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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
Claire Simpson, Erlend Møinichen Leonhardsen
and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-11/23

Låssenteret AS

v

Assa Abloy Opening Solutions Norway AS

in which the Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) requests the EFTA Court to give an advisory opinion, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, concerning the interpretation of Article 9 of Directive (EU) 2016/943 on the protection of trade secrets in the context of a claim for damages for breach of Article 54 of the EEA Agreement.

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1 INTRODUCTION/THE FACTS OF THE CASE

1. The present case concerns access to evidence in a claim brought under Article 54 EEA and the equivalent national rules by Låssenteret AS, for alleged breach of a dominant position by Assa Abloy Opening Solutions Norway AS (“**AAOS**”). The claim was brought before the Follo and Nordre Østfold District Court (*Follo og Nordre Østfold tingrett*), which dismissed certain requests for evidence *inter alia* by reference to Directive (EU) 2016/943 (“**the Trade Secrets Directive**”).¹
2. On appeal, the Eidsivating Court of Appeal (“**the Referring Court**”) asks whether such competition law proceedings fall within the scope of the Trade Secrets Directive. It asks in particular whether certain requirements in Article 9(2) of that directive apply (whether under the directive itself or by virtue of the fact that that provision expresses a more general principle of EEA law). These requirements concern the need to grant access to trade secrets to natural persons from each party, rather than to just their legal representatives.² More generally, the Referring Court asks about what sort of limits or requirements EEA law places on its ability to weigh up the competing interests of the parties to the proceedings before it, namely the need for access to trade secrets³ in order to effectively enforce one party’s competition law rights, versus the right to the protection of trade secrets of the other.
3. In short, the Authority submits that the Trade Secrets Directive does not apply to a case such as that at issue in the main proceedings. EEA law does not as such require a natural person from each party to have access to trade secrets, nor does it require (or indeed permit) the Referring Court to order disclosure of such secrets without a

¹ 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 Trade Secrets Directive was incorporated into the EEA Agreement on 29 March 2019 by Decision 91/2019 of the EEA Joint Committee, OJ L 210, 2.7.2020, p. 76, with entry into force on 1 January 2021.

² This perceived need for the presence of a natural person from each party appears to have become a point of contention between the parties, which is preventing agreement on the disclosure of the trade secrets in question: see the request for the advisory opinion (“**the Request**”), p. 8.

³ The Request proceeds on the basis that the evidential disclosure sought contains trade secrets, and the Authority’s submissions are accordingly also made on this basis.

weighing-up of the interests of each party. Such a weighing-up must be conducted in line with the settled case-law considered in particular under the fifth question below.

2 EEA LAW

4. Article 54 of the EEA Agreement prohibits the abuse by one or more undertakings of a dominant position.
5. Recitals 4, 7, 24 and 38 of the Trade Secrets Directive are relevant, and are considered further below.
6. Article 1(1), first paragraph, of the Trade Secrets Directive provides:

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

7. Article 3 of the Trade Secrets Directive is entitled “*Lawful acquisition, use and disclosure of trade secrets*”. Its second paragraph provides, as adapted:

“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 EEA law or national law.”

8. Article 9 of the Trade Secrets Directive is entitled “*Preservation of confidentiality of trade secrets in the course of legal proceedings*”. It provides (emphasis added):

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."*

3 NATIONAL LAW

9. The relevant provisions of Norwegian law are referred to at pages 4-5 of the Request. The main rule is that parties to court proceedings are free to adduce the evidence they wish under Section 21-3(1) of the Dispute Act.⁴ It provides:

*"(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."*⁵

10. As stated by the Referring Court, exceptions from this main rule "*must be justified and there must be a sufficient legal basis*",⁶ which the Authority understands can be under relevant domestic law (in particular under Chapter 22 of the Dispute Act) or under EEA law which is duly implemented into Norwegian law.

11. The key exception for the purposes of the present case is Section 22-10 of the Dispute Act, entitled "*Exemption for evidence for trade secrets*". It provides:

*"A party or witness may refuse to provide access to evidence that cannot be made available without revealing a trade secret. The court can nevertheless issue an order that the evidence must be made available when, after weighing it up, it deems it necessary."*⁷

12. Section 22-12(2) of the Dispute Act provides:

⁴ In Norwegian: *Lov 17 juni 2005 nr 90 om mekling og rettergang i sivile tvister (tvisteloven).*

⁵ In Norwegian: "*§ 21-3. Rett og plikt til bevisføring*

(1) Partene har rett til å føre de bevis de ønsker. Unntak fra retten til å føre bevis følger av §§ 21-7 og 21-8, kapittel 22 og øvrige bevisregler i loven her."

Unless otherwise stated, translations are provided by the Norwegian Ministry of Justice and are available at <https://lovdata.no/pro/#document/NLE/lov/2005-06-17-90>

⁶ Request, p.4.

⁷ In Norwegian: "*§ 22-10. Bevisfritak for forretningshemmeligheter*

En part eller et vitne kan nekte å gi tilgang til bevis som ikke kan gjøres tilgjengelig uten å røpe en forretningshemmelighet. Retten kan likevel gi pålegg om at beviset skal gjøres tilgjengelig når den etter en avveining finner det påkrevd."

“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).”⁸

13. Section 22-12(3)-(4) of the Dispute Act implements Article 9 of the Trade Secrets Directive.⁹ It provides:

“(3) When the evidence referred to in § 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 secret that can be derived from the evidence. The court can decide that oral hearings on the evidence shall take place in camera. In special cases, the court can limit the parties' access to co-counsel pursuant to § 3-7 to what the court deems necessary.

(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 secrets, or the protection ceases as a result of the information becoming generally known or easily accessible.”¹⁰

14. It follows from the Request that other rules of the Trade Secrets Directive are implemented into Norwegian law by the Act on the Protection of Trade Secrets (*lov om vern av forretningshemmeligheter*).¹¹ Those rules appear not to be at issue in the main proceedings.

⁸ In Norwegian: “(2) *Blir beviset ført i henhold til pålegg fra retten, kan retten pålegge taushetsplikt og bestemme at muntlig forhandling om beviset skal skje for lukkede dører. Det samme gjelder hvor retten ikke har fritatt for bevisplikt etter § 22-5 annet ledd, § 22-8 annet ledd eller § 22-9 tredje og fjerde ledd.*”

⁹ See page 9 of the Request. A table showing the intended implementation of the Directive into Norwegian law is available at <https://www.regjeringen.no/no/dokumenter/prop.-5-ls-20192020/id2674218/?ch=26>.

¹⁰ Translated by the Authority. In Norwegian: “(3) *Når bevis omhandlet i § 22-10 føres etter pålegg fra retten, skal retten pålegge de tilstedeværende taushetsplikt og forbud mot bruk av forretningshemmeligheten som kan utledes av beviset. Retten kan bestemme at muntlig forhandling om beviset skal skje for lukkede dører. Retten kan i særlige tilfeller begrense partenes adgang til å benytte rettslige medhjelpere etter § 3-7 til det retten anser nødvendig.*

(4) Forbud og påbud etter tredje ledd første punktum skal gjelde inntil det i rettskraftig dom eller kjennelse fastslås at opplysningene ikke utgjør forretningshemmeligheter, eller vernet bortfaller som følge av at opplysningene blir allment kjent eller lett tilgjengelig.”

¹¹ Page 9 of the Request. See also the overview of the implementation in the table referred to in footnote 9 above.

4 THE QUESTIONS REFERRED

15. Against this background, the Referring Court has asked the following questions:

- “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 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 [to be] 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?”*

5 LEGAL ANALYSIS

5.1 Question 1: The material scope of the Trade Secrets Directive

16. By its first question, the Referring Court essentially asks whether the Trade Secrets Directive applies to cases in which the subject matter of the dispute is not itself the unlawful acquisition, use or disclosure of trade secrets.¹² In other words, it asks whether that directive applies to a claim such as that at issue in the main proceedings – namely a claim brought for alleged breach of the EEA and national competition rules, in which disclosure of trade secrets is sought as an evidential matter.

17. The Authority submits that the answer to this question is “No”, for the following reasons.

18. First, a materially similar issue has recently been addressed in a ruling of the Court of Justice of the European Union (“CJEU”), in Case **C-927/19 *Klaipėdos regiono***.¹³ In that case, the proceedings concerned *inter alia* whether an unsuccessful party to a tender procedure could seek disclosure of confidential information in a (successful) competitor’s tender, in order to challenge the outcome of that tender. The question arose whether the Trade Secrets Directive applied to those proceedings.

19. The CJEU held that it did not. It referred to the purpose of the Trade Secrets Directive, as set out in Article 1(1) thereof, read in conjunction with Recital 4 thereof, and held that the directive:

*“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, such as proceedings relating to public procurement.**”¹⁴*

¹² The text of the question referred relates only to the “use” of acquired trade secrets, but from the context (and for completeness) the Authority understands the question as intending to refer also to the acquisition and disclosure of trade secrets.

¹³ Judgment of the Grand Chamber of the CJEU of 7 September 2021, ‘*Klaipėdos regiono atliekų tvarkymo centras*’ v *UAB* (“***Klaipėdos regiono***”), C-927/19, EU:C:2021:700.

¹⁴ *Ibid*, emphasis added, para. 97. See similarly the Opinion of Advocate General Campos Sánchez-Bordona, EU:C:2021:295, at paras. 43-50.

20. The Authority submits that this rationale applies also to the present case. The subject-matter of the proceedings does not concern the “*unlawful*” acquisition, use or disclosure of trade secrets, but rather whether AAOS has abused its dominant position, in the course of which proceedings access to trade secrets is sought.
21. Second, the Authority observes that the position adopted by the CJEU in the above case is also supported by Recital 24 of the Trade Secrets Directive, which refers to the need for requirements “*aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence.*”¹⁵ In other words, the scenario envisaged by the Trade Secrets Directive is one where the subject-matter of the proceedings is the protection of the trade secret itself,¹⁶ i.e. to avoid deterring “*legitimate trade secret holders from instituting legal proceedings to defend their trade secrets*” (see Recital 24).
22. Third, the Authority recalls Recital 38 of the Trade Secrets Directive, which provides:

“This Directive should not affect the application of competition law rules, in particular Articles 101 and 102 of the [...] TFEU. The measures, procedures and remedies provided for in this Directive should not be used to unduly restrict competition in a manner contrary to the TFEU.”

23. This suggests that the protection afforded to trade secrets under that directive should not be applied or exercised in such a way as to render ineffective the rights and obligations flowing from Articles 53 and 54 EEA. Thus, claims such as that raised in the present case (alleged abuse of dominance) should not be unduly restricted by the application of the Trade Secrets Directive.¹⁷ Nevertheless, as considered further under the fifth question below, this does not mean that confidential information and trade secrets should not receive appropriate protection in competition law cases – a proper balancing of the interests of the parties must still be conducted.

¹⁵ Emphasis added.

¹⁶ See similarly Recital 7 of the Trade Secrets Directive, which provides (emphasis added): “... Additionally, many national rules do not provide for adequate 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 ...**”

¹⁷ Independently of this, the Authority observes that Article 3(2) of the Trade Secrets Directive foresees that trade secrets may be lawfully disclosed where this is required or allowed by EEA or national law.

5.2 Questions 2 and 3: Article 9(2) of the Trade Secrets Directive

24. By its second and third questions respectively, the Referring Court seeks to ascertain whether:

- (i) Article 9(2) of the Trade Secrets Directive; or
- (ii) a general principle of EEA law (as expressed in Article 9(2) thereof);

prevents a national court from establishing a confidentiality ring which does not grant at least one natural person from each of the parties access to the evidence in the case which constitutes trade secrets.

25. As submitted under the first question above, the Trade Secrets Directive does not apply to a case such as the present. Accordingly, and in answer to the second question, the requirements expressed in the last sentence of Article 9(2) (as to the presence or absence of natural persons from confidentiality rings) also do not apply here. The Authority recalls further the text of Article 9(2), which applies to "*legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret.*" Applying by analogy the reasoning in **C-927/19 *Klaipėdos regiono*** (as explained in paragraphs 18-20 above), the main proceedings do not fall within this category of proceedings.

26. The third question asks, in the alternative, whether the last sentence of Article 9(2) reflects or expresses a general principle of EEA law, so that, even if the Trade Secrets Directive does not apply, the requirements expressed in that sentence (presence/absence of natural persons in confidentiality rings) nevertheless apply to the present case.

27. The Authority recalls the settled case-law according to which the right to the protection of business or trade secrets is a general principle of EU law, which may be recognised also by the EFTA Court.¹⁸ However, the Authority observes that there is nothing in that case-law which prescribes that confidentiality/trade secrets must be protected by means of the mechanisms set out in Article 9(2). Rather, the case-law requires the

¹⁸ C-927/19 *Klaipėdos regiono*, para. 132 and the case-law cited. See also judgment of the CJEU of 24 June 1986, *AKZO Chemie v Commission*, Case 53/85, EU:C:1986:256, para. 28 and judgment of the CJEU of 19 May 1994, *SEP v Commission*, Case C-36/92 P, EU:C:1994:205, paras. 36-37.

more general weighing-up of interests justifying disclosure of information¹⁹ and the protection of that information, which must be conducted by national courts on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.²⁰

28. Accordingly, if the Referring Court concludes:

- (i) having so weighed-up the interests of the parties to the case, and
- (ii) having had regard to the procedures available to it under national law for the protection of trade secrets,

that confidentiality (and thus the right to a fair trial) may be sufficiently protected without the need for a natural person from each party to be granted access to the evidence constituting trade secrets, such a conclusion is permissible as a matter of EEA law. In other words, EEA law does not preclude a situation where, in order to protect trade secrets or other confidential information, only external legal advisers are given access to such information. Indeed, the Authority observes for example that data rooms, to which only external legal advisers are given access, are a common occurrence in competition investigations conducted by the Authority or European Commission.²¹

5.3 Question 4: Relevance of the competitively sensitive nature of the information

29. The fourth question asks whether it is of significance to the answers to one or more of the questions above that the trade secrets at issue may also be competitively sensitive.

30. The Authority submits that whether or not the trade secrets to which access is sought are also competitively sensitive has no bearing on the answer to the first question (the material scope of the Trade Secrets Directive) or the second question (the extent to which the last sentence of Article 9(2) of the Trade Secrets Directive applies). In

¹⁹ Such as the need for the effective (private) enforcement of the EEA competition rules.

²⁰ See e.g. Judgment of the CJEU of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and others* ("**Donau Chemie**"), C-536/11, EU:C:2013:366, para. 34, considered further under the fifth question below. See also C-927/19 *Klaipėdos regiono*, paras. 130-132.

²¹ See e.g. paras. 19-20 of the Best Practices on the disclosure of information in data rooms under Articles 53 and 54 EEA, adopted by the EFTA Surveillance Authority: <https://www.eftasurv.int/competition/competition-rules-in-the-eea/best-practices-notice-and-guidelines>

relation to the third question, while the competitively sensitive nature of the information does not change the answer to that question, the Authority recalls for completeness that, if the information is competitively sensitive, the national court must protect it, in line with the general principle of the protection of business secrets, as referred to at paragraph 27 above and as considered further under the fifth question below.

5.4 Question 5: EEA law does not require national courts to order the disclosure of evidence containing trade secrets, without first weighing-up the parties' interests

31. As observed at paragraph 27 above, the right to the protection of trade or business secrets has been acknowledged as a general principle of EU/EEA law.²² Accordingly, and in answer to the fifth question, in cases involving an alleged abuse of dominance under Article 54 EEA, a national court may not simply order the disclosure of such secrets without a weighing-up of the interests of the parties. The Authority refers in particular to paragraphs 30-34 of **Case C-536/11 Donau Chemie**, in which the CJEU considered, at paragraph 31:

“That weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals.”

32. The CJEU went on to observe (in paragraph 32) that a rule refusing all access to confidential or sensitive information would tend to make it impossible or excessively difficult to protect the right to compensation/damages conferred on parties under the competition rules. This would be the case where, for example, all the documents needed to evidence a claim for damages were in the hands of another party. The Authority observes that this appears to be the case in the main proceedings: the confidential information needed to bring a claim, for e.g. damages for abuse of a dominant position, is in the hands of AAOS. In competition cases therefore, the national court must bear this ‘information asymmetry’ in mind when conducting its weighing up

²² See further the judgment of the CJEU of 19 June 2018, *Baumeister*, Case C-15/16, EU:C:2018:464, para. 53 (protection of business secrets).

exercise. The Authority refers here to **Case E-10/17 Nye Kystlink**, in which the EFTA Court, mindful of this asymmetry, held that this was a relevant factor in terms of the effectiveness of the competition rules, and which should therefore play a role in the national court's assessment and application of its national procedural rules.²³ In **Nye Kystlink** the Court also recalled the specificities of competition cases, which may be large and complex, and the aim of effective enforcement, which should also play a role in the national court's assessment and therefore the application of its national rules.²⁴

33. On the other hand, as observed by the CJEU in **Case C-536/11 Donau Chemie** at paragraph 33 of its judgment, a rule of generalised access under which any document relating to competition proceedings must be disclosed to a party seeking compensation is not needed in order to ensure effective judicial protection, and indeed could lead to the infringement of other rights conferred on the other party, such as the right to protection of business secrets. Accordingly, a weighing-up of the various interests must always be conducted on a case-by-case basis, which weighing-up must therefore also be conducted by the Referring Court in the main proceedings.

5.5 Question 6: National procedural law must be interpreted and applied in accordance with the EEA law principle of effectiveness

34. By its sixth question, the Referring Court asks whether, although the Damages Directive²⁵ has not been incorporated into the EEA Agreement, the EEA law principles of effectiveness or homogeneity require that national procedural law must be interpreted in accordance with Article 5 of that directive (disclosure of evidence).

35. While the Damages Directive was identified upon adoption as EEA-relevant, since it has not yet been incorporated into the EEA Agreement, there is no obligation in the

²³ Judgment of 17 September 2018, paras. 117-118.

²⁴ *Ibid*, para. 117. For the need for national rules to be adapted and applied in accordance with the specificity of competition law cases, in order to ensure the effectiveness of the EEA competition rules, see similarly judgment of the CJEU of 20 April 2023, *Repsol*, Case C-25/21, EU:C:2023:298, para. 60, and judgment of the CJEU of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paras. 44, 46 and 47.

²⁵ 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 L 349, 5.12.2014, p. 1–19.

EEA to apply its provisions.²⁶ Further, to the extent that it lays down rules which are not a codification of EEA-relevant case-law, there is no obligation in the EEA to ensure the same result as in the EU under that directive.²⁷

36. Article 5 of the Damages Directive (and the related Chapter II of that directive) contain certain minimum rules for the disclosure of evidence which EU national procedural rules must respect. In the Authority's view, these rules are intended to achieve minimum harmonisation, rather than codifying existing case-law.²⁸ Accordingly, the principle of homogeneity does not require EEA national courts to ensure the same procedural result as under Article 5 of that directive.
37. However, as recognised by the Court in **E-11/17 Nye Kystlink**, in such circumstances, national procedural rules must nevertheless respect the EEA law principles of equivalence and effectiveness.²⁹ The principle of effectiveness is relevant here. Such a principle entails that national procedural rules governing actions for safeguarding rights, which individuals and economic operators derive from EEA law, must not render practically impossible or excessively difficult the exercise of those rights.³⁰
38. Accordingly, national procedural rules (such as the Dispute Act) must ensure, and must be applied in such a way that a proper weighing-up of interests of the parties, as required by the settled case-law referred to at paragraphs 31-33 above, is conducted. Such a weighing-up must take into account the information asymmetry which claimants may face, and ensure that their ability to enforce their rights under the EEA competition

²⁶ Case E-10/17 *Nye Kystlink*, para. 73.

²⁷ *Ibid.*

²⁸ Support for this position can be found in the *White paper on damages actions for breach of the EC antitrust rules* (COM(2008) 165 final; 2.4.2008), which preceded the Damages Directive. Page 5 thereof described the need to ensure (original emphasis) "*across the EU a **minimum level of disclosure inter partes** for EC antitrust damages cases [...]. Building on the approach in the Intellectual Property Directive (Directive 2004/48/EC), access to evidence should be based on **fact-pleading** and **strict judicial control** of the plausibility of the claim and the proportionality of the disclosure request.*" The Authority observes that no reference is made to codification of CJEU case-law; rather, reference is made to the Intellectual Property Directive as the touchstone for the disclosure rules.

²⁹ Case E-11/17 *Nye Kystlink*, para. 73 and see also paras. 110-111.

³⁰ *Ibid.*, para. 111.

rules is not rendered nugatory by an over-zealous approach to the protection of trade or business secrets.³¹

39. Finally, while Article 5 of the Damages Directive does not form part of EEA law, its contents can nevertheless be seen as an expression of rules on disclosure which are considered effective from an EU law perspective. The Authority observes that there is nothing to prevent the Referring Court from taking such EU disclosure rules into account, as a framework against which to test its own rules on the disclosure of evidence. However, there is no obligation for the Referring Court to do so, nor for it to interpret the relevant national rules in accordance with the rules contained in Article 5 of the Damages Directive.

6 CONCLUSION

Accordingly, the Authority respectfully submits that the Court should answer the questions referred 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*

³¹ Judgment of 30 May 2018, Case E 6/17 *Fjarskipti hf v Síminn hf*, paras. 29-30, where the Court stated at paragraph 30 that “[a]ctions for damages before the national courts can make a significant contribution to the maintenance of effective competition.”

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.*

Claire Simpson

Erlend Møinichen Leonhardsen

Melpo-Menie Joséphidès

Agents of the EFTA Surveillance Authority

