EUROPEAN COMMISSION

Brussels, 28 November 2023
sj.a(2023)1221380

TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

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

European Commission

represented by Julie Samnadda, Paul-John Loewenthal, Sergio Baches Opi and Pedro Caro de Sousa, members of its Legal Service, acting as Agents, with a postal address for service in Brussels at the Legal Service, Greffe Contentieux, BERL 1/169, 200, rue de la Loi, 1049 Brussels, in case

E-11/23

Låssenteret AS v Assa Aboly Opening Solutions Norway AS

concerning a Request for an Advisory Opinion on the interpretation of Article 54 of the Agreement on the European Economic Area, submitted by the Eidsivating Court of Appeal (Norway) pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Contents

1. INTRODUCTION 3

2. THE LEGAL FRAMEWORK: 3

2.1. EEA Agreement 3

2.2. The Trade Secrets Directive 4

3. FACTS AND QUESTIONS RAISED BY THE EIDSIVATING COURT OF APPEAL 7

4. THE VIEW OF THE COMMISSION 9

4.1. Preliminary remarks 9

4.2. Question 1: The material scope of the Trade Secrets Directive: 10

4.3. Question 2: The interpretation of the last sentence of Article 9(2) of the Trade Secrets Directive 15

4.4. Question 3: On whether the last sentence of Article 9(2) of the Directive express a general EEA principle 15

4.5. Question 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? 16

4.6. Question 5: In a case involving an 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? 17

4.7. Question 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? 22

5. CONCLUSION 22

The European Commission (the "Commission") has the honour of submitting these written observations pursuant to Article 20 of the Statute of the EFTA Court.

1. INTRODUCTION

1. The request for an advisory opinion submitted to the EFTA Court by the Eidsivating Court of Appeal (the Request) concerns the interpretation of Directive (EU) 2016/943[1] (the Directive or Trade Secrets Directive), Directive 2014/104/EU[2] (the Damages Directive) and Article 54 of the Agreement on the European Economic Area (EEA Agreement). The provisions in Article 54 of the EEA Agreement are identical in substance to the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU). The present case thus falls within the scope of Article 6 of the EEA Agreement and Article 3, paragraph 2 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement).

2. THE LEGAL FRAMEWORK:

2.1. EEA Agreement

2. Article 6 of the EEA Agreement:

"Without prejudice to future developments of case-law, the provisions of this [EEA] Agreement, in so far as they are identical in substance to corresponding rules of the [TFEU] [...] shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the [European Union] given prior to the date of signature of this [EEA] Agreement."

3. Article 3, paragraph 2, of the Surveillance and Court Agreement:

"In the interpretation and application of the EEA Agreement [...] the EFTA Court shall pay due account to the principles laid down by the relevant rulings of the [Court of Justice of the European Union] given after the date of signature of the EEA Agreement and which concern the interpretation of [...] such rules of the [TFEU] [...] in so far as they are identical in substance to the provisions of the EEA Agreement [...]."

4. Annex XVII, point 13 of the EEA Agreement which includes the Trade Secrets Directive:

---

[1] OJ L 157, 15.6.2016, p. 1–18.

[2] OJ L 349, 5.12.2014, p. 1–19.

"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 [...]"

2.2. The Trade Secrets Directive

5. The following recitals and provisions of the Trade Secrets Directive are relevant:

6. Recital 7:

"[...] 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."

7. Recital 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.*"

8. Recital 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."

9. Recital 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."

10. Recital 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."

11. Recital 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."

12. Article 1 provides in relevant part:

"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 [...] the second subparagraph of Article 9(1), Article 9(3) and (4) [...] is ensured.

2. This Directive shall not affect:

(...)

(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; (...)."

13. Article 4 provides in relevant part :

"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."

14. Article 9 headed *"Preservation of confidentiality of trade secrets in the course of legal proceedings"* provides in relevant part:

"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. [...]"

3. FACTS AND QUESTIONS RAISED BY THE EIDSIVATING COURT OF APPEAL

15. The facts are as described in the Request for an Advisory Opinion by the Court of Appeal (Requesting Court). The proceedings concern a claim by Låssenteret (the claimant) against Assa Aboly Opening Solutions Norway AS ("AAOS") (the defendant) for an alleged infringement of Section 11 of the Norwegian Competition Act and Article 54 of the EEA Agreement, which prohibit an abuse of a dominant position. The claimant seeks either an injunction ordering the defendant to grant the claimant similar conditions as those granted to other operators of equivalent size, or alternatively, compensation to be determined by the court.

16. In the preparatory stages of the proceedings, the claimant submitted 18 requests for access to evidence, which were dismissed at first instance by the Follo and Nordre Østfold District Court (District Court) on 8 May 2023, by reference to the Trade Secrets Directive, *inter alia*. The parties agree, and the Request states that *"there appear to be no doubt"* that the evidence whose disclosure is requested contains trade secrets (page 4).

17. Låssenteret submits that the Trade Secrets Directive does not apply to the present dispute, considering that the Directive would only cover legal disputes in which the subject matter of that dispute is the acquisition or use of acquired trade secrets.

18. Låssenteret also argues that EEA law, including the principle of effectiveness, requires that national legislation enable access to evidence containing trade secrets in cases involving the application of EEA rules. It acknowledges that such access may be subject to conditions or restricted following a weighing up of the parties' respective interest. This balancing of interests, the claimant says, may take the form of a confidentiality ring, hearing *in camera* and/or redacting in the judgment or reproduction of confidential

information in an aggregated form in a manner that protects trade secrets. Finally, the claimant states that the Damages Directive[3] has EEA relevance and therefore Norwegian courts must have regard to the Damages Directive when interpreting national procedural law.

19. In contrast, AAOS submits that EEA law does not require national courts, in a case involving an alleged abuse of a dominant position, to order the defendant to disclose information constituting trade secrets, without the court performing beforehand an assessment of the proportionality of the request by weighing up the consideration of preserving the confidentiality of competitively sensitive information against the consideration of having complete information of the case. For the defendant, EEA law neither requires national legislation, when the protection of trade secrets weighs more than considerations of having complete information in the case, to nevertheless issue a disclosure order where the evidence is disclosed under a confidentiality ring which does not allow for at least one natural person of each party to have access to the evidence.

20. Finally, the defendant states the Directive is given a broader scope under Norwegian law than what the Directive requires and, accordingly, there are no EEA law-related doubts about its interpretation.

21. The parties in the main proceedings disagree on whether the principle of effectiveness in EEA law would apply in the circumstances of this case to enable access to trade secrets as evidence.

22. In this context, the Requesting Court referred the following six questions to the EFTA Court for an Advisory Opinion:

> *"Question 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?*
>
> *Question 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*

[3] 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 (Text with EEA relevance), OJ 2014 L349/1.

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?

Question 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?

Question 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?

Question 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?

Question 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?"

4. THE VIEW OF THE COMMISSION

4.1. Preliminary remarks

23. By its questions, the Requesting Court is asking not only about two measures of secondary law, the Trade Secrets Directive (Questions 1-4) and the Damages Directive (Question 6) but also primary law, namely Article 54 of the EEA Agreement (Question 5). In that context, the Requesting Court also enquires about the principles of effectiveness and the principle of homogeneity in the context of the application of Article 54 of the EEA Agreement but also the Damages Directive.

24. The Commission is of the view that the present dispute falls outside the scope of the Trade Secrets Directive. It will propose as its answer to Question 1 that the material scope of the Directive only concerns the unlawful acquisition, use or disclosure of a trade secret and legal proceedings related thereto. Questions 2 and 3 pertain to a specific rule in Article 9(2) of the Directive, whilst Question 4 concerns the relevance to answer

Questions 1-3 of the requested information being considered as competitively sensitive in relation to the party requesting access to the information. The Commission will propose no answer to Question 2 in the light of its proposed answer to Question 1. However, Questions 3 and 4 are general questions of interpretation of the Trade Secrets Directive and for both these Questions, the Commission will propose a response.

25. As the Requesting Court acknowledges (page 7 of the Request), unlike the Trade Secrets Directive, the Damages Directive has not been incorporated into EEA law. Therefore, this will have an impact on the answer proposed for Question 6 in the light of the EFTA Court's own case law on unincorporated measures of Union law.

26. Finally, as regards Norway's implementation of the Trade Secrets Directive, the doubts of the Requesting Court concern the interpretation of Section 22-12(2) and (3) of the Norwegian Dispute Act, read in conjunction with Section 22-10. According to the Requesting Court, Section 22-12(3) and (4) of the Norwegian Dispute Act implements Article 9 of the Trade Secrets Directive. There is no further information in the Request about the Norwegian implementation of the Trade Secrets Directive and in particular, whether Norway provides for more far reaching protection as allowed by Article 1(1) second subparagraph of the Directive. In addition, no English translation of the Norwegian Dispute Act ("Tvisteloven") has been provided. Therefore, the Commission will limit its response on the Trade Secrets Directive to the interpretation of the text of Directive and not address the Norwegian implementation which will be for the Requesting Court to assess.

4.2. Question 1: The material scope of the Directive on Trade Secrets:

27. In essence, by asking about the material scope of the Trade Secrets Directive, the Requesting Court would like to know:

- the circumstances in which the Directive applies; and
- which legal proceedings come within the scope of the rules provided for in the Directive.

28. The Court of Justice has already ruled on the scope of application of the Directive and the legal proceedings to which the Directive applies in a judgment of the Grand Chamber in Case C-927/19 '*Klaipėdos regiono atliekų tvarkymo centras' UAB*[4].

29. The Court held:

> *"97 Having regard to its purpose, as set out in Article 1(1) thereof, read in conjunction with recital 4 thereof, 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****, such as proceedings relating to public procurement.* (Commission emphasis)
>
> *98 Moreover, Article 4(2)(a) of that directive provides that the acquisition of a trade secret without the consent of the trade secret holder is to be considered unlawful whenever it is carried out by 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.*
>
> *99 Furthermore, as is apparent from Article 1(2)(c) thereof, that directive does not affect the application of EU or national rules requiring or allowing EU 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 EU or national law. In addition, recital 18 of that directive, in the light of which that provision must be interpreted, states that Directive 2016/943 should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in EU or national law[...].*
>
> *100 Lastly, 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 EU or national law."*

30. The provisions relied upon by the Court of Justice in arriving at its judgment are Article 1(1), Article 1(2)(c), Recital 18 and Article 3(2) of the Directive. In addition to those provisions, there are a number of other provisions of the Directive which support the Court's judgment and are of direct relevance to the present dispute and the arguments raised before the Requesting Court. The Commission will also consider those for the purposes of its reply to Question 1.

---

[4] Judgment of the Court (Grand Chamber) of 7 September 2021, ECLI:EU:C:2021:700 paragraphs 97-100.

31. Under the heading *"[S]ubject matter and scope"*, Article 1(1) provides that the Directive *"lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets"*. Recital 10 also clearly sets out that this is the aim of the Directive when it states *"[i]t 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"*.

32. Therefore, the Directive covers not just the unlawful *"use"* of trade secrets but also its *"acquisition"* and *"disclosure"*. Elsewhere, the Directive sets out the conduct and practices which would constitute unlawful acquisition, use or disclosure of a trade secret. Those are the circumstances to which the Directive applies, as stated also in Recital 15 where it says *'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.'*

33. As regards the subject matter of any dispute to which the rules in the Trade Secrets Directive apply, pursuant to Articles 4 and 5, Member States are required to provide 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. Thereafter, Chapter III (Articles 6-15) of the Directive headed *"Measures, procedures and remedies"* sets out, inter alia, the measures, procedures and remedies necessary to ensure the availability of civil redress where trade secret holders apply for redress.

34. In Chapter III, Article 9 headed *"Preservation of confidentiality of trade secrets in the course of legal proceedings"*, read also in the light of recital 24, provides that the protection afforded under the Directive is confined to legal proceedings about the unlawful acquisition use and disclosure of trade secrets. In particular, Article 9 lays down rules which apply to:

> *"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..."*

35. It follows the specific references in the text of Article 9(1) to *"legal proceedings relating to..."* and *"those legal proceedings"* that the preservation of confidentiality measures set out therein apply only to the identified persons ***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*** (Commission emphasis).

36. This reading is also supported by the text of Article 9(2) of the Directive, which relates to the measures to be taken to preserve the confidentiality to trade secrets or alleged trade secrets *"used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret"*.

37. Even if it were not already apparent from the text of Article 9 that the preservation measures apply only to such disputes, Article 9 should not to be taken outside the context to which it is applies or considered in isolation. A systematic reading of the provisions of the Directive clearly establishes that trade secrets are protected under the Directive only against an unlawful activity related to the acquisition, use and disclosure trade secrets, and that the rules in Article 9 apply only to such disputes. Hence, the Trade Secrets Directive does not apply to legal proceedings whose subject matter is not the use, acquisition and disclosure of trade secrets, as confirmed by the Grand Chamber of the Court of Justice in its *Klaipėdos regiono atliekų tvarkymo centras UAB* judgement.

38. Certain other provisions of the Directive lend further support to the conclusion that disputes in other areas of law remain unaffected by the Trade Secrets Directive.

39. For example, Article 3(2) has already been relied upon by the Grand Chamber at paragraph 100 of its judgment.

40. In addition, Article 1(2)(b) expressly provides that the Directive shall not affect *"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 or judicial authorities for the performance of the duties of those authorities."* The effect of this provision is that outside the scope of this Directive, the application of Union (EEA) or national rules which require disclosure of trade secrets to, inter alia,

judicial authorities in disputes pertaining to those rules, remain unaffected by the specific rules laid down in the Trade Secrets Directive.

41. Moreover, Recital 38 of the Trade Secrets Directive states that that 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')*".

42. Finally, Recital 39 adds that the same Directive *"should not affect the application of any other relevant law in other areas"*.

43. For the avoidance of doubt, in relation to the defendant's argument that under Norwegian law, the Directive is given broader scope than what is required under the Directive, the Commission would comment as follows.

44. The scope of the Trade Secrets Directive is confined to civil redress and measures about the litigation of trade secrets as such namely the unlawful acquisition, use and disclosure of trade secrets and court (legal) proceedings related to such litigation. Article 1(1), first subparagraph of the Directive allows EEA States to provide for more far reaching protection but only for acts within the scope of the Directive and in compliance with EEA law and particular provisions of the Directive itself. Therefore, should EEA States choose to provide for more far reaching protection, they must nevertheless remain within the scope of the Directive. If the Norwegian legislation also applies to other types of proceedings which do not concern the unlawful acquisition, use and disclosure of trade secrets but where trade secrets are invoked by any person, then that is of a *different* scope to that required by the Directive and is not a matter of implementation of the Directive[5].

45. Therefore, the discretion provided for in Article 1(1) does not affect the conclusion that the scope of the Directive does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings as confirmed by the Court. The Trade Secrets Directive does not permit a broader scope. Låssenteret's submission is correct that the Trade Secrets Directive does not *apply* to the present dispute, as the Directive

---

[5] https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf For a description of trade secrets in other types of litigation such as patent, tax etc.

would only cover legal disputes in which the subject matter of that dispute is the acquisition or use of acquired trade secrets.

46. In conclusion, the Trade Secrets 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 concerning an alleged abuse of a dominant position against Article 54 of the EEA Agreement, 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.

4.3. Question 2: The interpretation of the last sentence of Article 9(2) of the Trade Secrets Directive

47. In the light of the reply to Question 1, there is no need to reply to question 2.

4.4. Question 3: On whether the last sentence of Article 9(2) of the Directive express a general EEA principle

48. Without prejudice to the position the Commission has taken for Question 1 and 2, Question 3 is horizontal in scope as it asks about a general EEA principle, and therefore, the Commission will propose a reply.

49. The Commission understands the question as asking whether the specificity of the rule in the last sentence of Article 9(2) reflects a general principle of EEA law. Apart from the general principles of law which are now expressly set out in the EU Treaties, notably Article 6 of the Treaty on European Union, the notion of what constitutes a "general principle" of Union (EEA) law has developed in the case law over time where they *"result from the constitutional traditions common to the Member States"*. Whilst the last sentence of Article 9(2) does refer to *"compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial"* and together with the overall objective of protecting trade secrets, these would reflect general principles of EU (EEA) law but not the specific rules set out therein.

50. Therefore, the *de minimis* requirement of a number of persons *"no greater than necessary"* and *"at least one natural person"* etc, in the last sentence of Article 9(2), of the Directive should not be regarded as an expression of a general EEA principle. Rather, in the context of the adoption of measures to preserve the confidentiality of trade secrets

in the course of legal proceedings related to the unlawful acquisition, use or disclosure of trade secrets, such a rule merely provides a *de minimis* threshold for the persons present to whom any trade secrets would be divulged during the legal proceedings about the trade secrets themselves given the open nature of court proceedings. As noted in the Report on the Implementation of the Directive prepared for the Commission *"Article 9 seeks to address the paradox that trade secrets remain valuable and protectable if they are secret and yet court proceedings are inevitably open and public in nature. Thus, a trade secret holder who litigates will inevitably destroy their trade secret by revealing it during court proceedings"*[6].

51. In other words, this is a rule that the European Union legislator enacted for the specific setting of having to disclose trade secrets in the course of legal proceedings related to the unlawful acquisition, use or disclosure of trade secrets, and there is no indication that such a rule reflects a European Union (EEA) law principle requiring European Union or EEA courts to resort to such measure either in the context of legal proceedings falling within the material scope of the Directive or for other types of legal proceedings.

52. In light of the above, the requirement laid down in the last sentence of Article 9(2) of the Trade Secrets Directive should not be regarded as an expression of a general EEA principle.

4.5. Question 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?

53. The Commission considers that the fact that some of the documents requested to be disclosed to a claimant in a dispute such as that in the main proceedings can be regarded as competitively sensitive vis-à-vis the claimant has no bearing on the answers to questions 1 to 3.

54. The classification of evidence as competitively sensitive only indicates that such items may call for confidential treatment.

---

[6] Page 24 European Commission, European Innovation Council and SMEs Executive Agency, Radauer, A., Bader, M., Aplin, T. et al., *Study on the legal protection of trade secrets in the context of the data economy – Final report*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2826/021443

55. It is for the Requesting Court to take into account the competitively sensitive nature of the different information whose disclosure has been requested by the claimant as part of its weighing up exercise to determine, first, if such information is relevant to allow the claimant to defend its legal position, and second, to order the requisite measures to preserve the confidentiality of such competitively sensitive materials.

4.6. Question 5: In a case involving an 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?

56. Question 5 concerns EEA primary law and in particular Article 54 of the EEA Agreement. The right to an effective remedy for breaches of the competition rules of the EEA agreement is governed by EEA law, since the right to an effective remedy, including the right to claim damages, stems directly from Article 53 and 54 of the EEA Agreement, as both provisions are an integral part of Norway's domestic laws[7]. The EFTA Court has previously ruled that it is possible for an individual, in an action before a national court, to rely upon those rules[8]. The Commission considers that the full effectiveness of Article 54 of the EEA Agreement would be jeopardised if it were not open to an individual to claim damages for loss caused by conduct liable to restrict or distort competition, and that national courts must ensure that the competition provisions take full effect and that the rights conferred on individuals are protected[9].

57. Accordingly, the Commission submits that neither Article 54 of the EEA Agreement nor any principle under EEA law, including the principle of effectiveness, requires a national court to order the party alleged to have infringed the competition rules of the EEA Agreement to disclose evidence constituting trade secrets without that court having to weigh up beforehand the parties' interests.

---

[7] Judgment of the EFTA Court of 30 May 2018, E-6/17, *Fjarspipti*, paragraphs 25-26, and 28. See also by analogy judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 28 and the case-law cited.

[8] Judgment of the EFTA Court of 30 May 2018, E-6/17, *Fjarspipti*, paragraph 26.

[9] Judgment of the EFTA Court of 30 May 2018, E-6/17, *Fjarspipti*, paragraph 29.

58. On the contrary, for the reasons set out below, in exercising their powers for the purpose of applying national rules on the right of access to evidence deemed trade secrets by persons believing themselves to be adversely affected by an alleged abuse of a dominant position, national courts must weigh up the respective interests in favour of disclosure of trade secrets and in favour of the protection of that information in order to determine, first, whether or not the specific trade secrets whose disclosure is requested by the claimant are relevant for the claimant to exercise its rights to claim damages, and second, whether such disclosure should be accompanied by protection measures to ensure their confidentiality. Therefore, this balancing does not require that a request for disclosure be either allowed *in totum* or simply refused. Instead, national courts should ponder the relevance of the specific material containing trade secrets whose disclosure is requested and, if necessary, adopt mechanisms for restricted disclosure, such as confidentiality rings or *in camera* hearings, that strike a balance between the respective interests in disclosing certain information and protecting its confidentiality.

59. **First**, accepting that a national court could order the disclosure of trade secrets without prior weighing up the interests of the parties would go beyond what is necessary to ensure an effective application of Article 54 of the EEA Agreement, as there can be trade secrets that may be unnecessary for a claimant to prepare and submit its lawsuit, including an action for damages.

60. **Second**, granting access to information constituting trade secrets without duly pondering the interests of the parties to the proceedings could lead to infringement of other rights conferred on the defendants. Such would be the case concerning the right to the protection of confidential information (including trade secrets) which, without prejudice of its recognition under Norwegian domestic law, is enshrined in Article 122 of the EEA Agreement[10] and find expression in various EEA rules and legal materials, such as in Chapters II and III of Protocol 4 to the Surveillance and Court Agreement, and the

[10] Which mirrors Article 339 of the TFEU.

Notice on the rules for access the EFTA Surveillance Authority file in cases pursuant to Articles 53, 54 and 57 of the EEA Agreement[11].

61. The Court of Justice has also consistently ruled that, while provisions aimed at the protection of business secrets deal with particular situations[12], *"they must be regarded as an expression of a general principle which applies during the course of an administrative proceedings"*[13], and that such a principle finds expression in Article 339 of the TFEU (the equivalent provision to Article 122 of the EEA Agreement)[14].

62. The Commission submits that, the protection of business secrets being a general principle of EEA law, it is also a principle which should inform the disclosure of trade secrets by national courts in proceedings for the private enforcement of EEA competition law, given that, as established in the settled case law of the Court of Justice, actions for damages for infringement of the European Union competition rules (private enforcement) are, along those to implement public enforcement, an *"integral part"* of the system for enforcement of those rules[15].

63. **Third**, by analogy, it is also relevant to bear in mind that the need to weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information also emerges from the case law of the Court of Justice in

---

[11] OJ 2016 C-250/16, section 3.2, developed in the "Explanatory note on business secrets and other confidential information" of the EFTA Surveillance Authority, available at https://www.eftasurv.int/competition/how-to-make-a-complaint

[12] That is the case under a number of provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003", OJ 2003 L 1/1), such as Article 14, paragraph 6, concerning the publication of the opinion of the Advisory Committee; Article 27, paragraph 2 concerning assess to the Commission's file; Article 27, paragraph 4 which provides for the publication of a concise summary when the Commission intends to adopt a decision under Article 9 or Article 10; and Article 30, paragraph 2 which provides for the publication of certain decisions. These four provisions of Regulation 1/2003 require the Commission to have regard to the legitimate interest of undertakings in the protection of their business secrets. In its Judgment of 24 June 1986, *Akzo Chemie* v *Commission*, C-53/85, EU:C:1986:256, paragraph 28, the Court of Justice, with reference to Article 19, paragraph 3 and Article 21 of former Regulation 17/62 (OJ 1962 L 13/204), equivalent to Article 27, paragraph 4 and Article 30, paragraph 2 of Regulation 1/2003, ruled that *"Business secrets are thus afforded very special protection."*

[13] Judgment of the Court of Justice of 24 June 1986, *Akzo Chemie* v *Commission*, C-53/85, EU:C:1986:256, paragraph 28; Judgment of the Court of Justice of 19 May 1994, *SEP* v *Commission*, C-36/92 P, EU:C:1994:205, paragraphs 36-37 Judgment of the Court of Justice of 14 February 2008, *Varec* v *Belgian State*, C-450/06, EU:C:2008:91, paragraph 49; Judgment of the Court of Justice of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 53.

[14] Judgment of the Court of Justice of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 53.

[15] Judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraphs 35-37 and case law cited.

cases where it had to adjudicate on the scope of the right to access to the Commission's files in competition law infringement proceedings[16]. In particular, the Court of Justice has held that Union law does not provide for a rule of generalised access under which any document relating to competition infringement proceedings must be disclosed to a party requesting it on the sole ground that that party is intending to bring an action for damages. The Court of Justice ruled that such unlimited access to the competition file is not necessary to ensure the effective protection of the right to compensation, as it is highly unlikely that the action for damages must be based on all of the evidence in the file relating to those proceedings[17].

64. The Court of Justice further explained that such a rule could lead to the infringement of other rights conferred by Union law on the undertakings concerned, such as the right to protection of professional secrecy or of business secrecy, or on the individuals concerned, such as the right to protection of personal data[18]. Lastly, the Court of Justice has acknowledged that generalised access to the competition file is also liable to adversely affect public interests, such as the effectiveness of anti-infringement policies in the area of competition law, because it could deter parties involved in infringements of Articles 101 TFEU and 102 TFEU from cooperating with the competition authorities[19]. This would also be the case if an undertaking which could be considered to have infringed the competition rules would be exposed to the risk of being forced to disclose trade secrets in the context of a private antitrust action.

65. In view of the foregoing, the Commission considers that, specifically in the area of competition law, it follows from EEA law, including the principle of effectiveness, that **the Contracting Parties must ensure that the rules which they establish or apply in** pursuance of the principle of national procedural autonomy do not jeopardise the

---

[16] Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 30; Judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 30.

[17] See also Judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 33.

[18] *Donau Chimie*, paragraph 33.

[19] *Donau Chimie*, paragraph 33.

effective application of, among others, competition law provisions, including Article 54 of the EEA Agreement[20].

66. It will be for the Requesting Court to assess whether the Norwegian procedural rules applicable in the main proceedings respect the requirements of equivalence and effectiveness, assessing, in particular in that context, whether those rules jeopardise the effective application of Article 54 of the EEA Agreement. In that regard, it should be borne in mind that, for the reasons explained in the previous paragraphs, an interpretation of those 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, appears liable to undermine the effective application of Article 54 of the EEA Agreement and the rights that that provision confers on individuals and undertakings[21]. At the same time, an interpretation of national rules as providing access to any documents containing trade secrets appears incompatible with EEA law as it will be beyond what is necessary to ensure the effective application of Article 54 of the EEA Agreement, including beyond the right to compensation conferred by EEA law on parties adversely affected by an infringement of the competition rules of the EEA Agreement[22].

67. In conclusion, the Commission considers that 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.

---

[20] Judgment of the EFTA Court of 17 September 2018, *Nye Kystlink*, paragraph 73 *in fine*. See also, by analogy, Judgments of 7 December 2010, *VEBIC*, C-439/08, EU:C:2010:739, paragraph 57, of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 24; of 6 June 2013, *Donau Chemie and Others*, C 536/11, EU:C:2013:366, paragraph 27, of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 26; of 20 January 2016, *DHL Express [Italy] und DHL Global Forwarding [Italy]*, C 428/14, EU:C:2016:27, paragraph 78; of 21 January 2021, *Whiteland Import Export*, C 308/19, EU:C:2021:47, paragraphs 46-47, as well as of 10. November 2022, *Zenith Media Communications*, C-385/21, EU:C:2022:866, paragraph 34.

[21] See, by analogy, Judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 31.

[22] See, by analogy, Judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraphs 31-32.

4.7. Question 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?

68. Article 7 of the EEA Agreement foresees that only acts referred to or contained in the Annexes to the Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties.

69. The Commission notes that the Damages Directive has not been incorporated into de EEA Agreement and, therefore, there is no obligation for Norway to implement in its internal legal order the provisions of the Damages Directive, including the rules on disclosure of evidence laid down in its Article 5[23]. Hence, without prejudice of the Commission's observations concerning Question 5, the Commission considers that neither the principle of effectiveness nor any other principle under EEA law requires that Norwegian procedural law be interpreted in accordance with Article 5 of the Damages Directive.

5. CONCLUSION

For the reasons set out above, the Commission respectfully submits that the questions should 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.*

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.*

---

[23] Judgment of the EFTA Court of 17 September 2018, *Nye Kystlink*, paragraph 73.

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.*

Julie SAMNADDA
Sergio BACHES OPI

Paul-John LOEWENTHAL
Pedro CARO DE SOUSA

Agents of the Commission