



## JUDGMENT OF THE COURT

9 August 2024\*

*(Directive (EU) 2016/943 – Rules on evidence and disclosure of confidential information – Confidentiality rings – Trade secrets – Private enforcement of competition law – Weighing-up of interests – Article 5 of Directive 2014/104/EU)*

In Case E-11/23,

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 Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), in the case between

**Låssenteret AS**

and

**Assa Abloy Opening Solutions Norway AS,**

concerning the interpretation of the Agreement on the European Economic Area, in particular Article 54 thereof, and Article 9 of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann (Judge-Rapporteur) and Michael Reiertsen, Judges,

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\* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Låssenteret AS (“Låssenteret”), represented by Peter Hallsteinsen and Henrik Nordling, advocates;
- Assa Abloy Opening Solutions Norway AS (“Assa Abloy”), represented by Beret Sundet and Simen Skjold Sjøgaard, advocates;
- the EFTA Surveillance Authority (“ESA”), represented by Claire Simpson, Erlend Møinichen Leonhardsen, and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Julie Samnadda, Paul-John Loewenthal, Sergio Baches Opi and Pedro Caro de Sousa, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of Låssenteret, represented by Henrik Nordling and Peter Hallsteinsen; Assa Abloy, represented by Beret Sundet and Simen Skjold Sjøgaard; ESA, represented by Claire Simpson and Erlend Møinichen Leonhardsen; and the Commission, represented by Julie Samnadda, at the hearing on 13 March 2024,

gives the following

## **JUDGMENT**

### **I LEGAL BACKGROUND**

#### **EEA law**

- 1 Article 6 of the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) reads:

*Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.*

- 2 Article 54 EEA reads:

*Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.*

*Such abuse may, in particular, consist in:*

*(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

*(b) limiting production, markets or technical development to the prejudice of consumers;*

*(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

*(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

- 3 Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”) reads:

*In the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement.*

- 4 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1; and Norwegian EEA Supplement 2020 No 33, p. 480) (“Directive 2016/943”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 91/2019 of 29 March 2019 (OJ 2020 L 210, p. 76; and Norwegian EEA Supplement 2020 No 44, p. 92) (“JCD No 91/2019”). Directive 2016/943 is referred to at point 13 of Annex XVII (Intellectual Property) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein, and Norway. The requirements were fulfilled by 6 November 2020, and the decision entered into force on 1 January 2021.

- 5 Recitals 4, 7, 10, 15, 24, 25, and 38 of Directive 2016/943 read as follows:

*(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related cross-border activity within the internal market are undermined, and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.*

*(7) National rules also differ as to whether legitimate trade secret holders are allowed to seek the destruction of goods produced by third parties who use trade secrets unlawfully, or the return or destruction of any documents, files or materials containing or embodying the unlawfully acquired or used trade secret. Furthermore, applicable national rules on the calculation of damages do not always take account of the intangible nature of trade secrets, which makes it difficult to demonstrate the actual profits lost or the unjust enrichment of the infringer where no market value can be established for the information in question. Only a few Member States allow for the application of abstract rules on the calculation of damages based on the reasonable royalty or fee which could have been due had a licence for the use of the trade secret existed. Additionally, many national rules do not provide for appropriate protection of the confidentiality of a trade secret where the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret by a third party, thereby reducing the attractiveness of the existing measures and remedies and weakening the protection offered.*

*(10) It is appropriate to provide for rules at Union level to approximate the laws of the Member States so as to ensure that there is a sufficient and consistent level of civil redress in the internal market in the event of unlawful acquisition, use or disclosure of a trade secret. Those rules should be without prejudice to the possibility for Member States of providing for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets, as long as the safeguards explicitly provided for in this Directive for protecting the interests of other parties are respected.*

*(15) It is also important to identify the circumstances in which legal protection of trade secrets is justified. For this reason, it is necessary to establish the conduct and practices which are to be regarded as unlawful acquisition, use or disclosure of a trade secret.*

*(24) The prospect of losing the confidentiality of a trade secret in the course of legal proceedings often deters legitimate trade secret holders from instituting legal proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures, procedures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to an effective remedy and to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. Such protection should remain in force after the legal proceedings have ended and for as long as the information constituting the trade secret is not in the public domain.*

*(25) Such requirements should include, as a minimum, the possibility of restricting the circle of persons entitled to have access to evidence or hearings, bearing in mind that all such persons should be subject to the confidentiality requirements set out in this Directive, and of publishing only the non-confidential elements of judicial decisions. In this context, considering that assessing the nature of the information which is the subject of a dispute is one of the main purposes of legal proceedings, it is particularly important to ensure both the effective protection of the confidentiality of trade secrets and respect for the right of the parties to those proceedings to an effective remedy and to a fair trial. The restricted circle of persons should therefore consist of at least one natural person from each of the parties as well as the respective lawyers of the parties and, where applicable, other representatives appropriately qualified in accordance with national law in order to defend, represent or serve the interests of a party in legal proceedings covered by this Directive, who should all have full access to such evidence or hearings. In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined. Such safeguards should not be understood as requiring the parties to be represented by a lawyer or another representative in the course of legal proceedings where such representation is not required by national law. Nor should they be understood as restricting the competence of the courts to decide, in conformity with the applicable rules and practices of the Member State concerned, whether and to what extent relevant court officials should also have full access to evidence and hearings for the exercise of their duties.*

*(38) This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). The measures, procedures and remedies provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the TFEU.*

*1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.*

*Member States may, in compliance with the provisions of the TFEU, provide for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required by this Directive, provided that compliance with Articles 3, 5, 6, Article 7(1), Article 8, the second subparagraph of Article 9(1), Article 9(3) and (4), Article 10(2), Articles 11, 13 and Article 15(3) is ensured.*

*2. This Directive shall not affect:*

*(a) the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;*

*(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;*

*(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;*

*(d) the autonomy of social partners and their right to enter into collective agreements, in accordance with Union law and national laws and practices.*

7 Article 2 of Directive 2016/943, entitled “Definitions”, reads:

*For the purposes of this Directive, the following definitions apply:*

*(1) ‘trade secret’ means information which meets all of the following requirements:*

*(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*

*(b) it has commercial value because it is secret;*

*(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;*

(2) ‘trade secret holder’ means any natural or legal person lawfully controlling a trade secret;

(3) ‘infringer’ means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret;

(4) ‘infringing goods’ means goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.

8 Article 3 of Directive 2016/943, entitled “Lawful acquisition, use and disclosure of trade secrets”, reads:

*1. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:*

*(a) independent discovery or creation;*

*(b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;*

*(c) exercise of the right of workers or workers’ representatives to information and consultation in accordance with Union law and national laws and practices;*

*(d) any other practice which, under the circumstances, is in conformity with honest commercial practices.*

*2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.*

9 Article 4 of Directive 2016/943, entitled “Unlawful acquisition, use and disclosure of trade secrets”, reads:

*1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.*

*2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:*

*(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of*

*the trade secret holder, containing the trade secret or from which the trade secret can be deduced;*

*(b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.*

*3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:*

*(a) having acquired the trade secret unlawfully;*

*(b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;*

*(c) being in breach of a contractual or any other duty to limit the use of the trade secret.*

*4. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.*

*5. The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of paragraph 3.*

10 Article 9 of Directive 2016/943, entitled “Preservation of confidentiality of trade secrets in the course of legal proceedings”, reads:

*1. Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.*

*The obligation referred to in the first subparagraph shall remain in force after the legal proceedings have ended. However, such obligation shall cease to exist in any of the following circumstances:*

*(a) where the alleged trade secret is found, by a final decision, not to meet the requirements set out in point (1) of Article 2; or*

*(b) where over time, the information in question becomes generally known among or readily accessible to persons within the circles that normally deal with that kind of information.*

*2. Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.*

*The measures referred to in the first subparagraph shall at least include the possibility:*

*(a) of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;*

*(b) of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;*

*(c) of making available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.*

*The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.*

*3. When deciding on the measures referred to in paragraph 2 and assessing their proportionality, the competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures.*

*4. Any processing of personal data pursuant to paragraphs 1, 2 or 3 shall be carried out in accordance with Directive 95/46/EC.*

11 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) (“Directive 2014/104”) has not been incorporated into the EEA Agreement.

12 Article 1 of Directive 2014/104, entitled “Subject matter and scope”, reads:

*1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.*

*2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.*

13 Article 5 of Directive 2014/104, entitled “Disclosure of evidence”, reads:

*1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.*

*This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.*

*2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.*

*3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:*

*(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;*

*(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;*

*(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.*

*4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.*

*5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.*

*6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.*

*7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.*

*8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.*

## **National law**

14 Act No 90 of 17 June 2005 on mediation and procedure in civil disputes (*lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven)*) (“the Dispute Act”) contains rules on evidence.

15 The first paragraph of Section 21-3 of the Dispute Act reads:

*(1) The parties are entitled to present such evidence as they wish. Limitations on the right to present evidence are set out in Sections 21-7 and 21-8, Chapter 22 and the other evidence provisions in this Act.*

16 Section 22-10 of the Dispute Act, entitled “Exemption for evidence of trade or business secrets”, reads:

*A party or witness may refuse to provide access to evidence that cannot be made available without revealing trade or business secrets. The court may*

*nevertheless order such evidence to be made available if, after balancing the relevant interests, the court finds this to be necessary.*

17 The second to fourth paragraphs of Section 22-12 of the Dispute Act read:

*(2) If evidence is presented pursuant to an order of the court, the court may impose a duty of confidentiality and decide that oral hearing of the evidence shall be held in camera. The same applies if the court has not granted an exemption from the duty to provide evidence pursuant to Sections 22-5 (2), 22-8 (2) or 22-9 (3) and (4).*

*(3) When the evidence referred to in Section 22-10 is taken following an order from the court, the court shall impose a duty of confidentiality on those present and a ban on the use of the trade or business secret that can be derived from the evidence. The court may decide that oral hearings on the evidence shall take place in camera. In special cases, the court may limit the parties' access to co-counsel pursuant to Section 3-7 to such extent as is deemed necessary by the court.*

*(4) Prohibitions and injunctions pursuant to subsection three, first sentence, shall apply until it is established in a final judgment or order that the information does not constitute trade or business secrets, or the protection ceases as a result of the information becoming generally known or easily accessible.*

18 Section 26-7 of the Dispute Act, entitled “Disputes concerning access to evidence”, reads:

*(1) In disputes concerning access to items of evidence, the court may demand that the item be presented in order to determine whether it constitutes evidence.*

*(2) If the application for access to evidence is disputed on the grounds that the evidence is prohibited or exempted, the item of evidence cannot be presented unless the court is empowered, pursuant to a special statutory provision, to decide that the evidence nonetheless shall be presented. If only part of the item of evidence is prohibited or exempted, the remainder shall be presented if possible. Section 24-8 (3) second and third sentence applies correspondingly.*

*(3) The court shall determine in more detail and to the extent necessary how the evidence shall be made available, how it shall be stored and other issues of relevance to the presentation of such evidence. The evidence shall not be made known until the dispute regarding access has been resolved in a binding manner.*

## **II FACTS AND PROCEDURE**

19 Låssenteret sells, installs and maintains locks and security systems. Assa Abloy is part of the Assa Abloy Group, and produces and sells locks, keys, door handles and door

closers and services in the access control field for individuals and professional operators, such as locksmiths and building materials suppliers, and in the industrial and electrical markets. The product and service range includes mechanical lock systems and electronic access control.

- 20 Assa Abloy operates a dealer concept for mechanical lock systems, TrioVing Sikkerhetscenter (“TVSS”), in which a dealer can attain the status of partner. A TVSS partner has the right to use the trademark “TrioVing Sikkerhetscenter” as a quality designation on its retail shop and sales outlet. The partner then enters into a cooperation arrangement for marketing, trial and testing of new products. Assa Abloy also offers a licensed locksmith agreement (“LLS”) under which the dealer may design and produce lock systems based on system codes from Assa Abloy. The LLS agreement includes, inter alia, the right to produce keys and lock cylinders for doors.
- 21 A TVSS partner must have an LLS agreement in addition to a TVSS agreement, but a dealer may have an LLS agreement without being a TVSS partner. A dealer may also purchase lock systems that are designed and produced by Assa Abloy without an LLS agreement, and for service/after-sales service, a locksmith may purchase necessary services and components from Assa Abloy without a specific service agreement.
- 22 From 2017 to 2019, Låssenteret had TVSS and LLS agreements with Assa Abloy. On 2 December 2019, Assa Abloy terminated the TVSS cooperation with Låssenteret. The termination notice period for the TVSS agreement was six months. On 25 September 2020, Assa Abloy terminated the LLS agreements with Låssenteret. Låssenteret disputes the lawfulness of those terminations.
- 23 Assa Abloy has offered Låssenteret a licence for after-sales service for the lock systems in the dealer’s lock system archive. On the basis of such an agreement, Låssenteret has been able to perform maintenance by replacing various components, but it has had to purchase finished products when installing new lock systems or extending existing systems. Låssenteret claims that it does not receive the same discounts as TVSS dealers. In 2021, Assa Abloy presented an agreement proposal for after-sales service to the individual licence holders before the expiry of their LLS agreements. There were discussions about the agreement proposal. Låssenteret signed the agreement. Låssenteret claims that the agreement was signed despite disagreements about the draft, since not having such an agreement would have had immediate, drastic consequences for it.
- 24 In the main proceedings, Låssenteret claims that Assa Abloy has a dominant position in the market for mechanical and electromechanical locks/lock systems and in the after-sales service markets for the sale of spare parts for such systems, including maintenance, extensions, etc., and that the abuse may affect the installation market. According to the request, the dispute is cross-border in the sense that both Assa Abloy and Låssenteret operate in the EEA. The parties disagree as to how the market is to be defined, both with regard to the product market and the geographic market.

- 25 Låssenteret claims that Assa Abloy has abused its dominant position by terminating Låssenteret's TVSS and LLS agreements on insufficient grounds. Låssenteret also claims that there is abuse as Assa Abloy has subsequently actively assisted in attempting to force Låssenteret out of the market, which has taken the form, inter alia, of Låssenteret not receiving the same discounts as before and not being allowed to make components but instead having to order them from Assa Abloy. Låssenteret submits that this leads to considerable delays compared to its competitors. Låssenteret further submits that Assa Abloy has shared market-sensitive and confidential information with Låssenteret's competitors, disfavoured Låssenteret in terms of production capacity and logistical matters and spoken negatively about Låssenteret to potential customers. Låssenteret claims that it has thereby been prevented from being able to submit competitive offers for extensions and/or maintenance of Assa Abloy systems already installed at their own customers' and others' premises. Låssenteret contends that the abuse is liable to restrict competition.
- 26 Assa Abloy contends that it does not have a dominant position in any market and no evidence has been presented to the contrary. In the alternative, Assa Abloy disputes that there has been abuse of a dominant position. It has not applied dissimilar conditions to equivalent transactions and has therefore not placed Låssenteret at a competitive disadvantage. It submits that the terminations were objective and fair (*saklig*) and lawful. Changes to the discount scheme must be viewed in context with the termination of the LLS agreement. Assa Abloy contends that there is nothing to substantiate the claim that Låssenteret is being foreclosed from the market.
- 27 The evidentiary requests at issue in the main proceedings, and which the request to the Court concerns, were grouped and described by Nordre Østfold District Court in the following way:

*Requests in evidence numbers 5 to 8, which were subsequently formulated as a single request in evidence, concern internal documents and correspondence about Assa Abloy's market position in Norway and Europe in markets that indirectly or directly relate to one or more categories of locks, lock systems, components, irrespective of whether they are mechanical, electromechanical or electrical, from 1 December 2019 to 31 December 2022. Request in evidence number 14 seeks all market analyses, strategy documents or other internal documents that describe Assa Abloy's position in Norway in the market for electromechanical lock systems, mechanical lock systems or wholesale sales of spare parts. Request in evidence number 13 concerns market analyses, strategy documents or other internal documents that describe Assa Abloy's position in the Norwegian market from 2019 to 22 December 2022.*

*Requests in evidence number 9 and 10 concern agreements between Assa Abloy and Certego AS relating to mechanical and electromechanical lock systems in Norway from 2019 to 2022, including TVSS and licensing agreements with prices and detailed lists of prices obtained for sales of electromechanical and mechanical lock systems to Certego AS from 2019 to*

2022. Requests in evidence number 11 and 12 seeks the names of Assa Abloy's 10 largest customers, measured in value for each year between 2019 and 2022, and all discount matrixes used in relation to those 10 largest customers. Request in evidence number 15 asks for all written internal correspondence pertaining to volume discounts or other price reductions relating to volume/quantity of goods purchased between 2019 and 2022 to or from specified persons in Assa Abloy. Request in evidence number 16 concerns a list of Assa Abloy's 50 largest customers in Norway based on turnover, giving name and turnover and, where applicable at group level, for the years 2020, 2021 and 2022.

Låssenteret's request in evidence number 17 concerns information about market partitioning which Assa Abloy or companies in the same group have alleged in other cases before the courts and the competition authorities in cases in which it was relevant between 2017 and 2022.

- 28 According to the request, the parties agree, and there appears to be no doubt, that the evidence sought contains confidential information, but the parties disagree as to whether that information contains trade secrets within the meaning of Directive 2016/943. Låssenteret has submitted that it is possible to establish a confidentiality ring within the scope of the Dispute Act so that evidence containing trade secrets may nevertheless be disclosed. Three alternative approaches have been proposed: (1) a confidentiality ring under which Assa Abloy, the court, counsel and the experts have access to documents deemed to be Assa Abloy's trade secrets, but not Låssenteret as a party; (2) a confidentiality ring under which Assa Abloy, the court, counsel and the experts have access to documents deemed to be Assa Abloy's trade secrets, with Låssenteret's rights in that connection ensured by a person not having commercial functions (Låssenteret has proposed the company's IT director) and who is ordered to be subject to a duty of confidentiality; (3) disclosure *in camera* with a duty of confidentiality for those present, both with and without the party's representative (*partsrepresentant*) (if the parties are granted access, it will be with the same order on duty of confidentiality, breach of which will incur penalty).
- 29 According to the request, the EEA law-related doubts about interpretation in the present case concerning access to evidence relate, firstly, to the material scope (*ratione materiae*) of the Norwegian Act on the protection of trade secrets (*lov om vern av forretningshemmeligheter (forretningshemmelighetsloven)*) ("the Trade Secrets Act"), which implements Directive 2016/943. Paragraphs 3 and 4 of Section 22-12 of the Dispute Act implements Article 9 of Directive 2016/943. Låssenteret submits that the Trade Secrets Act does not apply because Directive 2016/943 covers only legal disputes in which the subject matter of the dispute is the acquisition or use of acquired trade secrets. Were it to be given a broader scope under Norwegian law, that cannot lead to a limitation on access to evidence, to the detriment of private enforcement of the competition rules. Assa Abloy submits that the scope of Directive 2016/943 is not in dispute, but that the directive is given a broader scope under Norwegian law than what is required. The question accordingly does not give rise to any EEA law-related doubts about interpretation. Further, there is disagreement as to whether Article 9 of Directive

2016/943 entails that the representative of the party must be part of the circle of persons to whom access to court hearings and evidentiary material is granted in a confidentiality ring.

- 30 According to the request, the parties also disagree on the significance EEA law principles generally have for access to evidence in cases involving private enforcement of the competition rules under EEA law. EU law provisions which are not part of the EEA Agreement do not, as a main rule, have any implications for Norwegian procedural law, apart from the indirect implications they may have through more general principles such as the duty of loyalty and the general rule that EU and EEA law provisions are to be interpreted in a uniform manner. The parties disagree as to whether the principle of effectiveness and/or the principle of homogeneity mean(s) that national procedural law must be interpreted in accordance with Article 5 of Directive 2014/104, even though it is not part of the EEA Agreement. There is also disagreement as to whether the principle of effectiveness entails that it must be possible to grant access to trade secrets as evidence through disclosure within the framework of a confidentiality ring.
- 31 Against this background, on 6 July 2023, Eidsivating Court of Appeal decided to stay proceedings and, by letter of 28 August 2023, registered at the Court on 31 August 2023, referred the following questions to the Court:
1. *Is the material scope (ratione materiae) of Directive 2016/943 limited to cases in which the subject matter of the dispute is the use of acquired trade secrets?*
  2. *The last sentence of Article 9(2) of the Directive on the protection of trade secrets requires that “[t]he number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings”. Despite that wording, does the Directive [on the protection of trade secrets] allow for a national court to establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case?*
  3. *Does the last sentence of Article 9(2) of the Directive on the protection of trade secrets express a general EEA law principle to the effect that a national court may not establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case?*
  4. *Is it of significance to the answer to one or more of questions 1 to 3 above that the trade secrets that are requested disclosed as evidence are*

*competitively sensitive in relation to the party requesting access to the information?*

5. *In a case involving abuse of a dominant position under Article 54 of the EEA Agreement, does EEA law, including the principle of effectiveness or the principle of homogeneity, require a national court to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests?*
6. *Do EEA law principles, including the principle of effectiveness or the principle of homogeneity, mean that national procedural law must be interpreted in accordance with Article 5 of the Damages Directive (Directive 2014/104/EU), even though it is not incorporated into the EEA Agreement?*

- 32 By a letter of 3 October 2023, Låssenteret petitioned the Court to revise the English translation of the request as regards the correct translation of the Norwegian term “*forretningshemmelighet*”. On 6 October 2023, the Registrar provided Assa Abloy with the opportunity to submit observations. Assa Abloy gave comments by letter of 10 October 2023. The Registrar wrote to the parties on 12 October 2023 stating that after careful consideration of the submission of both parties, the President had decided not to alter the translation. These submissions have been made part of the case file.
- 33 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

### **III ANSWER OF THE COURT**

#### **Question 1**

- 34 By its first question, the referring court asks, in essence, whether the material scope of Directive 2016/943 is limited to cases in which the subject matter of the dispute is the use of acquired trade secrets. It is apparent from the request that the main proceedings concern the interpretation of national rules on requests for access to evidence in a case concerning the private enforcement of EEA competition law.
- 35 Pursuant to recital 24 of Directive 2016/943, that directive seeks, inter alia, to protect the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. Furthermore, recital 38 of that directive states that Directive 2016/943 should not affect the application of competition law rules and that the measures, procedures and remedies provided for should not be used to unduly restrict competition. Therefore, Directive 2016/943 should not be applied or interpreted in such a way as to render ineffective the rights and obligations flowing from Articles 53 and 54 EEA.

- 36 It follows from its purpose, as set out in Article 1(1) of Directive 2016/943, read in conjunction with recital 4, that the scope of Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings (compare the judgment of 7 September 2021 in *Klaipėdos regiono*, C-927/19, EU:C:2021:700, paragraph 97).
- 37 Moreover, the Court recalls that Article 3(2) of Directive 2016/943 provides that the acquisition, use or disclosure of a trade secret is to be considered lawful to the extent that it is required or allowed by EEA or national law (compare the judgment in *Klaipėdos regiono*, C-927/19, cited above, paragraph 100).
- 38 Therefore, the answer to the first question must be that the scope of Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings.

### **Questions 2, 3, 4 and 5**

- 39 By its second question, the referring court seeks guidance as to whether Directive 2016/943 allows a national court to establish a confidentiality ring, which does not include at least one natural person from each of the parties to the case, to be granted access to evidence constituting trade secrets which is submitted as evidence in the case. By its third question, the referring court asks, in essence, whether the last sentence of Article 9(2) of Directive 2016/943 expresses a general EEA law principle to the effect that a national court may not establish a confidentiality ring as described in the second question. By its fourth question, the referring court enquires whether it is of significance to the answer to one or more of Questions 1 to 3 that the trade secrets that are requested to be disclosed as evidence are competitively sensitive in relation to the party requesting access to the information. By its fifth question, the referring court asks, in essence, whether in a case involving abuse of a dominant position under Article 54 EEA, EEA law requires a national court to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests. The Court considers it appropriate to answer these questions together.
- 40 It follows from the answer to the first question that the requirement expressed in the last sentence of Article 9(2) of Directive 2016/943 does not apply to cases such as those in the main proceedings. Hence, Directive 2016/943 does not prevent a national court in a case, such as that in the main proceedings, from establishing a confidentiality ring which does not include at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which are submitted as evidence in the case.
- 41 However, according to the request, the third and fourth paragraphs of Section 22-12 of the Dispute Act implement Article 9 of Directive 2016/943. Thus, in adopting the provisions of national law at issue, the Norwegian legislature may have intended for

Article 9(2) of Directive 2016/943 to have a broader scope than that envisaged by that directive. Insofar as the third and fourth paragraphs of Section 22-12 of the Dispute Act also apply to cases that are outside of the scope of Directive 2016/943, the Court observes that it is settled case law that where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see the judgment of 19 April 2023 in *Verkfræðingafélag Íslands*, E-9/22, paragraph 25 and case law cited).

- 42 It is for the referring court to determine whether the third and fourth paragraphs of Section 22-12 of the Dispute Act adopt the requirement expressed in the last sentence of Article 9(2) of Directive 2016/943, and whether the prerequisite that provisions or concepts are taken from EEA law that necessitate uniform interpretation is fulfilled.
- 43 In that respect, the Court observes that the application of Article 9(2) of Directive 2016/943 outside of its intended scope must be reconciled with other rules of EEA law. It follows from recital 25 that the rationale behind the confidentiality regime outlined in Article 9(2) of Directive 2016/943 is firmly grounded in the specific nature of proceedings governed by that directive. The objectives underpinning that directive may be less relevant for proceedings beyond its intended scope.
- 44 In the absence of EEA rules governing the matter, in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. Such rules must respect the principles of equivalence and effectiveness. This entails that the procedural rules governing actions for damages arising from infringement of the competition rules of the EEA Agreement must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness). It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness (see the judgment of 4 July 2023, *RS*, E-11/22, paragraph 55 and case law cited, and compare the judgment of 6 June 2013 in *Donau Chemie*, C-536/11, EU:C:2013:366, paragraphs 25 to 27 and case law cited). EEA law requires, in addition to observance of the principles of equivalence and effectiveness, that national legislation does not undermine the right to effective judicial protection (compare the judgment of 16 July 2009 in *Mono Car Styling*, C-12/08, EU:C:2009:466, paragraph 49 and case law cited).
- 45 Specifically in the area of competition law, those national rules on the right of access, by persons believing themselves to be adversely affected by such an alleged infringement, to documents and other evidence relating to that alleged infringement must not jeopardise the effective application of Articles 53 and 54 EEA. In that regard,

the Court observes that a rigid interpretation of national procedural rules might jeopardise the effectiveness of Articles 53 and 54 EEA (see the judgment of 17 September 2018 in *Nye Kystlink*, E-10/17, paragraph 73 and case law cited, and compare the judgment in *Donau Chemie*, C-536/11, cited above, paragraphs 26 and 27).

- 46 Furthermore, the Court recalls that all EEA law must be interpreted in the light of general principles of EEA law, including fundamental rights which form part of these principles. The European Convention on Human Rights (“ECHR”) and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights (see the judgment of 9 February 2021 in *Kerim v The Norwegian Government*, E-1/20, paragraphs 42 and 43 and case law cited). The fundamental right to respect for private life and one’s correspondence, as also reflected in Article 8 ECHR, as well as a right to the protection of trade secrets, which the European Court of Justice has acknowledged as a general principle of EU law, are general principles of EEA law that may require the protection of genuinely confidential information, including trade secrets (compare the judgment in *Klaipėdos regiono*, C-927/19, cited above, paragraph 132 and case law cited).
- 47 However, even though the last sentence of Article 9(2) of Directive 2016/943 seeks to protect trade secrets, it does not give expression to a general EEA law principle to the effect that a national court may not establish a confidentiality ring in the form described in the request. It follows from recital 7 of Directive 2016/943 that many national rules do not provide for appropriate protection of the confidentiality of a trade secret where the trade secret holder introduces a claim for alleged unlawful acquisition, use or disclosure of the trade secret, and that there is no common legal tradition as to how to protect the confidentiality of a trade secret in such circumstances.
- 48 In its written observations and at the hearing, Assa Abloy has raised concerns that the possibility to seek disclosure of evidence based on an unsubstantiated claim of infringement of EEA competition rules carries an inherent risk of abuse, where it may be utilised for non-specific or overly broad requests (a “fishing expedition”) or allowing rules concerning disclosure or discovery to be used to pressure defendants into settlements even though a claim may be weak or unfounded.
- 49 The Court recalls that the protection of confidential information, including trade secrets, is neither absolute nor does it require that the preservation of its confidentiality in the course of legal proceedings is confined to the methods employed in Article 9(2) of Directive 2016/943. Further, for the sake of clarity, the Court observes that there is no single definition of “trade secret” in EEA law and that the concept of trade secret used in the context of Directive 2016/943 does not necessarily coincide with how it is applied in relation to Articles 53 and 54 EEA.
- 50 The principle of the protection of confidential information and of trade secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial (compare the

judgment of 14 February 2008 in *Varec SA*, C-450/06, EU:C:2008:91, paragraph 52 and case law cited).

- 51 Legitimate interests, which could justify the disclosure of confidential information, including trade secrets, are, inter alia, the principle of effective judicial protection, including the right to a fair trial, which comprises, in particular, the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal and the right to be advised, defended and represented, as well as the fundamental right to an effective remedy, which are general principles of EEA law (see the judgment of 9 August 2024 in *X v FMA*, E-10/23, paragraph 70 and case law cited; the judgment of 10 December 2020 in *Adpublisher AG v J & K*, Joined Cases E-11/19 and E-12/19, paragraphs 50 and 55; the judgment of 5 May 2022 in *Telenor ASA and Telenor Norge AS v EFTA Surveillance Authority*, E-12/20, paragraph 75 and case law cited; and compare the judgment of 18 October 2018 in *E.G.*, C-662/17, EU:C:2018:847, paragraph 48). The essence of the right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed by EEA law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it (compare the judgment of 17 November 2022 in *Harman International Industries*, C-175/21, EU:C:2022:895, paragraphs 60 and 61 and case law cited).
- 52 Furthermore, given the circumstances of the main proceedings, the effective private enforcement of the EEA competition rules under Articles 53 and 54 EEA is another legitimate interest that could justify the disclosure of confidential information, including trade secrets. Articles 53 and 54 EEA encompass a right for an individual to claim damages for loss caused by conduct liable to restrict or distort competition. The Court recalls that private enforcement of Articles 53 and 54 EEA ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA. While pursuing his or her private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest. This thereby also benefits consumers (see the judgment in *Nye Kystlink*, E-10/17, cited above, paragraphs 71 and 72 and case law cited).
- 53 The Court further recalls that the special characteristics of competition cases, in particular large and complex cases, and the aim of effective enforcement are relevant factors under the principle of effectiveness and therefore in the referring court's assessment when ruling on access to information and evidence. Another relevant factor is the degree of information and evidence available to an injured party from potential perpetrators, competition authorities or third parties. The potential for information asymmetry, in terms of both information and evidence, may make it difficult even for those injured parties who have proven to have suffered harm to quantify the extent of the harm suffered in order to obtain damages. Other considerations include the potential for a claimant to conduct economic analysis to the extent necessary and sufficient to bring an action with the prospect of a positive outcome (see the judgment in *Nye Kystlink*, E-10/17, cited above, paragraphs 117 and 118).

- 54 It is settled case law that the question of whether a national procedural provision makes the application of EEA law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure (see the judgment in *Nye Kystlink*, E-10/17, cited above, paragraph 111 and case law cited).
- 55 It is for the national legal system to provide methods and limitations for the disclosure of information and evidence necessary to pursue the private enforcement of the EEA competition rules. The method and the extent of disclosure depends on a weighing-up of the protected interests on a case-by-case basis by the national courts and tribunals. They must, first, appraise the interest of the requesting party in obtaining access to the documents in question in order to prepare its action, in particular in the light of other possibilities it may have, and, second, take into consideration the actual harmful consequences which may result from such access having regard to public interests or the legitimate interests of other parties (compare the judgment in *Donau Chemie*, C-536/11, cited above, paragraphs 34, 44 and 45 and case law cited). In connection with that assessment, in order to counter potential “fishing expeditions”, national courts must determine if the requested evidence is relevant for the claim, and separately whether measures are necessary to safeguard the confidentiality of the said evidence. In this context, it should be emphasised that the interest of undertakings to avoid actions for damages for an infringement of competition law is not a legitimate interest worthy of protection.
- 56 Furthermore, it is for national courts to take appropriate steps in the proceedings to strike a balance between the requirements of effective legal protection or the interest of a due examination of the substance of a claim and the safeguarding of business confidentiality. Whether the confidential information, including any trade secrets for which disclosure is sought, is competitively sensitive in relation to the party seeking access to the information is primarily a matter which affects the method of disclosure, during the weighing-up exercise, rather than necessarily the extent of the disclosure obligation itself.
- 57 The Court notes that a confidentiality ring that is formed solely of the parties’ legal advisers may be an effective method of facilitating disclosure in a manner that complies with EEA law. An interpretation of national procedural rules that rigidly rules out any possibility of implementing a mechanism for restricted disclosure, that would strike a balance between the respective interests in disclosing relevant information and protecting its confidentiality, would be liable to undermine the effective application of Articles 53 and 54 EEA (compare the judgment in *Donau Chemie*, C-536/11, cited above, paragraph 31).
- 58 As for the relationship between a party and its legal counsel, provisions of EEA law are to be interpreted in light of fundamental rights which form part of the general principles of EEA law. The referring court must therefore assess whether a confidentiality regime

as proposed would conflict with fundamental rights taking into account that Låssenteret appears to be of the view that access to the documents in question, with or without the presence of its direct representatives, is vital to its claim. Moreover, the referring court should consider whether Låssenteret may waive its right to be present by giving clear and unequivocal consent in accordance with settled case law (compare the judgment of 26 February 2013 in *Melloni*, C-399/11, EU:C:2013:107, paragraph 49 and case law cited).

- 59 In light of the above, the answer to the second question must be that Directive 2016/943 does not prevent a national court in a case such as that in the main proceedings from establishing a confidentiality ring which does not include at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case.
- 60 The answer to the third question must be that Article 9(2) of Directive 2016/943 does not give expression to a general principle of EEA law to the effect that a national court may not establish a confidentiality ring which does not include at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case. In accordance with the principle of national procedural autonomy, it is for the national legal system to provide methods and limitations for the disclosure of information and evidence necessary to pursue the private enforcement of EEA competition law. However, the principle of effectiveness requires that the method and the extent of disclosure depends on a weighing-up of the protected interests on a case-by-case basis by the national court or tribunal.
- 61 The answer to the fourth question must be that it is not of significance to the answers to questions 1 to 3 that the confidential information including trade secrets for which disclosure is sought is competitively sensitive in relation to the party seeking access to the information.
- 62 The answer to the fifth question must be that, also in a case involving abuse of a dominant position under Article 54 EEA, EEA law requires a national court to weigh up the parties' interests prior to ordering a party alleged to have abused its dominant position to disclose evidence constituting trade secrets while ensuring the effectiveness of EEA law.

### **Question 6**

- 63 By its sixth question the referring court effectively seeks guidance as to whether EEA law principles, including the principles of effectiveness or homogeneity, mean that national procedural law must be interpreted in accordance with Article 5 of Directive 2014/104, although that directive has not been incorporated into the EEA Agreement.
- 64 The Court recalls that since Directive 2014/104 has not been incorporated into the EEA Agreement, there is no obligation under EEA law to apply its provisions. Although Directive 2014/104 reiterates some of the principles arising from the relevant case law, such as the principles of effectiveness and equivalence, mentioned in Article 4 of that

directive, many of its provisions, as has been noted by those submitting written observations, go further than merely codifying relevant case law, such as Article 5 of Directive 2014/104, which provides for detailed rules regarding the disclosure of evidence. Nevertheless, as noted by ESA in its written observations, the rules set out in Article 5 are an example of rules considered to be sufficiently effective by the EU legislature.

- 65 Therefore, the answer to the sixth question must be that in the absence of the incorporation of Directive 2014/104 into the EEA Agreement, there is no obligation under EEA law to interpret national law in light of Article 5 of Directive 2014/104.

#### **IV COSTS**

- 66 Since these proceedings are a step in the proceedings pending before Eidsivating Court of Appeal, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

## THE COURT

in answer to the questions referred to it by the Eidsivating Court of Appeal hereby gives the following Advisory Opinion:

- 1. The scope of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings.**
- 2. Directive 2016/943 does not prevent a national court in a case such as that in the main proceedings from establishing a confidentiality ring which does not include at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case.**
- 3. Article 9(2) of Directive 2016/943 does not give expression to a general principle of EEA law to the effect that a national court may not establish a confidentiality ring which does not include at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case. In accordance with the principle of national procedural autonomy, it is for the national legal system to provide methods and limitations for the disclosure of information and evidence necessary to pursue the private enforcement of EEA competition law. However, the principle of effectiveness requires that the method and the extent of disclosure depends on a weighing-up of the protected interests on a case-by-case basis by the national court or tribunal.**
- 4. It is not of significance to the answer to questions 1 to 3 that the confidential information including trade secrets for which disclosure is sought is competitively sensitive in relation to the party seeking access to the information.**
- 5. Also in a case involving abuse of a dominant position under Article 54 of the EEA Agreement, EEA law requires a national court to weigh up the parties' interests prior to ordering a party alleged to have abused its dominant position to disclose evidence constituting trade secrets while ensuring the effectiveness of EEA law.**

- 6. In the absence of the incorporation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union into the EEA Agreement, there is no obligation under EEA law to interpret national law in light of Article 5 of Directive 2014/104.**

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 9 August 2024.

Ólafur Jóhannes Einarsson  
Registrar

Páll Hreinsson  
President