Case C-363/24

Request for a preliminary ruling

Date lodged:

17 May 2024

Referring court:

Högsta domstolen (Sweden)

Date of the decision to refer:

8 May 2024

Applicant:

Finansinspektionen

Defendant:

Carnegie Investment Bank AB (publ)

[…]

PARTIES

Applicant

Finansinspektionen (Financial Supervisory Authority)

[…] Stockholm

[…]

Defendant

Carnegie Investment Bank AB (publ) […]

[…] Stockholm

[…]

SUBJECT MATTER

Imposition of a fine under Lagen (2016:1306) med kompletterande bestämmelser till EU:s marknadsmissbruksförordning (Law No 1306 of 2016 concerning provisions supplementing the EU Market Abuse Regulation)

[…]

The Högsta domstolen (Supreme Court, Sweden) […] makes the following

ORDER

The Supreme Court orders that a reference be made to the Court of Justice of the European Union for a preliminary ruling in accordance with Annex A to this record.

[…]

REQUEST FOR A PRELIMINARY RULING

Background

1 At the material time, the company Varvtre AB was owned by BAK, who was then also the chief executive officer and major shareholder of the listed game development company Starbreeze AB. Varvtre had a so-called ‘depository loan’ with Carnegie Investment Bank AB. A depository loan means that the customer obtains a credit from the bank in exchange for pledging shares in the bank’s depository as collateral.

2 Under the agreement for Varvtre’s depository loan, the company had a credit of 35 million kronor (SEK) in return for pledging shares in Starbreeze up to a certain value. The agreement stated that the shares in Starbreeze could only be used as collateral up to a certain level and that Carnegie had the right to terminate the credit for immediate payment if the collateral for the credit was no longer adequate. In such circumstances, Carnegie also had the right to use the pledge deposit as it saw fit.

3 On account of a fall in the price of Starbreeze’s shares, Varvtre’s credit with Carnegie became over-indebted. On 14 November 2018, the over-indebtedness amounted to approximately SEK 5 million. The following day, a sale of Starbreeze shares was initiated.

4 At 13.32 on 15 November, the head of communications at Starbreeze, who also assisted BAK and Varvtre in relation to Carnegie, sent an email to Carnegie stating that BAK had been logged on Starbreeze’s transparency register and could not sell as of 13.33. At 13.35 an insider list was opened at Starbreeze and at 13.37 BAK was registered in that list. Carnegie has argued that the information in the

message was not correct because he had not yet been included in the insider list when the email was sent.

5 According to the head of communications, the reason why BAK was included in the insider list was that he had been informed that Starbreeze's chief financial officer (CFO) had resigned. However, the email to Carnegie did not contain any information about the reason for BAK's inclusion in the insider list. Carnegie has asserted that the assessment that the resignation constituted inside information was not correct. According to Carnegie, there was no other information which related directly or indirectly to Starbreeze and which constituted inside information.

6 After Carnegie received the email on 15 November, the sale of Starbreeze shares that had been initiated that morning was suspended. The sale was then resumed in the afternoon by Carnegie. A total of just over SEK 16 million worth of shares was sold after receipt of the email and up to and including 19 November. For Varvtre, the disposal meant a loss limitation of approximately SEK 4.9 million.

7 On 23 November, Starbreeze issued a press release stating, inter alia, that the company's sales revenue was lower than expected and that the company's CFO no longer held that post.

Examinations by the Tingsrätten (District Court) and the Hovrätten (Court of Appeal)

8 The Finansinspektionen brought an action against Carnegie and claimed that the bank should be ordered to pay a fine of SEK 35 million for having infringed the prohibition against insider dealing laid down in Articles 8 and 14 of the Market Abuse Regulation. [1] As grounds for the claim, the Finansinspektionen argued that Carnegie, through the information in the email from the head of communications at Starbreeze, had had access to insider information when the sale of the Starbreeze shares was carried out.

9 The District Court ruled that the information in the email constituted inside information and upheld the action. In the view of the District Court, the information in the email could only be interpreted as meaning that there was financial information in respect of Starbreeze that was unfavourable to the company. The District Court further ruled that it was possible to draw conclusions from the information as to the potential effect on the price of Starbreeze shares, regardless of the exact information that had led to the insider list being drawn up.

10 The Court of Appeal has varied the judgment of the District Court and dismissed the action brought by the Finansinspektionen since the Court of Appeal did not consider that the information in the email constituted inside information. In the

[1] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

view of the Court of Appeal, the information in the email was not such as to enable the recipient to understand why BAK was considered as an insider and prevented from selling. Nor, therefore, should the recipient have comprehended that the information itself could have an effect on the development of the share price. Instead, the Court of Appeal considers that the content of the email can rather be categorised as vague or general and thus not of a specific nature.

Proceedings before the Supreme Court

11 The Supreme Court has granted leave to appeal on the issue of whether the information in the email constituted inside information. The main issue in the case is whether the information was specific enough to constitute inside information under Article 7(2) of the Market Abuse Regulation.

The legal framework

12 Article 14 of the Market Abuse Regulation prohibits insider dealing. Such dealing arises inter alia where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates (Article 8(1)).

13 Under Article 7(1)(a), inside information means 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. Under Article 7(2), information is to be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments.

14 The definition of inside information is relevant not only to the prohibition of insider dealing but also to the application of Article 17 on the public disclosure of inside information and Article 18 on the drawing up of insider lists. Under Article 17, an issuer is, as a starting point, to inform the public as soon as possible of inside information which directly concerns that issuer. Article 18 provides that the issuer is to draw up a list of all persons who have access to inside information and promptly update that list in certain events. The insider list is to state the reasons why a person has been included in the list. The list must be treated confidentially. [2]

[2] See Article 1(4) of Commission Implementing Regulation (EU) 2022/1210 of 13 July 2022 laying down implementing technical standards for the application of Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to the format of insider lists and their updates.

15 Under Paragraph 1 of Chapter 5 of Law No 1306 of 2016 concerning provisions supplementing the EU Market Abuse Regulation, the Finansinspektionen is required to take action against any person who has infringed the prohibition against insider dealing. Such action can be effected by imposing a fine. The law supplements the Market Abuse Regulation. The terms and expressions in the law have the same meaning as those in the regulation (see second subparagraph of Paragraph 1 of Chapter 1).

Case-law of the Court of Justice

16 The Court of Justice of the European Union has interpreted the meaning of the provisions on inside information in the Market Abuse Regulation and the corresponding earlier acts in several judgments.

17 According to the judgment of the Court of Justice of 11 March 2015, *Lafonta*, C-628/13, EU:C:2015:162, paragraph 31, the only information excluded from the concept of inside information is information that is vague or general, from which it is impossible to draw a conclusion as regards its possible effect on the prices of the financial instruments concerned.

18 The judgment of the Court of Justice of 15 March 2022, *Autorité des marchés financiers*, C-302/20, EU:C:2022:190, concerned information relating to the forthcoming publication of a press article. The judgment states that information relating to a market rumour may constitute specific information. At the same time, it notes that the precise nature of information relating to the forthcoming publication of a press article is closely linked to that of the information forming the subject matter of the article. In the view of the Court of Justice, were the information to be published not to have any degree of precision, knowledge of that publication would not enable any conclusions to be drawn as to the possible effect of that publication on prices. It cannot be ruled out on principle that information may be regarded as being of a precise nature merely because it falls within a particular category of information; a case-by-case examination is necessary.

The need for a preliminary ruling

19 Thus, for information to constitute inside information under the Market Abuse Regulation, it must have been of a specific nature. In the present case, the question arises as to whether it therefore follows that it is not sufficient that information is provided that shows that a person has been included on an insider list and has been deemed to be prevented from selling, but rather the recipient of the information must also have been able to comprehend the underlying circumstances which led to the person being included on the insider list.

20 If the provisions are to be construed as meaning that inside information in a situation such as the present consists primarily of the underlying circumstances, questions arise as to the level of detail and the degree of certainty with which the recipient of the information was able to draw conclusions about those circumstances (see relevant Swedish case NJA 2008, p. 292). Is it sufficient that it

is possible to understand that the circumstances are negative or positive for the company, or must the recipient have been able to draw conclusions about what the circumstances are more specifically? A related question is whether it is relevant in this context whether the issuer's assessment that the circumstances constituted inside information was correct (see paragraph 5).

21 A circumstance which distinguishes the current situation from the situations previously addressed by the Court of Justice is that the information to be assessed in this case relates to insider lists, which are governed specifically by EU law. [3] The function and special position of insider lists in the scheme concerned could justify treating information relating to such a list differently from other information. For that reason, inter alia, it is not self-evident that what has previously been stated by the Court of Justice in, for example, *Autorité des marchés financiers*, can readily be applied to the current situation involving information about the inclusion of a person on the insider list.

22 The link with the provisions on insider lists, as with the provisions on the public disclosure of inside information, also raises specific questions as to the consequences of considering – or not considering – information of the kind at issue in this case as inside information. The purposes of the prohibition of insider dealing may support a particular approach when it comes to what constitutes inside information, while the purposes of the provisions on the drawing up of insider lists and public disclosure, which are linked to the same definition, may point in a different direction. [4]

23 The case thus raises questions about the interpretation of the Market Abuse Regulation that are not clear or have not been clarified. There are therefore grounds for requesting a preliminary ruling from the Court of Justice.

Request for a preliminary ruling

24 The Supreme Court requests that the Court of Justice give a preliminary ruling on the following questions.

1. Can a communication that a particular person has been included in an insider list and is prevented from selling shares in an issuer be of a sufficiently specific nature to constitute inside information under

[3] See, in addition to Article 18 of the Market Abuse Regulation, also Commission Implementing Regulation (EU) 2016/347 of 10 March 2016 laying down implementing technical standards with regard to the precise format of insider lists and for updating insider lists in accordance with Regulation (EU) No 596/2014 of the European Parliament and of the Council. See, currently, Commission Implementing Regulation (EU) 2022/1210 of 13 July 2022 laying down implementing technical standards for the application of Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to the format of insider lists and their updates.

[4] See recital 14 of the Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651 final.

Article 7(2) of the Market Abuse Regulation, even if the reasons for the person's inclusion are not clear?

2. If that is the case, then under what conditions?

3. Is it relevant to the assessment of whether a communication of the kind referred to in Question 1 constitutes inside information, if the issuer's assessment that the circumstances which led to the person's inclusion in the insider list constituted inside information was correct?

4. Is it relevant to the assessment of whether a communication such as that referred to in Question 1 constitutes inside information, if the information contained in the communication was correct?