukans að birtar skuli opinberlega upplýsingar varðandi fyrirhugaða verðjöfnun fjármálagerninga […]*."

[41] Unofficial translation by the Authority of reasoning in Chapter IV.5 of the judgment: "*Þá verða ákvæði laga nr. 108/2007 skýrð með þeim hætti, svo sem áður hefur komið fram, að lagt sé bann við því að slíkt fyrirtæki stundi skipuleg viðskipti með eigin hluti í þeim tilgangi að greiða fyrir því að markaðsverð skapist á hlutunum nema í þeim tilvikum, sem vísað er til í 1. tölulið 3. mgr. 115. gr. laganna, og þá með því að tilkynna þær fyrirhuguðu ráðstafanir opinberlega. Ekkert er fram komið í málinu um að Landsbanki Íslands hf. hafi tilkynnt, hvort sem er með formlegum eða óformlegum hætti, að hann stundaði skipulega kaup á eigin hlutabréfum í fyrrgreindum tilgangi. Þvert á móti benda skjöl málsins og framburður ákærðu fyrir héraðsdómi til þess að leitast hafi verið við af hálfu bankans að halda hinum umfangsmiklu kaupum hans á eigin hlutum leyndum fyrir þeim sem komu að viðskiptum með hlutina á skipulegum verðbréfamarkaði*."

[42] Unofficial translation by the Authority. Original wording of the reasoning in Chapter IV.6: "*Eins og áður greinir var bankanum sem fjármálafyrirtæki, er hafði með höndum verðbréfaviðskipti, óheimilt samkvæmt lögum nr. 108/2007 að stunda viðskipti með eigin hluti á skipulegum verðbréfamarkaði eins og í kauphöllinni í þessum tilgangi nema í undantekningartilvikum sem ekki eiga við hér. Umrædd viðskipti voru því ólögmæt".*

were likely to give a false indication of demand for and of prices of securities. This conduct constitutes a violation of Article 117(1)(a) […], as the transactions cannot be considered to have been based on lawful reasons or in accordance with general market practice".[43]

Thus, the Supreme Court independently evaluated the conduct in question as trading in own shares, which did not fulfil the transparency requirements. In its assessment, the Supreme Court applied the definition of market abuse under Article 117 of the Securities Act, in addition to separately assessing, on the facts of the case, whether the conduct fell within the general exclusion from Article 117, or within the exemptions provided for in Articles 115(3) and Article 116 of the Act. It also compared the conduct against the transparency requirements of Regulation No. 630/2005, which further implements the Directive and Regulation No. 2273/2003 into national law.

4.3.2 The Kaupthing judgment

In its judgment in case no. 498/2015 (*Kaupthing*), the Icelandic Supreme Court specifically referred to the judgment in case no. 842/2014 (*Landsbankinn)* and that therein, the Court made a reference to the aims of the Securities Act. It stated next that the Court had referred to Articles 115, 116 and 117 of the said Act and the provisions of Regulation no. 630/2005. It referred to the implementation of Directive 2003/6 into national law, citing the definition of market abuse, its interpretation and the exemptions and exclusions set out therein. The Supreme Court stated that the interpretation of the Court in the previous *Landsbankinn* case would be applied to the case at hand.[44] A similar assessment as in the *Kaupthing* case was thus conducted.

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[43] Unofficial translation by the Authority. Original wording of reasoning: "*Ekki leikur neinn vafi á að sá mikli fjöldi tilboða, sem ákærðu Júlíus og Sindri gerðu, og þau umfangsmiklu viðskipti, sem þeir áttu þátt í að koma á, gáfu eða voru í það minnsta líkleg til að gefa eftirspurn og verð hlutabréfa í Landsbanka Íslands hf. ranglega eða misvísandi til kynna. Með þessari háttsemi brutu þeir því af ásettu ráði og á refsiverðan hátt gegn a. lið 1. töluliðar 1. mgr. 117. gr., sbr. 1. tölulið 146. gr. laga nr. 108/2007, enda verður slík háttsemi ekki skýrð með því að* ***lögmætar ástæður*** *hafi búið að baki henni* ***ellegar*** *hún verið* ***í samræmi við viðurkennda markaðsframkvæmd*** *á skipulegum verðbréfamarkaði*."

[44] Unofficial translation by the Authority. Original wording of reasoning: „*Í ákæru var háttsemi ákærðu samkvæmt I. kafla hennar talin varða við a. og b. liði 1. töluliðar 1. mgr. 117. gr., sbr. 1. tölulið 146. gr., laga nr. 108/2007. Eins og greinir í dómi Hæstaréttar í máli nr. 842/2014 er eitt af helstu markmiðum þeirra laga að stuðla að eðlilegri verðmyndun á markaðstorgi fjármálagerninga með skipulegum verðbréfamarkaði, þar á meðal í kauphöll, en reglur um þá markaði er einkum að finna í IV. og XII. kafla laganna. Samkvæmt því á lögmál um framboð og eftirspurn að ráða þar ríkjum, þannig að sé framboð á tilteknum hlutabréfum meira en eftirspurn lækki verð þeirra, en sé eftirspurnin meiri en framboðið hækki verðið. Í samræmi við þetta markmið beinast mörg af ákvæðum laganna, svo og ákvæði laga nr. 110/2007 um kauphallir, að því að koma í veg fyrir að fjárfestar og aðrir sem hagsmuna hafa að gæta láti freistast til að hafa áhrif á þessa verðmyndun með ótilhlýðilegum hætti. Geri þeir það eru lögð ströng viðurlög við þeim brotum. Í dómi Hæstaréttar í máli nr. 842/2014 er gerð grein fyrir ákvæðum […] 115., 116., 117. og 118. gr. laga nr. 108/2007 og ákvæðum 4. og 9. gr. viðauka við reglugerð nr. 630/2005. Þá er þess getið í dóminum að þegar eldri lög um verðbréfaviðskipti nr. 33/2003 tóku gildi, hafi í fyrsta skipti verið kveðið á um viðskiptavakt í lögum á sama hátt og gert er í 116. gr. gildandi laga. Þá eru raktar þær gagngeru breytingar sem gerðar voru á lögum nr. 33/2003 með lögum nr. 31/2005, þegar tilskipun Evrópusambandsins nr. 2003/6/EB um innherjaviðskipti og markaðsmisnotkun (markaðssvik) var innleidd hér á landi. Við það var skilgreiningunni á markaðsmisnotkun breytt í það horf sem nú er kveðið á um í 1. mgr. 117. gr. laga nr. 108/2007, auk þess sem tekið var fram, eins og nú er gert í 1. tölulið 3. mgr. 115. gr. laganna, að ákvæðin um markaðsmisnotkun ættu ekki við þegar um væri að ræða viðskipti með eigin hluti í endurkaupaáætlun eða við verðjöfnun fjármálagerninga. Í framhaldinu er sú ályktun dregin um lögskýringu í dóminum, að eftir „þessar breytingar á lögum um verðbréfaviðskipti verða ákvæði XII. kafla laga nr. 108/2007 um verðmyndun á skipulegum verðbréfamarkaði skýrð á þann hátt með gagnályktun frá 1. tölulið 3. mgr. 115. gr. og 116. gr. þeirra að fjármálafyrirtækjum, sem hafa heimild til verðbréfaviðskipta, sé óheimilt að stunda viðskipti með eigin hluti á slíkum markaði í því skyni að greiða fyrir að markaðsverð skapist á þeim, sbr. niðurlag 1. mgr. 116. gr., nema um sé að ræða viðskipti í endurkaupaáætlun eða við*

4.3.3 *Conclusion on the Landsbankinn and Kaupthing judgments and their application by the Supreme Court in case no. 3/2017*

In its *Landsbankinn* and *Kaupthing* judgments, the Icelandic Supreme Court therefore assessed the conduct under the definition of market abuse as per the Directive and national law.

Although the Court established in both cases that the activities did not benefit from the exclusions or exemptions, the wording of the judgments does not support the contention of the complainant that the Supreme Court "*automatically*" concluded that the trades were "*in themselves*" market abuse for the "*sole reason*" that they fell outside the scope of the safe harbour rules. In light of this, the decision of the Supreme Court in judgment no. 3/2017 to refuse a referral to the EFTA Court, *inter alia* by referring to the interpretation and application of the relevant market abuse provisions in the *Landsbankinn* and *Kaupthing* judgments, can neither be considered contrary to the provisions of Directive 2003/6 and Regulation no. 2273/2003 nor Articles 3 or 7 of the EEA Agreement.

Finally, in light of the thorough assessment in the aforementioned judgments of the Supreme Court, the Authority is not of the view that the Supreme Court of Iceland in judgment no. 3/2017 has manifestly erred in its application of EEA law.

By letter of 9 May 2018, the Internal Market Affairs Directorate informed the complainants of its intention to propose to the Authority that the case be closed.[45] The complainants were invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 9 June 2018.

The complainants did not reply to that letter. In the light of this and of the above, there are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Iceland to comply with Directive 2003/6 and Article 3 and 7 of the EEA Agreement is hereby closed.

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson Acting President College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

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verðjöfnun fjármálagerninga, sbr. 1. tölulið 3. mgr. 115. gr." Þá segir í dóminum að rétt sé að skýra 1. tölulið 1. mgr. 117. gr. laga nr. 108/2007 svo „að það að eiga viðskipti eða gera tilboð, sem gefa eða eru líkleg til að gefa framboð, eftirspurn eða verð fjármálagerninga ranglega eða misvísandi til kynna, teljist ekki markaðsmisnotkun ef sá, sem í hlut á, getur sýnt fram á að ástæður að baki viðskiptunum eða fyrirmælum um þau séu lögmætar og að viðskiptin eða fyrirmælin hafi verið í samræmi við viðurkennda markaðsframkvæmd á skipulegum verðbréfamarkaði." Þessi lögskýring verður lögð til grundvallar við úrlausn um sakargiftir á hendur ákærðu í þessu máli."

[45] Document No. 912799.

This document has been electronically authenticated by Hogni S. Kristjansson, Carsten Zatschler.