Linklaters

September 2011

Linklaters Stop Press

ECJ case on market manipulation

The Court of Justice of the European Union (the "**ECJ**") considered in this case[1] the interpretation of the market manipulation offence in Article 1(2)(a) of the Market Abuse Directive 2003/6/EC ("**MAD**"). In particular the ECJ looked at whether, in order for a price to be considered to have been fixed at an abnormal or artificial level, the price must be maintained at that level for more than a certain duration. Interestingly, the ECJ also looked at different language versions of the market manipulation offence in MAD in order to determine the directive's purpose, and subsequently overruled the Dutch law interpretation of the market manipulation offence in favour of an interpretation that had been more widely applied in other EEA states.

There are a couple of points to take away from this decision. The first is clarification that Article 1(2) (a) of MAD does not require that the price of a financial instrument be maintained at an artificial or abnormal level for a certain duration, (although this is not in fact an issue under English law, since the wording of the English law manipulation offence in s118(5) FSMA implementing the directive uses the less ambiguous word "secure"). The second point, which is indicative of the ECJ's approach to national law when interpreting a directive, is that the case is an example of the ECJ overriding a natural interpretation of national law by reference to the purpose of a directive. Whilst it is not surprising that the ECJ should take this approach, particularly in the context of a market abuse case and concerns of detriment to investor confidence, it is something to be borne in mind when interpreting English law implementing an EU directive, especially where the implementing authority has not used a straight "copy out" approach.

The facts

A case was brought in Holland under Dutch market abuse rules deriving from the MAD. The conduct in question involved the execution of orders which created a sudden fall in the share price, which then triggered a sell order and another fall in share price. Within a few minutes the share price had risen back to its previous level.

[1] IMC Securities BV v Stichting Autoriteit Financiële Markten (2011).

The Dutch authorities referred to the ECJ the question as to whether the reference in MAD to “secure” requires the price of financial instruments to stay at an abnormal or artificial level for a certain amount of time.

Article 1(2) of MAD provides that ”*Market manipulation” shall mean*:

> *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 decision

The objective of MAD to promote full and proper market transparency would be undermined if the conduct in question could fall outside the scope of the prohibition of market manipulation solely on the ground that it gave rise to a single transaction without the price of the financial instruments at issue maintaining an abnormal or artificial level for more than a certain duration.

Article 1(2)(a), second indent, of MAD must be interpreted as not requiring, in order for the price of one or more financial instruments to be considered to have been fixed at an abnormal or artificial level, that that price must maintain an abnormal or artificial level for more than a certain duration.

The ECJ noted that whilst the Dutch language version of Article 1(2)(a) used the verb “houden” (to maintain), it could not just examine the Dutch language version. European case law and the need for uniform application and interpretation of EU measures means that one version of the text cannot be reviewed in isolation, but must be interpreted “on the basis of both the real intention of its author and the aim which the latter seeks to achieve, in the light, in particular, of the versions in all languages”.

The ECJ found from examining Spanish, Danish, German, English, French, Italian, Portuguese, Finnish and Swedish versions that it is sufficient if the conduct in question has led to the setting of the price of one or more financial instruments at an abnormal or artificial level in order for it to amount to market manipulation.

Linklaters

Contacts

For further information please contact:

Michael Kent
Partner

(+44) 207 456 3772

michael.kent@linklaters.com

Peter Bevan
Partner

(+44) 207 456 3776

peter.bevan@linklaters.com

Nadia Swann
Partner

(+44) 207 456 5232

nadia.swann@linklaters.com

Carl Fernandes
Partner

(+44) 207 456 3002

carl.fernandes@linklaters.com

Sarah Parkhouse
Partner

(+44) 207 456 2674

sarah.parkhouse@linklaters.com

Author: Kirsty Gibson

One Silk Street

London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222

Linklaters.com

A13980566/0.1/07 Sep 2011