Case C-229/24 [*Bränelius*] [i]

Request for a preliminary ruling

Date lodged:

26 March 2024

Referring court:

Högsta domstolen (Sweden)

Date of the decision to refer:

21 March 2024

Appellants:

TK

OP

Other party to the proceedings:

Riksåklagaren

…

PARTIES

Appellants

1. TK

…

2. OP

…

Other party to the proceedings

Riksåklagaren (Prosecutor General, Sweden)

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

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SUBJECT MATTER

Insider trading

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REQUEST FOR A PRELIMINARY RULING

Background

1. In the spring of 2018, Umeå kommunföretag AB, a municipal company in which the Municipality of Umeå has a legally decisive influence, conducted a tendering procedure for electric buses and charging stations. Two companies submitted tenders. One of these was the listed company Hybricon Bus Systems AB. A further three companies had registered interest in the tendering procedure but were not eligible to submit tenders.

2. On 14 May 2018, the municipal company adopted a decision by which the contract was awarded not to Hybricon, but to the other tenderer. In an email sent at 2.34pm on the same date, the municipal company notified all five companies of the outcome of the tendering procedure.

3. At Hybricon the email was received by an operating officer who had main responsibility for contacts with the municipal company concerning the tendering procedure. Shortly thereafter, the operating officer sent a message to OP urging him to sell his shares in Hybricon. OP passed on the information to TK, who also owned shares in the company.

4. At 2.37pm TK placed an order to sell 73 000 shares in Hybricon. A few minutes later, at 2.40pm, OP sold 31 000 shares in the company.

5. A press release announcing that Hybricon had been unsuccessful in the tendering procedure was issued by the company at 3.22pm. Hybricon’s share price fell sharply thereafter. By disposing of shares in the company prior to that, OP and TK limited their losses.

The proceedings before the tingsrätten (District Court)

6. OP and TK, among others, were charged with the crime of insider trading in connection with the sale of shares at issue.

7. The tingsrätten (District Court) sentenced OP and TK each to a suspended sentence and community service for non-minor insider trading. Had imprisonment been the penalty chosen instead, a four-month prison sentence would have been handed down. As compensation for crime, SEK 51 508 of OP’s property and SEK 146 536 of TK’s property were confiscated.

8. According to the tingsrätten (District Court), the message that Hybricon had been unsuccessful in the tendering procedure constituted information of a precise nature relating directly to Hybricon which affected share prices. Furthermore, the information could not be considered to have been made public before the press release had been issued by Hybricon.

The proceedings before the hovrätten (Court of Appeal)

9. The hovrätten (Court of Appeal) altered the judgment of the tingsrätten (District Court) only such that OP and TK were each handed a suspended sentence in conjunction with 150 daily fines.

The proceedings before the Högsta domstolen (Supreme Court, Sweden)

10. OP and TK have claimed that the Högsta domstolen (Supreme Court) should exonerate them of responsibility for insider trading. They have asserted inter alia that the information ceased to be inside information once the award decision had been sent and thus became a public document that was not covered by confidentiality.

11. The Riksåklagaren has countered that the judgment of the hovrätten (Court of Appeal) should be altered. The Riksåklagaren has stated that the award decision became a public document the moment it was sent, but argues that the decision can still have been covered by confidentiality. According to the Riksåklagaren, the decision constituted inside information in any event until Hybricon issued its press release.

12. The Högsta domstolen (Supreme Court) granted leave to appeal on the basis of the findings of fact made by the hovrätten (Court of Appeal).

13. The main question in the case is when the information in the award decision concerning the tendering procedure should be considered to have been made public and thus no longer constitute inside information.

Legal provisions

Insider trading

14. Under the lagen (2016:1307) om straff för marknadsmissbruk på värdepappersmarknaden (Law on penalties for market abuse on the securities market), a person who has inside information and who, for him or herself or for another person, acquires or disposes of financial instruments to which the information relates through trading on the securities market is to be convicted of insider trading (see Chapter 2, Article 1, first paragraph, subparagraph 1). The penalty is imprisonment for a maximum of two years. If the crime is serious, the penalty for serious insider trading is imprisonment for a minimum of six months and a maximum of six years. If the deed is minor, no liability is imposed. Criminal liability requires that the act be committed intentionally.

15. The lagen om straff för marknadsmissbruk transposes Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) into Swedish law. Under Article 3(1) of that directive, Member States must take the necessary measures to ensure that insider dealing in certain specified situations constitutes a criminal offence at least in serious cases and when committed intentionally.

16. Under Chapter 1, Article 4 of the lagen om straff för marknadsmissbruk, inside information means information within the meaning of Article 7 of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation). The corresponding reference to the definition in the regulation can be found in Article 2(4) of the market abuse directive.

17. Under Article 7(1)(a) of the market abuse regulation, inside information is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

Disclosure of inside information

18. Under the market abuse regulation, an issuer must inform the public as soon as possible of inside information which directly concerns that issuer (Article 17). The issuer must ensure that the inside information is made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public and, where applicable, by a specifically prescribed method.

19. When an issuer has disclosed information in a manner which complies with the conditions under Article 17 of the market abuse regulation, the information is considered to have been made public within the meaning of Article 7 of the regulation.

Information on the outcome of a public tendering procedure

20. An authority which conducts a public tendering procedure must as soon as possible inform candidates and tenderers of decisions to award a contract or conclude a framework agreement (see Chapter 12, Article 12, first paragraph of lagen (2016:1145) om offentlig upphandling (Law on public procurement)). The authority must provide information on the results of the award procedure by means of a notice no later than 30 days after an agreement has been concluded (see Chapter 19, Article 7, first paragraph). There is no obligation to inform the public before then.

21. An award decision may, however, constitute a public document which must be disclosed upon request.

Disclosure of public documents

22. The fundamental provisions governing disclosure of documents are contained in Chapter 2 of the tryckfrihetsförordningen (Law on the freedom of the press). That chapter provides that everyone has the right of access to public documents, but that that right may be restricted by law under certain conditions. A document is public if it is deposited with an authority and is considered to have been received by or drawn up by an authority. The document is considered to have been drawn up by an authority, inter alia, when it has been sent (see Chapter 2, Articles 1, 2, 4 and 10).

23. A person who requests a public document must, immediately or as soon as possible, be granted access to the document on the spot. Upon request, an authority must also – where appropriate for a fee – provide a transcript or copy of the document. Such a request must be processed promptly by the authority (see Chapter 2, Articles 15 and 16).

24. Detailed provisions governing official procedures for disclosure of public documents and restrictions of the right of access to such documents are contained in the offentlighets- och sekretesslagen (2009:400) (Law on public access to information and confidentiality). Under Chapter 6, Article 4, an authority must, upon request by an individual, provide information from a public document deposited with the authority unless the information is confidential or this would impede the due process of the work.

25. The right of access to public documents applies also in respect inter alia of limited liability companies where municipalities exercise a legally decisive influence. For the purposes of the application of the offentlighets- och sekretesslagen, such companies are to be treated in the same manner as authorities (see Chapter 2, Article 3).

26. In the case of a tendering procedure, information concerning, inter alia, tenders may not under any circumstances be disclosed to anyone other than the tenderers until all tenders have been made public or the decision on the supplier and the tender has been made or the matter has previously been closed (see Chapter 19, Article 3, second paragraph of the offentlighets- och sekretesslagen). Even thereafter, information concerning the tender may be covered by confidentiality (c.f., inter alia, Chapter 31, Article 16).

27. In the light of the foregoing, an individual, as a starting point, has the right to have access to an award decision that has been taken and sent by an authority or by a municipal company that is to be treated as an authority. The period within which the individual may, in practice, be informed of the decision or of its content can vary depending on how the authority has organised its work and on other circumstances.

The need for a preliminary ruling

28. The tingsrätten (District Court) and the hovrätten (Court of Appeal) found that the information in the award decision which the municipal company sent to the companies concerned constituted inside information until the moment that Hybricon published the press release. Those courts therefore considered that the sending of the award decision by the municipal company did not mean that the information was made public in the manner required for it no longer to be considered inside information under the market abuse regulation.

29. The main question before the Högsta domstolen (Supreme Court) is when the information in the award decision concerning the tendering procedure should be considered to be made public and thus not constitute inside information. Accordingly, the case raises questions as to the interpretation of the expression 'has not been made public' in Article 7(1)(a) of the regulation.

30. It does not follow from Article 7(1)(a) of the regulation that all information which has not been disclosed publicly in the manner prescribed by Article 17 should be considered not to have been made public. According to statements made by the European Securities and Markets Authority (ESMA), inside information can be made public in a manner other than by public disclosure under Article 17, including actions taken by third parties (Questions and Answers on the Market Abuse Regulation, version 17, last updated on 25 November 2022, A5.10).

31. It does not, however, follow expressly from the regulation that information can be made public through such so-called actual public disclosure and, moreover, this has not been confirmed in any decision of the Court of Justice of the European Union. There is no further guidance on what requirements should apply in such cases in order for information no longer to be considered inside information.

32. It is thus not clear, or clarified, how the market abuse regulation must be interpreted in this respect. It is therefore necessary to request a preliminary ruling from the Court of Justice.

The request for a preliminary ruling

33. The Högsta domstolen (Supreme Court) requests that the Court of Justice of the European Union give a preliminary ruling with a view to answering the following questions:

1. Is it necessary for public disclosure to have taken place in the manner referred to in Article 17 of the market abuse regulation in order for information to be considered to have been made public in accordance with Article 7(1)(a) of the regulation?

2. If public disclosure can take place in another manner, what circumstances should be taken into account in determining whether information should be considered to have been made public within the meaning of Article 7(1)(a)?