



E-11/23-20

REPORT FOR THE HEARING

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 inter alia the interpretation of Directive (EU) 2016/943 on the protection of trade secrets in the context of a claim for damages for an alleged breach of Section 11 of the Norwegian Competition Act (*konkurranseloven*) and Article 54 of the EEA Agreement.

I Introduction

1. Eidsivating Court of Appeal has requested an advisory opinion in the case pending before it between Låssenteret AS (“Låssenteret”) and Assa Abloy Opening Solutions Norway AS (“Assa Abloy”). Låssenteret has initiated proceedings against Assa Abloy for an alleged infringement of Norwegian and EEA competition law.

2. During the preparatory stages of the proceedings at first instance, Låssenteret put forward 18 requests for access to evidence. On 8 May 2023, Nordre Østfold District Court (*Follo og Nordre Østfold tingrett*) dismissed the requests for access to evidence with reference, inter alia, to 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 (“Directive 2016/943”). It is against that part of the decision that Låssenteret has appealed to Eidsivating Court of Appeal and to which the present request for an advisory opinion concerns.

II Legal background

EEA law

3. 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.

4. 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.

5. 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.

6. 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) (“Decision 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.

7. Article 1 of Decision No 91/2019 reads as follows:

The following is inserted after point 12 (Regulation (EU) 2017/1128 of the European Parliament and of the Council) of Annex XVII to the EEA Agreement:

‘13. 32016 L 0943: 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 L 157, 15.6.2016, p. 1).

The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

(a) In Article 1(1), the term “TFEU” shall, for the EFTA States, be read as “EEA Agreement”

(b) The reference in Article 1(2)(a) and Article 5(a) to “the right to freedom of expression and information as set out in the Charter” shall, for the EFTA States, be read as “the fundamental right to freedom of expression and information”.

(c) In Article 1(2)(b) and (c), the term “Union or national rules” shall, for the EFTA States, be read as “EEA rules or national rules”.

(d) The reference in Article 1(2)(c) to “Union institutions and bodies” shall, for the EFTA States, be read as including “EEA EFTA institutions and bodies”.

(e) In Article 1(2)(c) and (3)(c), Article 3(2) and Article 5(c) and (d), the term “Union or national law” shall, for the EFTA States, be read as “EEA law or national law”.

(f) In Article 1(2)(d) and Article 3(1)(c), the term “Union law and national laws and practices” shall, for the EFTA States, be read as “EEA law and national laws and practices”.

8. 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.

9. Article 1(1) and (2) of Directive 2016/943, entitled "Subject matter and scope", reads:

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.

10. 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 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.

11. 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.

12. 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.*

13. 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.

14. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on the 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.

15. 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.

16. 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 law¹

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

18. Section 21-3(1) 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.

19. 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.

¹ All translations of national law are unofficial.

20. Section 22-12(2)-(4) of the Dispute Act reads:

(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.

21. 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.

III Facts and procedure

22. 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.

23. Assa Abloy operates a dealer concept for mechanical lock systems, TrioVing Sikkerhetssenter (“TVSS”), in which a dealer can attain the status of partner. A TVSS partner has the right to use the trademark “TrioVing Sikkerhetssenter” 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 licenced 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. According to the request, the parties agree, and there appears to be no doubt, that the evidence sought contains trade secrets. 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).

32. 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. Section 22-12(3) and (4) 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.

33. 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.

34. 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?

35. 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 "*forretnings hemmelighet*". 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. However, these submissions will be made part of the case file.

IV Written observations

36. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

Låssenteret AS, represented by Peter Hallsteinsen and Henrik Nordling, advocates;

Assa Abloy Opening Solutions Norway AS, 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.

V Proposed answers submitted

Låssenteret AS

37. Låssenteret proposes that the questions referred be answered as follows:

1. The material scope of Directive 2016/943 is limited to the unlawful acquisition, use or disclosure of trade secrets, and does not apply to other court proceedings, including those relating to Article 54 EEA.

2. Directive 2016/943 allows for the establishment of a confidentiality ring which does not include at least one natural person from each of the parties to the case, if that right has been waived, or national law so allows. Further, it is for the national court to ensure that the application of Article 9(2) last sentence does not lead to the enforcement of rights following from the EEA Agreement being made impossible or excessively difficult by denying access to evidence without a proportionality assessment for each of the access requests submitted.

3. The last sentence of Article 9(2) of Directive 2016/943 does not express a general EEA law principle which would preclude the establishment of 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. It is not relevant for Questions 1 to 3 that the trade secrets that are requested disclosed as evidence are competitively sensitive in relation to the party requesting access to the information. If disclosure of such evidence is requested, national courts should take this fact into account when establishing arrangements to protect the competitively sensitive information, and limit access to such information to the greatest degree necessary, whilst ensuring compliance with the principle of effectiveness and the right to a fair trial.

5. Where a party requests access to relevant evidence to substantiate its position in a case that entails the abuse of a dominant position under Article 54 EEA, EEA law as a rule requires a national court to order that party to disclose this evidence, including when it includes trade secrets or other confidential information. Granting requests for access to evidence must however be based on a case-by-case assessment and be proportionate. The proportionality of

access to relevant evidence shall be ensured through the establishment of arrangements that limit disclosure of such evidence to the greatest possible degree. Without prejudice to public interests, such as the effectiveness leniency programmes, the protection of confidential information as such cannot outweigh the right to effective enforcement and evidence.

6. Article 5 of Directive 2014/104/EU is an expression of the principle of effectiveness, accordingly, even though it is not incorporated into the EEA Agreement, national procedural law should be interpreted in accordance with this provision.

Assa Abloy Opening Solutions Norway AS

38. Assa Abloy proposes that the questions referred be answered as follows:

1. The material scope (ratione materiae) of Directive 2016/943 is the unlawful acquisition, use or disclosure of trade secrets. Article 9 is applicable to legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret.

2. The last sentence of Article 9 (2) of Directive 2016/943 does not 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. The last sentence of Article 9(2) of the Directive on the protection of trade secrets is an expression of the adversarial principle (part of the fundamental principle of due process and right to a fair trial), which is a general EEA law principle. Whether and to what extent national courts may limit the adversarial principle in a given case by ordering access only to external advisors and not the representative of a party, will depend on the procedures available under national law, which it is under the national procedural autonomy of the EEA states to decide.

4. It is of significance to the answers to questions 1 to 3 that 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, EEA law, including the principle of effectiveness or the principle of homogeneity, does not 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. *EEA law principles, including the principle of effectiveness or the principle of homogeneity, do not mean that national procedural law must be interpreted in accordance with Article 5 of the Damages Directive (Directive 2014/104/EU).*

ESA

39. ESA proposes that the questions referred be answered as follows, with the first three questions being answered together:

1. Article 1(1) of Directive (EU) 2016/943 must be interpreted in such a way that the material scope (ratione materiae) of that directive does not encompass cases in which the subject matter of the dispute is not itself the unlawful acquisition, use or disclosure of trade secrets. Accordingly, that directive and the requirements of its Article 9(2) do not apply to a case such as that at issue in the main proceedings. Further, the requirements of Article 9(2) of that directive do not express a general principle of EEA law, and therefore cannot be applied on that alternative basis to a case such as that at issue in the main proceedings.

2. A national court may conclude that trade secrets will be sufficiently protected without the need for a natural person from each party to be granted access to that evidence, where, in line with settled case-law, it has weighed up the interests of the parties to the case, including the need for the access to such evidence in order effectively to bring a claim for infringement of competition law, and the competing right to the protection of trade secrets.

3. In cases concerning abuse of a dominant position under Article 54 of the EEA Agreement, EEA law does not permit national courts to order the disclosure of evidence containing trade secrets without first weighing up the parties' interests in line with settled case law.

4. EEA law does not require national procedural law to be interpreted in accordance with Article 5 of Directive 2014/104/EU, given that it is not incorporated into the EEA Agreement.

The Commission

40. The Commission proposes that the questions referred be answered as follows:

Question 1: *In light of Article 1, paragraph 1 and Article 9, paragraphs 1 and 2 of Directive 2016/943, disputes in legal proceedings with a subject matter different from an unlawful acquisition, use or disclosure of trade secrets, such as proceedings concerning an alleged abuse of a dominant position against Article 54 of the EEA Agreement, do not fall within the material scope of*

Directive 2016/943, even if a dispute arises in the context of such legal proceedings or in preparation thereof on whether the competent court should order disclosure of material containing trade [secrets].

Question 3: *The requirement laid down in the last sentence of Article 9(2) of Directive 2016/943 should not be regarded as an expression of a general EEA principle.*

Question 4: *It is of no significance to the answers to Questions 1-3 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.*

Question 5: *EEA law, including the principle of effectiveness, requires that national courts, when exercising their powers for the purpose of applying national rules on the right of access to evidence by persons believing themselves to be adversely affected by an alleged abuse of a dominant position, weigh up the respective interests in favour of disclosure of information containing trade secrets against the interests in favour of the protection of the confidentiality of that information.*

Question 6: *Without prejudice to the answer provided for question 5, in the absence of the incorporation of Directive 2014/104/EU into the EEA legal framework, there is no obligation by Norwegian courts under EEA law to interpret Norwegian procedural legislation in light of Article 5 of Directive 2014/104/EU.*

Bernd Hammermann

Judge-Rapporteur