28 November 2023

WRITTEN OBSERVATIONS

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

---

LÅSSENTERET AS

represented by

Peter Hallsteinsen and Henrik Nordling

IN CASE E-11/23

Låssenteret AS

v

Assa Abloy Opening Solutions Norway AS

CMS Kluge Advokatfirma AS

Bryggegata 6

Postboks 1548 Vika

NO-0117 Oslo, Norway

TABLE OF CONTENTS

1. INTRODUCTION

1. This case presents the Court with the issue of whether and how a claimant for private enforcement of Article 54 EEA should be given access to evidence held by the defendant.

2. Efficient enforcement of the EEA competition rules depends both on private and public enforcement. As this Court held in *Color Line*, private enforcement of Article 54 EEA 'ought to be encouraged as it can make a significant contribution to the maintenance of effective competition in the EEA'.[1] A point the CJEU recently echoed, stating that private enforcement is 'an integral part'[2] of competition enforcement that not only works to prevent anticompetitive conduct, but also provides a remedy both for the damage suffered by the claimant as well as the harm caused to the structure of the market.[3]

3. National courts are thus instrumental in ensuring efficient enforcement of the EEA competition provisions. To this end, private enforcement must provide parties with a fair and reasonable opportunity to try their case before the ordinary courts.

4. To establish an infringement of Article 54 EEA, a claimant must demonstrate the anticompetitive nature of the conduct in question by adducing evidence to the requisite standard of proof. Gaining access to necessary evidence is thus vital. However, most of the information required is held by the defendant, or by third parties. Such structural information asymmetries are common in competition cases.

5. As the present case illustrates, it is often difficult for claimants to obtain crucial resources needed to build a compelling case. As a result, private enforcement has been limited in general, and almost non-existent in '*stand-alone*' claims which are not based on a decision by a competition authority – such as the present case.

6. Låssenteret AS' ("***Låssenteret***") cause of action relates to an abuse of dominance by Assa Abloy Opening Solutions AS ("***AAOS***") stemming, essentially, from the termination of its licensing agreements and the harm this continues to cause. Låssenteret primarily seeks the reinstatement of these agreements, putting it (back) on equal footing with its competitors. The primary remedy is thus an equitable one, with a secondary claim for damages.

7. However, Låssenteret's attempts to prove an abuse of dominance were frustrated by an incorrect application of Directive 2016/943 (the Trade Secrets Directive or "***TSD***") and an insufficient proportionality assessment, denying access to <u>any</u> evidence held by AAOS.

---

1 Judgment of 17 September 2018, *Nye Kystlink AS v Color Group AS and Color Line AS*, E-10/17, para 72.
2 Judgment of 6 October 2021, *Sumal*, C-882/19, ECLI:EU:C:2021:800, para 37.
3 Judgment of 10 November 2022, *PACCAR*, C-163/21, ECLI:EU:C:2022:863, para 56.

8. Låssenteret considers that this amounts to an infringement of fundamental principles of EEA law – especially the principle of effectiveness. Indeed, the underlying rationale for the established EU jurisprudence is that access to evidence should, as a rule, be granted, albeit with appropriate mechanisms in place to protect the confidentiality of such information.

9. It follows from the request an advisory opinion (***"the Request"***), that the referring court seeks guidance from this Court on how to decide the pending proceedings on access to evidence in accordance with EEA law.

10. The Request thus provides an opportunity for this Court to detail the requirements under EEA law as regards access to confidential evidence in competition cases. Such guidance could be beneficial for private enforcement in the entire internal market, going far beyond the confines of the pending case.

11. If following the advisory opinion the results the national court of first instance arrived at – namely that no access to evidence at all is granted – would be repeated also by the referring court, this would be a serious blow to private enforcement in the EEA.

2. FACTUAL BACKGROUND

12. The facts and background are set out concisely in the Request. Nevertheless, Låssenteret will provide a few background elements which illustrate the necessity of the disclosure requests.

2.1 The products involved and the licencing agreements used by AAOS

13. A mechanical locking system consists of multiple components put together in a configuration which usually relates to an entire building or complex. The configuration is documented in a 'system archive'.

14. These systems have a long service life, often up to 30 years. Purchasing and installing a locking system is a significant investment, and not something that is often replaced. Instead, locking systems are regularly maintained and serviced.

15. AAOS is a leading provider – and in Låssenteret's view a *dominant* provider – of, amongst others, mechanical locking systems in Norway, both for new installations but also the existing installed base. A third-party analysis conducted in the summer of 2023 shows that AAOS accounts for approximately 70% of installed cylinder locks in office buildings in the central areas of Norway's seven largest cities.[4]

---

[4] Oslo Economics, *Analysis of cylinder locks in commercial and public buildings*, 26 July 2023, included as Annex I. Analysis of 1 543 unique cylinder locks in commercial and public buildings shows that AAOS is the manufacturer with the highest share, accounting for a total share of 70 percent.

16. In order to sell AAOS locking systems, a locksmith needs a dealer agreement with AAOS, which regulates prices, support, training and delivery times. To manufacture a locking system, a locksmith also needs a license from AAOS. This gives the right to retrieve parts and code information for AAOS systems. These licenses effectively govern who is allowed to build, deliver, service and upgrade new and existing AAOS systems.

17. Without a license, a locksmith cannot manufacture AAOS systems. All production and construction of new locking systems, and to a large extent extensions and maintenance of existing locking systems, must then be carried out centrally by AAOS and subsequently installed by the non-licenced locksmith. This leads to longer delivery times and a higher price for the end customer.

18. Holding an AAOS license is thus a pre-requisite for Norwegian locksmiths. Without it, locksmiths are cut off from serving the most significant part of the market.

19. AAOS has the following types of agreement in place in the locksmith segment:

20. *TrioVing Security Center ('TVSS')*: a dealer concept consisting of locksmiths who are dealers and are licensed to build AAOS mechanical locking systems. TVSS Dealers get the very best terms and conditions, including on price, extensive product training, support etc.

21. *Licensed locksmith ('LLS')*: LLS dealers have lower discounts than TVSS dealers, but essentially the same license rights. LLS dealers get less freedom of choice for the types of locking systems they can supply.

22. *Locksmith without a license ('LS')*: LS cannot build their own locking systems, but only sell ready-made and installed locking systems, including AAOS systems. LS cannot service or install new cylinders on existing AAOS systems. Such subsequent deliveries must be made by or through AAOS.

2.2 Background to the Dispute

23. In the period 2017 to 2019, Låssenteret was a key customer and partner of AAOS. Their collaboration was regulated through TVSS and LLS agreements entered into between AAOS and each of the Låssenteret's local departments.

24. However, there was a gradual breakdown in the relationship between Låssenteret and AAOS. There is undoubtedly a personal conflict between the CEO of AAOS, Pål Mathiesen, and Ståle Raa, Låssenteret's founder and CEO. It was due to 'a demanding collaborative environment' that AAOS terminated the TVSS agreement with Låssenteret. Subsequently, AAOS terminated Låssenteret's LLS agreements, forcing Låssenteret to relinquish all its

system archives and spare parts to AAOS. As a substitute, Låssenteret was given a maintenance agreement which was, effectively, imposed by AAOS (all of Låssenteret's revisions were rejected).

25. Since then, whenever Låssenteret has acquired a local locksmith with full TVSS and LLS rights, AAOS' response has been to immediately terminate this locksmith's agreements.

26. For example, on 5 April 2021, Låssenteret announced the acquisition of Thermoglass (a locksmith in northern Norway). Two days later, on 7 April 2021, AAOS informed Thermoglass that its license agreements would be terminated. Thermoglass immediately contacted AAOS and inquired about the background for this. AAOS feedback was that 'AAOS does not wish to cooperate with companies owned by Ståle Raa' and the reason for the dismissal was Mr. Raa's 'unfriendly actions towards the group over several years'. According to AAOS, the fact that Låssenteret could have been a large customer was not relevant, as AAOS 'are business people, not prostitutes'.

27. What AAOS communication shows is that Låssenteret's differentiated treatment is not justified by costs or other efficiency gains. Rather, it is purely subjective behaviour which can be afforded only by virtue of the market position AAOS enjoys.

28. As a result, AAOS' termination of Låssenteret's TVSS and LLS agreements has restricted Låssenteret's ability to compete effectively.

29. First, Låssenteret is stripped of the terms and conditions it previously had on an equal footing with its competitors (all of which are TVSS and LSS-licensed). This makes it challenging for Låssenteret to win tenders and other assignments.

30. Second, Låssenteret cannot submit competitive offers in projects linked to extensions and/or maintenance of installed AAOS systems, as it is in practice necessary to have a license from AAOS to perform in line with customer expectations.

31. Third, the termination means that Låssenteret is cut off from expanding and maintaining installed AAOS systems for its own customers, as Låssenteret is no longer licensed to handle AAOS products other than at the lowest level.

32. Fourth, Låssenteret loses customers more directly, in that AAOS has both explicitly and implicitly, in several cases, discouraged customers from cooperating with the Låssenteret.

2.3 Låssenteret's reaction and efforts to obtain relief

33. Against this background, Låssenteret initially contacted the Norwegian Competition Authority with its concerns. However, the Authority adopted a prioritisation decision that it

could not allocate resources to the case and did not pursue it. Left with no other choice, Låssenteret filed a claim before the Søndre Follo District Court ("***SFDC***").

34. In order to build its case, Låssenteret requires access to information held by AAOS. This notably includes the agreements which AAOS has in place with other locksmiths, in order to demonstrate abusive discrimination and differential treatment.

35. To this end, Låssenteret submitted 17 specific disclosure requests as detailed in the Request. AAOS made every effort to notdisclose these documents, stressing that their confidential nature was such as to render them impossible to communicate in light of the damage it would cause to AAOS' interests.

36. To accommodate this, Låssenteret suggested a number of different mechanisms through which evidence could be provided. This included redactions, holding *in camera* hearings and different types of confidentiality rings (as is also detailed in the Request). Each of whic was rejected by AAOS.

37. To be clear, Låssenteret is indifferent as to *which* arrangement is put in to place to obtain access to evidence. It does not have to be a confidentiality ring – even though this seems most appropriate. The point is that Låssenteret, as it stands, has no access to any evidence. Obtaining at least *some* access would be magnitudes better than *none*.[5]

38. Låssenteret also agrees with AAOS that not 'each and every operator who so requests is to be granted access to competitively-sensitive information'.[6] However, Låssenteret is not *just another operator* on – borrowing a term eagerly used by AAOS – a 'fishing expedition'. Låssenteret is pursuing its legitimate right to seek relief from a violation of EEA law, a principle enshrined and protected by the jurisprudence of this Court. With this principle follows a right to gain access to evidence needed to bring a private enforcement claim. This right rests high within the hierarchy of a proportionality assessment. Only in exceptional circumstances will the confidential nature of a document be such as to hinder its disclosure absolutely.

39. Rather, as will be shown, the question is not *if*, but *how* access to the requested evidence can be provided.

---

5 In fact, the only evidence that the SFDC ordered to be disclosed was the correspondence between Låssenteret and the Norwegian Competition Authority. It is a peculiar outcome that, in an action for private damages, the only evidence to which access is granted is the claimant's own correspondence with a competition authority.

6 Request, page 7.

3. LEGAL FRAMEWORK

40. Låssenteret will in the following list the most relevant legal provisions for the Request. Additional references, in particular to pertinent recitals, are provided in the subsequent parts of the submission.

3.1 EEA law

41. The most central provision of the TSD reads:

> Article 9 - Preservation of confidentiality of trade secrets in the course of legal proceedings
>
> 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; [...]
>
> 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.

42. The most central provisions of the Directive 2014/104/EU (the ***"Damages Directive"***) read:

> Article 5 - Disclosure of evidence
>
> 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.

3.2 National Law

The TSD has been implemented in Norway mainly through the Act on Trade Secrets (*forretningshemmelighetsloven*). The Act implements the TSD more or less verbatim with regard to most of its provisions. Its Article 9(2), however, has been implemented mainly in the Dispute Act (*tvisteloven*), and specifically, its Section 22. An inhouse translation of the relevant provisions for access to confidential information/trade secrets in the Dispute Act is reproduced in the following:

> Section 22-10. Exemption for evidence of trade or business secrets
>
> 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.
>
> Section 22-12. Confidentiality and *in camera* hearings
>
> (3) When the evidence referred to in § 22-10 is provided 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*. [..]

43. As is apparent from the foregoing, most of the wording of Article 9(2), and specifically its last sentence, has not been reproduced in the Norwegian implementation of the TSD.

4. LEGAL ANALYSIS

4.1 Introduction

44. The Request concerns, in essence, three issues:

    i. Questions 1 to 4 relate to the significance of the TSD and specifically its Article 9(2) for the pending case and confidentiality rings more generally.

    ii. Question 5 pertains to EEA law, and in particular the principle of effectiveness, requirements as regards access to evidence in competition cases.

    iii. Question 6 asks whether national law must be interpreted in accordance with Article 5 of the Damages Directive.

45. Låssenteret will address these issues and the six Questions in chronological order in the following. Given that there is a significant thematic overlap between several questions, Låssenteret kindly asks that the Court takes into account the full body of this submission when considering each of the Questions.

46. Contrary to what AAOS appears to suggest, Låssenteret does *not* contend that Norwegian procedural law and specifically Section 22 of the Dispute Act conflicts with EEA law generally.

47. However, given that provision's brevity, and the discretion it bestows upon national courts, there is a real risk of national procedural law being *applied* in a manner incompatible with EEA law, as the pending case illustrates. Indeed, this is in contrast to the position of AAOS which considers that EEA law 'does not place any limitations on the discretion exercised by national courts in that weighing up exercise'.[7]

48. The advisory opinion of the EFTA Court will thus be critical to ensure an application of national procedural law in compliance with EEA law in disputes on access to evidence.

4.2 Questions 1-4: The Trade Secrets Directive is irrelevant for assessing requests for access to evidence in competition cases

4.2.1 Introduction

49. The present case deals with a *stand-alone* application of Article 54 EEA and is one of the first of its kind in Norway. It falls squarely within the field of private enforcement of competition law.

---

[7] Request, page 7.

50. In contrast, the TSD provides for rules at Union level to ensure that there is a sufficient and consistent level of civil redress in the event of **unlawful** acquisition, use or disclosure of a trade secret.[8] It was adopted, notably, because innovative business are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, copying and espionage.[9] Just by glancing through the recitals of the TSD it becomes readily apparent that it is aimed at situations and proceedings wholly different to those in the present case. The present case does not, for instance, 'compromise a legitimate trade secret holders ability to obtain first-mover returns from their innovation-related efforts' which is what the TSD seeks to prevent.[10]

51. Solely in view of the foregoing, it was surprising that the TSD was applied by the SFDC (with no prior contradiction by the parties). That this instrument was used to deny *all* of Låssenteret's disclosure requests is not only regrettable but, as will be shown, a clear misapplication.

52. First, the case manifestly falls outside of the TSDs material scope.

53. Second, the disclosure requests do not, at least not primarily, relate to *trade secrets* in the meaning of the TSD, but rather to *confidential information*, which is a broader concept – one which the English translation of the Request fails to reflect.

54. Third, the confidentiality ring proposed by Låssenteret, where Låssenteret would only be represented by its external advisers, is in any event in full conformity with both the TSD and its Article 9(2), and EEA law in general.

55. Fourth, the suggested confidentiality ring is also the most proportionate means of respecting, *on the one hand*, the legitimate and effective enforcement of Article 54 EEA including access to relevant evidence held by the defendant, and, *on the other hand*, the legitimate interest of preserving the confidentiality of potentially competitively sensitive information, and the right to a fair trial.

56. Låssenteret will first elaborate on the second issue, namely the difference in scope and material content between *trade secrets* in the meaning of the TSD, and *confidential information*, before addressing the remaining points in relation to Questions 1-4 of the Request.

---

8 Recital (10) TSD.
9 Recital (4) TSD.
10 Recital (4) TSD.

4.2.2 Not all *confidential information* constitutes *trade secrets* within the meaning of the TSD

57. This case is fundamentally about access to evidence, relevant and most likely necessary to substantiate AAOS' infringement of Article 54 EEA.

58. As is clearly stated in the Request, Låssenteret's disclosure requests encompassed specified categories of documents, defined with regards to their material and temporal scope. Låssenteret considers it probable that most, if not *all*, of the evidence requested amounts to *confidential information*. However, it is unlikely that much, if *any*, of this evidence can be considered a *trade secret* in the meaning of the TSD.

59. When the Request states that 'the parties agree, and there appear to be no doubt, that the abovementioned evidence contains trade secrets'[11] (emphasis added), this is quite simply not true. Rather, it is an unfortunate consequence of the English translation. To be clear, Låssenteret does not consider, that the evidence requested contains *trade secrets* in the meaning of the TSD.

60. Låssenteret therefore approached the EFTA Court's registrar immediately after the Request was transmitted, as the English translation of the Request does not correctly distinguish between these two different concepts. Låssenteret encloses the letter sent to the registrar as Annex II to this submission.

61. There can be no doubt that the terms 'trade secret' and 'confidential information' *are* concepts with a materially different rationale, content and scope.

62. First, 'trade secret' is a defined term with an autonomous meaning under EEA law.

63. To enable the TSD to establish the framework and fulfil the purpose for which it was adopted – which, again, is entirely distinct from that of the present proceedings – it was 'important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation'.[12] As such, Article 1(1) of the TSD defines 'trade secrets' as follows:

> (1) 'trade secret' means information which meets all of the following requirements:
>
> (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
>
> (b) it has commercial value because it is secret;
>
> (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

[11] Request, page 4.
[12] Recital (14) TSD.

64. Conceptually, the notion of a 'trade secret' is based on the WTO's TRIPS agreement, which relates to the protection of intellectual property, as evidenced by Recital (5) of the TSD. Indeed, according to Article 39.2 of the TRIPS Agreement, information that is secret, has commercial value because it is secret and that has been subject to reasonable steps to keep it secret, needs to be protected.

65. Conversely, the term 'confidential information' is not *de jure* defined in EEA law, and encompasses a broad category of information. Instead, CJEU jurisprudence has consistently held that three cumulative conditions must be met in order to qualify as confidential information:[13]

(i) it is known only to a limited number of persons; and

(ii) its disclosure is liable to cause serious harm to the person who provided it or to third parties; and

(iii) the interests liable to be harmed by the disclosure of confidential information are, objectively, worthy of protection.

66. A comparison of the notion of confidential information as provided in the foregoing with the definition in Article 1(1) of the TSD immediately reveals that the former is a much broader concept.

67. Second, these two concepts have different legal protections.

68. *On the one hand,* with regards to 'trade secrets', these are afforded distinct protection by the way of *lex specialis* provisions.

69. A 'trade secret' is a defined category of information that is afforded distinct protection through the TSD. It is only with regards to 'trade secrets', as defined in Article 1(1) TSD, that 'trade secret' *holders* are entitled to apply for the measures, procedure and remedies provided for in the TSD.[14] Thus, whether information amounts to a 'trade secret' under the TSD is a determination with important consequences under the EEA legal order. Harmonised EEA protection is *only* bestowed upon 'trade secrets' under the TSD.[15]

70. *On the other hand,* with regards to 'confidential information', this information only derives protection on a *lex generalis* basis.

---

[13] Judgment of 30 May 2006, *Bank Austria* v *Commission*, T-198/03, EU:T:2006:136, para 71; judgment of the General Court of 8 November 2011, *Idromacchine* v *Commission*, Case T-88/09, EU:T:2011:641, para 45; judgment of 28 January 2015, *Akzo Nobel and Others* v *Commission*, Case T-345/12, EU:T:2015:50, para 65; and judgment of 14 March 2017, *Evonik Degussa* v *Commission*, Case C-162/15 P, EU:C:2017:205, para 107.

[14] Article 4(1) TSD.

[15] See also Recital (8) TSD which explains that 'The differences in the legal protection of trade secrets provided for by the Member States imply that trade secrets do not enjoy an equivalent level of protection throughout the Union, thus leading to fragmentation of the internal market in this area and a weakening of the overall deterrent effect of the relevant rules.'

71. It is uncontested that the protection of business secrets and other confidential information is a general principle of EEA law. Yet this only affords protection to confidential information insofar as it is not outweighed by other overriding principles of EEA law. This will be examined at length from various angles in this submission. Notably, the right to seek relief from a violation Article 54 EEA will trump a general right to protection of confidential information in almost all situations.

72. Third, the necessary distinction between these terms is supported by both the CJEU and the Commission.

73. In *Antea Polska* the CJEU held that the notion of 'trade secret' in the sense of the TSD is much narrower than the concept of 'confidential information':[16]

> It is true that the concept of 'trade secret', as defined in Article 2(1) of Directive 2016/943, or in a corresponding provision of national law, overlaps only in part with the words 'information forwarded to it … designated as confidential' contained in Article 21(1) of Directive 2014/24. According to the very wording of that provision, the information referred to therein includes 'but [is] not limited to, technical or trade secrets and the confidential aspects of tenders' which indicates, as the Advocate General noted in points 34 and 35 of his Opinion, that the scope of the protection of confidentiality set out in Directive 2014/24 is broader than that of protection covering trade secrets alone. The Court has, moreover, already held that the rules on the unlawful acquisition, use or disclosure of trade secrets, within the meaning of Directive 2016/943, do not release public authorities from the confidentiality obligations which may arise under Directive 2014/24.

74. The present case concerns, at its core, access to evidence containing *confidential information*. This situation is by no means unique. To facilitate such proceedings, the European Commission has issued guidance in its Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (the "***Confidentiality Communication***")[17]. There the Commission refers to 'confidential information', which encompasses business secrets and other confidential information.[18] Moreover, the Communication explicitly states that the 'trade secrets', in the sense of the TSD, are a sub-category of 'confidential information'.[19]

75. Indeed, the term 'trade secrets' is glaringly absent from the entire corpus of antitrust legislation developed by the EU. In the EU compendium of antitrust enforcement, which runs to 284 pages, 'trade secrets' is not mentioned a single time.[20] Other than the brief

---

[16] Judgment of 17 November 2022, *ANTEA POLSKA*, C-54/21, ECLI:EU:C:2022:888, para 55.

[17] EU Commission, *Communication on the protection of confidential information by national courts in proceedings for private enforcement of EU competition law*, 2020/C 242/01.

[18] *Ibid*, para 18.

[19] *Ibid*, para 24.

[20] EU Commission, *Rules Applicable to Antitrust Enforcement, Volume 1: General Rules*, available on the following link.

mention above in the Confidentiality Communication, the term 'trade secret' and the TSD have been given no consideration in EEA competition rules. Yet, in the SFDCs decision, this secondary legislation has been interpreted and applied to effectively curtail the private enforcement of EEA competition rules.

76. In view of the foregoing, Låssenteret considers that this Court should, in its answer to the Request, clearly distinguish between 'trade secrets' and 'confidential information'.

4.2.3 Question 1: The TSD applies only to disputes regarding unlawfully acquired trade secrets

77. The background to this Question is that the SFDC had considered that the confidentiality ring proposed by Låssenteret would be in conflict with the TSD, specifically Article 9(2) thereof, even though the pending case concerns the private enforcement of competition rules and therefore falls outside the TSD's material scope.

78. First, as has been detailed in Section 4.2.2 above, the TSD relates to proceedings which are entirely different from private enforcement of competition law.

79. This is a point which the CJEU recently confirmed in *Klaipèdos*, which related to whether the rules in the TSD can be applied to other proceedings, and more specifically public procurement. This was answered in the negative (emphasis added): [21]

> 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.

80. The CJEU has thus clarified the limited material scope of the TSD. It stands to reasons that this conclusion applies to the private enforcement of competition law as well.

81. Second, the express purpose of the TSD clearly limits its scope to the unlawful acquisition, use or disclosure of 'trade secrets', but is without prejudice to lawful acquisition, use and *disclosure* of trade secrets, required or allowed by EU or national law.

82. Indeed, Article 1(1) of the TSD provides that '[t]his Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets'. Thus, the wording of the TSD makes clear that its scope is limited to cases which are marked by the unlawful appropriation of a trade secret. This textual interpretation is also supported by the recitals to the TSD and the entire legislative procedure.

83. The TSD does not apply to situations where trades secrets are acquired or disclosed lawfully. Indeed, it is explicitly stated that the acquisition, use or disclosure of trade secrets, 'whenever

[21] Judgment of 7 September 2021, *Klaipėdos*, C-927/19, EU:C:2021:700, paras 97-100.

imposed or permitted by law, should be treated as lawful for the purposes of this Directive'.[22] This principle is also enshrined in Article 3(2) TSD.

84. There can be no doubt that, under Section 22 of the Disputes Act, a Norwegian court *can* order the disclosure of information necessary for the applicant to prove its case. This is also a principle which is enshrined in EEA law as will be further detailed in Section 4.3. Any evidence so received – and so far none has been provided – would then be legally disclosed by AAOS and legally acquired by Låssenteret (albeit for limited use).

85. Any disclosure ordered by the national court in the present case would then necessarily be lawful. Låssenteret's requested disclosures are, as will be seen, required, and at the very least *allowed* under EEA law. Accordingly, the TSD is irrelevant for the proceedings as it would in any event not concern unlawful appropriation of trade secrets.

86. Third, applying the TSD to the private enforcement of competition law would go well beyond its narrow scope and clearly be *ultra vires*.

87. Recital (38) of the TSD provides that it 'should not affect the application of competition law rules, in particular Articles 101 and 102 [TFEU].'

88. Were the TSD to be construed as an obstacle to disclosure of relevant evidence in proceedings concerning Article 54 EEA, it would, demonstrably, affect the application of competition rules. Such an application would thus go well beyond the scope of the TSD and create an untenable situation of encroachment on neighbouring EEA rights.

89. Fourth, and finally, the TSD only applies to 'trade secrets'. As mentioned in the introductory Section above, the present case is about access to 'confidential information', not (necessarily) trade secrets.

90. In the light of the foregoing, Låssenteret urges the Court to cut through the fog that has risen around the relevance of the TSD and to clarify that the TSD does not apply.

91. Låssenteret therefore proposes that Question 1 is answered as follows:

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.

[22] Recital (18) TSD.

4.2.4 Question 2: The suggested confidentiality ring is in compliance with the TSD

92. In essence, the national court is seeking guidance on whether the confidentiality ring proposed by Låssenteret is consistent with Article 9(2) TSD.

93. First, prior to delving into the legal analysis, note that Låssenteret has already suggested a confidentiality ring that includes a natural person representative.

94. As detailed in the Request, Låssenteret has suggested: i) a confidentiality ring with *only* external advisors; and, ii) a confidentiality ring with external advisors and a representative from Låssenteret with a non-commercial function (the IT director). Låssenteret has thus suggested an alternative which would allow for a representative of Låssenteret to have access to the evidence requested.

95. Again, the confidentiality rings are but one of the confidentiality arrangements Låssenteret suggested – *which* of these is ultimatled used is immaterial. However, AAOS has opposed *all* arrangements due to alleged concerns regarding confidentiality.

96. Second, if the Norwegian legislator has indeed intended to extend the scope of Article 9(2) to all civil proceedings, it is all the more important that this Court provides guidance.

97. As has been detailed in Question 1, Låssenteret's standpoint is that the TSD does not apply to the present proceedings. As such, it may at first sight appear as unnecessary to vet the compatibility of the confidentiality ring with Article 9(2) – it has no relevance.

98. However, the Norwegian implementation of the TSD raises its own set of interpretative issues that this Court should address. Indeed, it may seem as if the Norwegian legislator has meant for Article 9(2) to have a broader scope than is envisaged in the TSD.

99. Preparatory works regarding the Norwegian Dispute Act Section 22, which implements this provision into Norwegian law, would seem to envisage that Article 9(2) is meant to apply to all civil legal proceedings where trade secrets, or possibly also other confidential information, is submitted as evidence. This would clearly go beyond what is required by the TSD. As such, it would be a purely domestic rule, which must, as Låssenteret will show, be interpreted in accordance with EEA law.

100. Merely declaring that the TSD does not apply to the present case, might therefore not entirely resolve the underlying EEA law issue or provide the referring court with the answer it needs. Låssenteret therefore considers that this Court should provide guidance under Question 2, even if the Court considers, rightfully, that the case pending before the national court falls outside the TSDs material scope, as shown in Section 4.2.3.

101. Third, in any event, Låssenteret does not consider that the wording of Article 9(2), which *prima facie* requires that at least one natural person from each party to the dispute is granted access to evidence submitted in the course of the legal proceedings, can be considered to be an obstacle to the establishment of a confidentiality ring as proposed by Låssenteret.

102. There are several reasons for this being so:

- The TSD provides for minimum harmonisation, and trade secrets can be granted greater protection than envisaged by the TSD. Accordingly, confidentiality regimes excluding representatives of the parties are possible under the TSD.
- In any event, and despite its wording, Article 9(2) is not meant to prevent a confidentiality ring where the claimant *consents* to not being granted access to evidence, with access is granted solely to its legal counsel, in order to enable that evidence to be disclosed.
- If it were considered that Article 9(2) would prevent a confidentiality ring that does not include a natural person from each party, this could in Låssenteret's view not mean that *no access* is granted to the relevant evidence. Instead, it would have to mean that access is granted also to *at least* one natural person from each party. It would be for the national court to ensure that confidentiality measures consistent with the TSD are put in place.
- National procedural law would in any event have to be interpreted in manner that does not make access to confidential information, and thereby the effective enforcement of Article 54 EEA impossible or excessively difficult.
- Article 9(2) applies only to trade secrets, and not any confidential information. Låssenteret refers in this regard to its observations under Section 4.2.2.

103. Låssenteret will elaborate on these grounds in the following.

4.2.4.1 *More far-reaching protection than that envisaged by the Trade Secrets Directive is possible, including confidentiality rings limited to external counsel*

104. The TSD provides for minimum harmonisation. Pursuant to Article 1, Member States may:

> [P]rovide 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.

105. Given that Article 9(2) is not mentioned, it is therefore possible for Member States to provide for greater protection of trade secrets than Article 9(2) prescribes. This would entail, in

Låssenteret's view, the possibility to exclude the parties from access to evidence constituting trade secrets.

106. To illustrate the forgoing, reference can be made to Austria's implementation of the TSD which allows for trade secrets to only be disclosed to an expert appointed by the court.[23]

4.2.4.2 A confidentiality ring limited to external counsel is in compliance with Article 9(2) of the Trade Secrets Directive where the claimant consents to it

107. Requesting access to evidence entailing confidential information will lead to a conflict of rights, namely between the rights to effective enforcement and the protection of confidential information. Adjudicating access to such evidence requires that a proportionate balance be struck between those conflicting rights.

108. There are various EU regulatory acts in addition to the TSD that address the conundrum that relevant evidence necessary to decide a lawsuit contains confidential information which needs to be disclosed to enable a correct decision on the merits, whilst its confidentiality ought to remain protected as far as possible.

109. Examples of such acts are Directive 2004/48/EC,[24] and Directive (EU) 2020/1828.[25] These acts recognise that effective enforcement requires disclosure, while at the same time arrangements ought to be in place protecting that information's confidentiality.

110. Common to all those instruments created to preserve or strengthen the private enforcement of EU/EEA rights, is the recognition that access to (confidential) information, often in possession of the defendant, is a prerequisite for effective enforcement.

111. There may be instances where the information is so confidential, that its disclosure to any natural person from the parties, in particular the claimant, would risk leading to grave harm, such as for example leniency applications, as discussed further below under Section 4.3.3.

---

[23] Section 26h paragraph 2 of Austria's Unfair Competition Act reads as follows (emphasis added): 'Upon application or of its own accord, the court shall take measures to prevent opposing parties and third parties from obtaining information about the trade secret exceeding their previous knowledge in this regard. **Any measures to be taken can also stipulate that the alleged trade secret may be disclosed only to an expert appointed by the court**. The appointed expert shall be instructed to submit to the court a summary that does not contain confidential information about the trade secret. Moreover, for the purpose of assessment, the expert shall submit to the court all documents, the findings and the expert opinion on the trade secrets and shall mark trade secrets as such. These parts of the file shall be excluded from the right of inspection of the file. Notwithstanding para 3, the court shall keep these written records on a trade secret in a separate part of the file that is accessible neither to the opposing party nor to third parties.' An English version of Austria's *Gesetz gegen den unlauteren Wettbewerb* is available here: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984_448/ERV_1984_448.pdf

[24] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004. See in particular Article 6 thereof.

[25] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27. See in particular Article 18 thereof.

112. This is what AAOS has argued for *all* the disclosure requests.

113. In such a situation, an additional legal conundrum seems to arise. Would it infringe a party's right to a fair trial, including the principle of adversarial proceedings, if *none* of its representatives were granted access to it?

114. AAOS has argued that this is the case and claims that 'such an arrangement challenges the fundamental considerations of a proper and fair procedure that fosters trust'[26].

115. The ECtHR has indeed held that right to a fair trial enshrined in Article 6 of the ECHR and the principle of adversarial proceeding 'mean[s] in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed [...] with a view to influencing the court's decision'[27] (emphasis added).

116. According to this Court's established case-law, the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights. The provisions of the ECHR and the judgments of the ECtHR are important sources for determining the scope of these fundamental rights.[28]

117. This Court has also held that the principle of effective judicial protection, including the right to a fair trial (enshrined in Article 6 ECHR) is a general principle of EEA law.[29]

118. Therefore, it seems clear that in EEA law, just as in EU law, there is no absolute right to access and comment on all evidence, as this right only exists '*in principle*'. Further, the objective of preserving the claimant's procedural rights cannot in Låssenteret's view outweigh the claimant's right to effective enforcement.

119. Indeed, the claimant would in the situation sketched out in the forgoing have two choices: i) forgo (effective) enforcement; or, ii) forfeit some of its procedural rights, to gain a realistic opportunity to obtain a correct decision on the merits of the case.

120. Låssenteret considers it as inconceivable that the EU legislator would have opted to *mandate* for claimants to forgo effective enforcement, when the rationale of these legislative acts, and the TSD in particular, is also to ensure and better provide for effective enforcement.

---

[26] Request, page 8.
[27] Judgment of the ECtHR of 27 March 1998 in *J.J.v Netherlands*, Reports of Judgments and Decisions 1998-II, p. 604, para 43.
[28] Judgment of 18 April 2012, *Posten Norge*, E-15/10, para 85.
[29] *Ibid*, para 86.

121. Therefore, there are in Låssenteret's view two meaningful possibilities to reconcile the wording of Article 9(2) with the underlying rationale of the TSD and fundamental principles of EU and EEA law.

122. First, that the TSD retains the possibility to establish a confidentiality ring without natural persons of the parties being part of the ring, in particular when the parties *consent* to such an arrangement.

123. Second, that the TSD simply does not attribute such great importance to the protection of confidentiality that it would *ever* be necessary to exclude every natural person from the parties from access to the trade secret(s).

124. Låssenteret will elaborate on the first option directly below and revert to the second possibility under Section 4.2.4.3 below.

125. It is recalled that it is Låssenteret that has proposed the confidentiality ring that gave rise to the Request. This was done to obtain the evidence from AAOS necessary to substantiate its claim. Låssenteret thus *consented* to protect the confidential information potentially contained therein to the highest conceivable degree by waiving its right to have one of its own representatives participate in the confidentiality ring. As has been mentioned, Låssenteret also suggested a confidentiality ring with a natural person.

126. If a claimant, such as Låssenteret in the pending case, forfeits procedural rights voluntarily, it does so because its interest in effective enforcement is greater than a procedural right. Those procedural rights would however be without any value in proceedings marred by the fact that material evidence has not been submitted at all, in order to protect its confidentiality.

127. Låssenteret thus considers that Article 9(2) TSD cannot be regarded as preventing the establishment of a confidentiality ring without representation of the parties, where the party proposing such an arrangement consents not to participate directly.

128. Indeed, the CJEU held in *Melloni* that procedural rights may be waived in court proceedings (emphasis added):[30]

> Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute [...] The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest.

[30] Judgment 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para 49.

129. Note that *Melloni* concerned criminal proceedings and the right to appear in person, which is a more fundamental right than access to (all) evidence. The possibility to waive procedural rights in civil proceedings cannot be more limited than in criminal proceedings, and therefore these considerations – including the possibility to waive procedural rights – must apply also to the TSD.

130. In that respect, Låssenteret also recalls that it is AAOS which has raised concerns about *Låssenteret's* procedural rights and the implications of the confidentiality ring 'for the cooperative relationship between a lawyer and a client, since the lawyer's ability to advise the client on procedural risks and strategy may be impaired if the client is unable to have full access to the evidence on the basis of which the case is decided'.[31]

131. Such concerns are unwarranted.

132. Not only does Låssenteret waive procedural rights voluntarily in exchange for having a real opportunity to obtain a just verdict on the merits of the case, it also does so in full appreciation of what this arrangement entails for its relationship with its external counsel.

133. Further, lawyers are also in European legal traditions considered as *officers of the court* and *auxiliaries of justice*, and hence an important adjunct to the administration of justice. Lawyers also owe a duty to the court and contribute to ensure that justice is done.

134. An arrangement where the lawyer, but not its client, has access to certain evidence, is not only compatible with fundamental procedural rights and a client-lawyer relationship governed of confidence and trust, it is also very common.

135. In almost all competition cases and merger filings (in particular those involving competitors) lawyers will be granted access to information that they cannot share, unredacted, with their client. If that were impossible, many proceedings would grind to a halt.

136. Låssenteret therefore considers – that even in legal proceedings falling within the material scope of the TSD – a confidentiality ring which does not include a natural person from each party would be consistent with the TSD when that party has waived its right to have access to specific confidential evidence in order to ensure its right to an effective remedy.

4.2.4.3 Article 9(2) cannot mean access to evidence constituting trade secrets is entirely denied

137. In the event that this Court were to consider that a confidentiality ring, within the material scope of the TSD, needs to include a natural person from each party, this could in Låssenteret's view not mean that no access is granted to the relevant evidence at all.

---

[31] Request, page 8.

138. Indeed, the balancing act that national courts are meant to undertake in accordance with Article 9(3) TSD, where 'competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial' when deciding on measures to protect confidentiality, would be meaningless if no access to the relevant evidence could be granted at all.

139. In that regard, it is also important to recall that the TSD does not even contemplate the possibility that a trade secret is so confidential that it cannot be disclosed *at all*, including to at least one natural person from each party. Instead, the TSD presumes that access is granted, and considers granting access to one natural person of each party necessarily proportional, subject perhaps to additional safeguards such as non-disclosure obligations and sanctions.

140. However, this was the result of the proceedings before the SFDC, and is in Låssenteret's view, incompatible with EEA law in general, and the TSD specifically.

141. It is thus incorrect to argue, as AAOS does, that:[32]

> EEA law neither requires that a national court, in a case where a specific weighing-up of considerations of protecting the trade secret weighs more heavily than considerations of having complete information in the case, nevertheless shall issue an order requiring disclosure.

142. As indicated above, the protection of trade secrets can never outweigh the importance of a correct decision on the merits of a case, and it can certainly not be grounds to refuse access to all requested evidence, without even a specific consideration of each and every request.

143. Further, in Låssenteret's view, an application of the TSD to a specific case which leads to access to evidence being denied solely because the confidentiality ring proposed is too narrow (and does not include one natural person from each party), would be inconsistent with both the TSD and the principle of effectiveness (see further on the latter under Section 4.3.2.)

144. Instead, the correct application of the TSD and the principle of effectiveness would have to mean that in such a situation, the confidentiality ring is extended so as to include at least one natural person from each party, or alternatively, that other confidentiality arrangements are established.

145. In Låssenteret's view, a correct application of the TSD therefore also entails a duty for the national court to ensure that confidentiality arrangements consistent with the TSD are put in place, instead of access to evidence being denied.

---

[32] Request, page 8.

4.2.4.4 The TSD and its Article 9(2) cannot apply in competition cases

146. Låssenteret has already shown that the case pending before the national court falls outside the TSD's material scope, and that the TSD in any event only applies to trade secrets, and not to other confidential information.

147. There are additional reasons why the material scope of the TSD, and in particular also its Article 9(2) cannot plausibly be wider than the unambiguous wording of the TSD suggests, and cannot, in any event, be applied in the context of private enforcement of competition rules.

148. According to *inter alia* the recitals to the TSD, one of the TSD's main aims is to remedy underenforcement of infringements of trade secrets. The TSD recalls in Recital (24) that:

> 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.

149. This illustrates two important points.

150. First, in trade secret disputes, measures to protect confidentiality are meant in particular to *foster* effective enforcement. The TSD is meant to provide assurances to the trade secrets holders – normally claimants – that legal proceedings will not jeopardise the confidentiality of the information they possess. This is in contrast to the typical situation in proceedings relating to competition rules, where generally speaking the defendant possess the relevant (and confidential) evidence.

151. Second, and even more important, the subject matter of a trade secrets dispute is the trade secret *itself*. This has implications for the importance of giving access to this information also to the parties themselves, and the right to a fair trial.

152. Indeed, the Commission's proposal for the TSD[33] did not contain any provision that would require at least one natural person from each party being given access. The provision was inserted in the course of the legislative process. Its rationale is recalled in the report of the European Parliament to the Commission's proposal (emphasis in original by the European Parliament)[34]:

---

[33] Proposal for a Directive of the European Parliament and the Council /* COM/2013/0813 final - 2013/0402 (COD)

[34] Report on the proposal for a directive of the European Parliament of 22 June 2015, (COM(2013)0813 – C7-0431/2013 – 2013/0402(COD)), Recital 14. The report is accessible here:

> The prospect of losing the confidentiality of a trade secret during litigation procedures often deters legitimate trade secret holders from instituting proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right 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. These should include the possibility to restrict access to evidence or hearings, or to publish only the non-confidential elements of judicial decisions. **As the main purpose of the proceedings is to assess the nature of the information which is the subject of the dispute, those restrictions should not be such as to prevent at least one person from each of the parties and their respective legal representatives from having full access to all the documents in the file.**

153. The rationale for introducing this extra safeguard to protect the parties' procedural rights was thus clearly related to the purpose of proceedings that concern the unlawful acquisition, use and disclosure of trade secrets. The main assessment in such proceedings entails an analysis of whether a specific trade secret has been violated, and the trade secret itself is thus at the absolute core of such infringements.

154. In this *specific* context, the right to fair trial and the principle of adversarial proceedings may arguably indeed require for parties to have access to the trade secret. The introduction of this requirement is thus to be seen as a specific and circumscribed choice by the EU legislator, consistent with the *lex specialis* principle outlined in Section 4.2.2.

155. In competition lawsuits, confidential information (possibly including trade secrets) plays an important, but nonetheless less central role, in particular when it comes to specific documents or pieces of information.

156. In the case pending before the national court, access to AAOS's contractual arrangements with Låssenteret's competitors will for example be necessary to substantiate the claim that AAOS has engaged in unlawful discrimination. An analysis of the confidential aspects of these arrangements by Låssenteret's external counsel would seem appropriate and sufficient to respect Låssenteret's procedural rights. Låssenteret itself does not necessarily need to know the details of AAOS's arrangements with other distributors, as long as it can be informed, through its external counsel, if those arrangements entail a discrimination if compared with those Låssenteret has with AAOS.

157. The ECtHR's jurisprudence regarding fair trial and access to evidence can also shed light on the appropriateness of such an arrangement.

158. Established case law from the ECtHR provides that even in the context of criminal proceedings, the right to disclosure of relevant evidence is not absolute. The ECHR recalled

---

https://www.europarl.europa.eu/doceo/document/A-8-2015-0199_EN.html?redirect#_part1_def2

in *Aksoy*, for example, that there may be competing interests that prevent disclosure of all evidence even to the accused, and that similar considerations should apply in civil proceedings.[35]

159. Furthermore, Låssenteret has previously pointed out that other EU acts also contain access to evidence regimes. Only the TSD can be read as requiring access by natural persons of the parties to trade secrets submitted as evidence. In other words, this is at most an exception to the main rule, which does not have such a requirement.

160. The Damages Directive does not entail such a requirement either, and the Commission's pertinent guidance on the issue – the Confidentiality Communication – expressly provides for confidentiality rings limited to external counsel.

161. Finally, as Låssenteret will also revert to below under Section 4.2.5, EEA law has recognised that it may, in certain situations, be necessary to restrict access to evidence to the deciding court alone.

162. In view of the above, the requirement of direct representation of the parties in confidentiality rings, provided that the TSD so prescribes, cannot be extended to proceedings falling outside the material scope of the TSD, such as the case pending before the national court.

4.2.4.5 National law has to be interpreted in accordance with the narrowly defined scope of the TSD and the narrow scope of its Article 9(2)

163. As indicated above, the national court presumably asked Questions 1 to 4 also because of its understanding of Article 9(2) TSDs implementation in the Dispute Act. Indeed, national preparatory works suggest that Article 9(2) is meant to apply to *all* civil law proceedings. That being said, the wording of Article 9(2), and in particular the second subparagraph of Article 9(2) regarding the requirement of direct representation of the parties in confidentiality rings, has not been made part of national law.

164. This raises the question of whether EEA law requires national law to be interpreted in accordance with the fact that a potentially absolute requirement of direct representation of the parties in confidentiality rings does not exist in proceedings falling outside of the TSD's material scope.

165. In view of what was argued in the forgoing, Låssenteret considers this to be so.

166. Indeed, extending – by means of *interpretation* of national rules – the requirement of direct representation of the parties in confidentiality rings that, according to a policy choice by the

---

[35] Judgment of the ECtHR of 31 October 2006 in case 59741/00, *Aksoy (Eroğlu) v. Turkey*, para 27.

EU legislator, was meant to apply only in the specific context of the legal proceedings relating to the unlawful acquisition, use and distribution of trade secrets, would be ignoring this policy choice, and run counter the principle of effectiveness.

167. Låssenteret therefore invites this Court to clarify in its advisory opinion the narrow confines of this requirement, and that extending it beyond the material scope of the TSD would be incompatible with EEA law, specifically in cases relating to Article 54 EEA.

4.2.4.6 Conclusion

168. In the light of the foregoing, Låssenteret proposes that Question 2 is answered as follows:

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.

4.2.5 Question 3: There are no general EEA law principles that would prevent the establishment of the proposed confidentiality ring

169. Låssenteret has already shown above that Article 9(2) is the result of a specific policy choice relating to legal proceedings on trade secrets, and that other access to evidence regimes established by EU law do not contain this requirement.

170. Therefore, Article 9(2) cannot possibly 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. There are additional reasons supporting this conclusion.

171. First, the CJEU has held on several occasions that limiting the access to evidence to the deciding court only, thus excluding both parties and their legal representatives, can be necessary and is as such compatible with EU law.

172. This is particularly well-articulated by AG Stix-Hackl in *Mobistar* (emphasis added):[36]

> Furthermore, as most of the parties have argued, it is for the appeal body – in the present case, the referring court – to take appropriate steps in the proceedings before it in order to strike a

[36] Opinion of 23 March 2003 (AG Stix-Hackl), *Mobistar*, C-438/04, ECLI:EU:C:2006:198, paras 88-89.

> balance between the requirements of effective legal protection or the interest of a due examination of the substance of an appeal and the safeguarding of business confidentiality.
>
> In a case like the one at issue, the referring court may, for example, order the submission of all information which it requires for a due decision on the substance of the appeal before it against the decision of the national regulatory authority and – in so far as is essential for the protection of the confidential information and having due regard to the rights of the defence – if necessary treat the information in question confidentially, even vis-à-vis **the parties** to the proceedings.

173. The CJEU followed the AG's opinion.

174. In *Varec,* the CJEU confirmed this line of reasoning, and held (emphasis added):[37]

> The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute and [...]as a whole accord with the right to a fair trial.
>
> To that end, the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets [...]
>
> It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and [...], so as to ensure that the proceedings as a whole accord with the right to a fair trial.

175. The CJEU's jurisprudence thus makes clear that it is of utmost importance for the deciding body or court to have access to all the relevant information. If that information is confidential or contains business or trade secrets, appropriate protection must be considered.

176. As an *ultima ratio*, this process can also lead to the exclusion from access to certain evidence of both parties, including their external counsel. Not requesting the submission of relevant evidence, or disregarding it, is not an option entertained by the CJEU.

177. In view of the foregoing, Låssenteret therefore does not consider there to be any indications for a general principle of EEA law that would prevent the establishment of confidentiality rings which limits access to evidence to external counsel.

178. Perhaps most tellingly, the Confidentiality Communication expressly provides for the possibility of a confidentiality ring composed of external advisors only. In Låssenteret's view, the Commission would not have proposed a confidentiality regime in violation of general EEA law principles.

---

[37] Judgment of 14 February 2008, *Mobistar*, C-438/04, ECLI:EU:C:2008:91, paras 52-55.

179. In the light of the foregoing, Låssenteret proposes that Question 3 is answered as follows:

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.

4.2.6 Question 4: The competitively sensitive nature of the requested information is of no significance for answering Questions 1-3, but is relevant for establishing access regimes

180. Whether the disclosure requests contains information that is competitively sensitive cannot, in Låssenteret's view, have any bearing on how Questions 1, 2 and 3 should be answered.

181. The competitively sensitive nature of information cannot have any significance as regards the material scope of the TSD (Question 1), the compatibility of a confidentiality ring limited to external counsel with the TSD (Question 2) or the existence of a general principle of EEA law preventing the establishment of such confidentiality rings (Question 3).

182. Further, confidential information and in particular also trade secrets *will* often be competitively sensitive. That such evidence can be competitively sensitive will thus have been taken into account in the legislation and jurisprudence referred to above.

183. That being said, Låssenteret *does* consider that the competitively sensitive nature of evidence to which access is sought is relevant in the context of access to evidence.

184. If evidence is competitively sensitive, courts will need to take particular care to avoid disclosure beyond what is necessary in order to respect the principle of effectiveness and the right to a fair trial. A confidentiality ring as proposed by the Låssenteret in the pending proceedings is well suited to cater for the situation of evidence requested being competitively sensitive, precisely because the party to which this information is unknown will not be able to access it. Its competitively sensitive nature becomes therefore, in a way, irrelevant.

185. In the light of the foregoing, Låssenteret proposes that Question 4 is answered as follows:

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.

4.3 Question 5: The requirements of EEA law as regards access to evidence in cases of private enforcement of the EEA Agreements rules on competition

4.3.1 Introduction

186. By its fifth Question, the Court seeks, essentially, to understand the requirements under EEA law, including the principle of effectiveness and the principle of homogeneity, with regards to ordering access to confidential information held by the defendant in cases involving a potential infringement of article 54 EEA and, specifically, whether the court must carry out a balancing of interests before ordering such access.

187. Låssenteret submits that such a balancing of interests is a required step before ordering the disclosure of any confidential information. This principle is both undisputed by Låssenteret – as is also evidenced by the Referral – and consistent with EU jurisprudence. However, the more relevant issue, and one which should be addressed by this Court in its advisory opinion, is *how* this balancing should be conducted and to provide the referring court with the tools its needs to conduct this assessment.

188. First, the principle of effectiveness sets limits as to the procedural autonomy of the Member States and defines the scope of any procedural discretion.

189. Second, the balancing of parties' interests with regards to access to evidence in competition cases has been clearly established as a principle of EU law. It revolves, essentially, on the balancing of interests protected by EU law and sets a high bar for the limits that can be placed on the ability of undertakings to enforce Article 54 EEA.

190. Third, the protection of confidential information *as such* is not an overriding interest which merits protection and does not, in any event, outweigh the right to enforce EEA law rights.

191. Fourth, the protection of confidential information is in any event not absolute and can reasonably be accommodated by adopting different measure that limit or eliminate the exposure of the information.

192. Fifth, the principle of homogeneity requires that the same benefits be enjoyed regardless of whether an economic actor is based in the EU or the EEA EFTA States.

4.3.2 The referring court's procedural autonomy is curtailed by the principle of effectiveness

193. It is settled case-law that Article 102 TFEU/Article 54 EEA produce direct effects in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard.[38] Furthermore, the right to seek relief from the harm caused

[38] Judgment of 30 January 1974, *BRT v SABAM*, C-127/73, ECLI:EU:C:1974:6, para 16; Judgment of 18 March 1997, *Guérin automobiles v Commission*, C-282/95 P, ECLI:EU:C:1997:159, para 39.

by an infringement of EEA competition rules through civil proceedings is a long-established principle, first enshrined by the CJEU in *Courage and Crehan* and affirmed in *Manfredi*.[39] The right of victims to bring actions for damages for infringements of Article 102 TFEU/Article 54 EEA has thus been 'clearly underscored by the Court'.[40]

194. In light of this, it is important that this Court asserts and ensures that Låssenteret can rely on the legal protection it derives from Article 54 EEA. This brings to the fold two important EEA law principles: the principle of procedural autonomy and the principle of effectiveness.

195. On the one hand, procedural autonomy is a principle of EEA law which stipulates that Member States are free to establish their own national procedural rules to govern the exercise of EEA law, to the extent that there are no harmonized rules.

196. On the other hand, the principle of effectiveness embodies a general obligation on the Member States to ensure effective judicial protection of an individual's rights under EEA law.[41] This involves, most notably, ensuring that national remedies and procedural rules do not render claims based on EEA law impossible or excessively difficult.

197. Jurisprudence from the EEA courts clearly establishes that the principle of autonomy must be exercised, notably, within the confines of the principle of effectiveness. Competition cases are no exception and there is a considerable practice from the EU jurisprudence regarding applying national rules so as not to jeopardise the full effectiveness of EEA law.

198. For instance, *Manfredi* concerned national procedural rules on limitation periods and damages claims for breaches of competition law.[42] In *Vebic* the CJEU dealt with the participation of the Belgian national competition authority in review proceedings against decisions adopted by it.[43] A case will be examined in some detail is *Pfleiderer* which related to the interplay between public and private enforcement and the granting of access for private claimants to self-incriminating documents retained by the German competition authority.[44] In *Eturas* the CJEU had to deal with the presumption of innocence and the inference of knowledge of concerted practices.[45] More recently, in *Skanska* the CJEU was called on to

---

39 Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465; Judgment of 13 July 2006, *Manfredi*, C-295/04 to C-298/04, ECLI:EU:C:2006:461.

40 Opinion of 16 December 2010 (AG Mazák), *Pfleiderer*, ECLI:EU:C:2010:782, para 36.

41 Judgment of 17 September 2018 in case E-10/17, *Color Line*, para 110. Judgment of 1 July 2010, *Speranza*, C-35/09, ECLI:EU:C:2010:393, para 47.

42 Judgment in *Manfredi*, n.39 above.

43 Judgment of 7 December 2010, *Vebic*, C-439/08, ECLI:EU:C:2010:166.

44 Judgment of 14 June 2011, *Pfleiderer*, C-360/09, ECLI:EU:C:2010:389.

45 Judgment of 21 January 2016, *Eturas and others*, C-74/14 , ECLI:EU:C:2016:42.

determine whether the piercing of the corporate veil was required to ensure effective damages claims.[46]

199. The matter pending before the Court, *Låssenteret*, falls within this line of cases and deals with disclosure of confidential information in stand-alone competition cases.

200. An important element of this – which is *'apparent from the case-law'*[47] – is that the rules of evidence applied by a national court to actions relating to a breach of EEA law must not make it impossible or excessively difficult in practice for individuals to exercise the rights and protection conferred by EEA law.[48]

201. There can therefore be no doubt that the principle of effectiveness limits the procedural autonomy enjoyed by the court.

202. This is in stark contrast to AAOS' position which, as evidenced in the Request, considers that EEA law does 'not place any limitations on the discretion exercised by national courts and does not contain any requirements as to how much weight is to be attached to the various factors.'[49]

203. Not only does the principle of effectiveness curtail the procedural autonomy enjoyed by national courts, but, as will be shown now, there is clear jurisprudence regarding which interests must be given weight and how. AAOS' interpretation thus goes against to the well-established principles that have guided the EU courts for decades.

4.3.3 A balancing of interests is an integral part of the principle of effectiveness – to deny all access to evidence requires the protection of a considerable legitimate interest

204. As has already been mentioned above in Section 4.2.4, a request for disclosure of evidence which amounts to confidential information (and possibly trade secrets) leads to a conflict of rights that must be balanced. In and of itself, this is nothing new to the EU and EEA legal order. The CJEU has heard multiple cases raising conflicts of rights, which must, at the outset, be held as equal although one interest must inevitably be restricted by the other.[50]

205. This principle of balancing interests for and against disclosure of evidence, including *how* disclosure is to be made, thus fits squarely with the spirit of the CJEU weighing and gauging of rights.

---

46 Judgment of 14 march 2019, *Skanska Industrial Solutions and Others*, C-724/17, ECLI:EU:C:2019:100.
47 Opinion of 7 February 2013 (AG Jääskinen), *Donau Chemie*, C-536/11, ECLI:EU:C:2013:67, para 49.
48 Judgment of 3 February 2000, *Dounias*, C-228/98, ECLI:EU:C:2000:65, para. 69.
49 Request, page 7.
50 See for instance Judgment of 15 July 2010, *Commission v Germany*, C-271/08, ECLI:EU:C:2010:426, para 44 and case-law cited there.

206. In the following, Låssenteret will demonstrate, first, that a balancing of interests flows clearly from the jurisprudence of the CJEU from before the Damages Directive. Second, that the Damages Directive, and recent case law, merely builds on this existing principle.

4.3.3.1 The jurisprudence prior to the Damages Directive establishes a balancing of interests giving considerable weight to the claimants right to obtain access to evidence

207. The CJEU has had the opportunity to vet rules on disclosure with the principle of effectiveness on multiple occasions with regards to the EU/EEA competition rules. In the following, we will demonstrate how the CJEUs judgements in *Pfleiderer* and *Donau Chemie* establish the interests that must be weighted.[51]

208. First, *Pfleiderer* was the first case to clearly establish the need to balance the interests, and that the interests that must be balanced are those that are 'protected by European Union law'.

209. Here, the CJEU ruled on access to documents submitted by the defendant to a national competition authority in the context of a leniency procedure in order to allow a claimant to bring an action for damages. Leniency procedures allow undertakings that have been involved in 'secret cartels' to reveal their existence to competition authorities.[52] Indeed, pursuant to the EFTA Surveillance Authority's Leniency Notice such secret cartels are 'often difficult to detect and investigate' without the cooperation of implicated undertakings.[53]

210. The CJEU considered that in light of the absence of common rules, it is for Member States to establish national rules on right of access to such documents. However, consistent with its case law, the CJEU underlined that the Member States' procedural autonomy is subject to the principle of effectiveness, and 'specifically in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardize the effective application of Articles 101 TFEU and 102 TFEU.'[54]

211. Applying the principle of effectiveness, the CJEU considered that, in principle, EU law 'does not preclude' a claimant from obtaining access to leniency documents.[55] However, this is subject to a weighting of interests protected by EU law, which must be carried out on a case-by-case basis by the national court. With regards to the interests that must be weighed there was:

---

51 Judgment in *Pfleiderer*, n.44 ; Judgment of 6 June 2013, *Donau Chemie*, C-536/11, ECLI:EU:C:2013:366.

52 EFTA Surveillance Authority Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 294, 3.12.2009, p. 7–14, para 1 ("***Leniency Notice***").

53 Leniency Notice, para 3. Note that, at the time, there were no common EU rules provisions on the right of access to documents relating to a leniency procedure which have been voluntarily submitted. Something which has since changed with the adoption of the Damages Directive.

54 Judgment in *Pfleiderer*, n.44, para 24.

55 *Ibid*, para 34.

212. On the one hand, the maintenance of leniency programs as useful tools to stop infringements of the competition rules which, in turn, serves the 'objective of effective application of articles 101 TFEU and 102 TFEU.'[56]

213. On the other hand, the right to claim damages for loss caused by infringements of competition rules which can make a significant contribution to 'the maintenance of effective competition in the EU'.[57]

214. In essence, this boiled down to balancing the weight of the protection of information provided voluntarily by an applicant for leniency, against the necessity to ensure that the applicable national rules do not operate in such a way as to make it practically impossible or excessively difficult to obtain relief.[58]

215. Whilst the CJEU did not undertake a balancing of interests, AG Mazák's opinion did provide further analysis on this subject. Here, AG Mazák distinguished between voluntary self-incriminating statements, created *ex novo* for the purposes of the leniency application, and 'all other pre-existing documents' submitted by the leniency applicants.[59] Finding that the applicant enjoys an 'overriding legitimate expectation that self-incriminating statements will not be disclosed', AG Mazák considered that disclosure of these self-incriminating corporate statements could seriously undermine the effective enforcement of EU/EEA competition law by disincentivising participation in leniency programs.[60] As such, in his opinion, the principle of effectiveness does not require access to self-incriminating corporate statements.[61] However, this conclusion only holds true with regard to these specific documents. Importantly, it does not extend to other documents submitted in the context of a leniency application, as they 'are not in effect a product of the leniency procedure' but rather 'exist independently of that procedure'.[62] Summarising his opinion, AG Mazák could 'see no cogent reason why such documents which are specifically destined and apt to assist in an action for damages should be refused'.[63]

216. This sets the bar high when balancing the interests of a claimant's right to access documents in the context of a private enforcement procedure, as it is only those documents that constitute self-incriminating corporate statements that outweigh the right to access. All other

---

56 Judgment in *Pfleiderer*, n.44, para 26.
57 *Ibid*, para 27.
58 *Ibid*, para 30.
59 Opinion in *Pfleiderer*, n. 40, para. 47.
60 *Ibid*, para 45.
61 *Ibid*, para 45.
62 *Ibid*, para 47
63 *Ibid.*

documents which may contain indications of an infringement – and are necessarily confidential – do not benefit from that same protection.

217. Second, this balancing of interests with regards to disclosure request in civil proceedings was further developed by the CJEU in *Donau Chemie*.

218. The case again related to access to evidence on file held by a national competition authority obtained through a national leniency program. Summarising *Pfleiderer*, the CJEU held that the national courts 'must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information'.[64] Developing this principle, the CJEU further explained that weighing-up is necessary because 'in competition law in particular, any rule that is rigid' is liable to undermine effective application of the rights the competition provisions confer on individuals.[65]

219. The CJEU then helpfully summarised the two competing interests that must be appraised: [66]

> [F]irstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of other possibilities it may have. [...] Secondly, the national courts must take into consideration the actual harmful consequences which may result from such access having regard to public interests or the legitimate interests of other parties.

220. Of relevance to the present proceedings, the CJEU emphasised that where access to a document is 'needed to establish their claim' a complete refusal would violate the principle of effectiveness as it would 'render nugatory' the right to relief which the claimant derives directly from EU/EEA law.[67] Taking this into account, the CJEU held that it is only 'if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.'[68]

221. This plays back to the balancing of principles protected under EU law as being fundamental in the proportionality assessment. Once again, the threshold is high. It is only where there is a real risk that a document may undermine a public interest that access can be denied. This builds on the opinion of AG Jääskinen in the same case, which considers that the right of private parties to seek relief from infringers of EU competition law should not 'be developed to a point that would imperil the efficacy of public law enforcement mechanisms.'[69]

---

64 Judgment in *Donau Chemie*, n. 51, para 30.
65 *Ibid*, para 31.
66 *Ibid*, paras 44-45.
67 *Ibid*, para 32.
68 *Ibid*, para 48.
69 Opinion in *Donau Chemie*, n. 47, para 62.

222. The situation prior to the Damages Directive is one where the interests of the claimant in obtaining access to evidence is given considerable weight. In the balancing exercising, the claimant's interest trumps almost all of the interests of the defendant in preserving the confidentiality of evidence, except for self-incriminating corporate statements.

223. Suffice to say that in the present action, the only thing Låssenteret is seeking to obtain access to, is what AG Mazák usefully categorised as 'all other pre-existing documents'.

4.3.3.2 The Damages Directive codifies the balancing principle and the extent of disclosure required has been further expanded in Paccar

224. First, the principle of balancing the interests of the parties has been subsequently codified and clarified in the Damages Directive, this is also detailed in Section 4.4.2 below.

225. Article 5(3) of the Damages Directive explicitly sets out that 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. In so doing, pursuant to Article 5(3)(c), a national court must consider whether the requested evidence contains confidential information, especially concerning third parties, and what arrangements have been put in place in order to protect such confidential information.

226. This follows neatly from the principles in Recital (18) which confirms that:

> [W]hile relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately.

227. As such, the Damages Directive clarifies the proportionality assessment by asserting that weighing the interests for disclosure of confidential information is not an absolute question where the outcome is a binary full access or no access. Rather, it endorses a more nuanced principle which recognises the importance of protecting confidential information, which can be calibrated by adopting a range of measures to allow access to this information in a restricted form by using different methods. Only in very narrow cases would the court disallow access to any documents completely.

228. Second, *Paccar* illustrates that the interpretation of disclosure rules is dynamic, clarifying that the scope of 'relevant evidence' includes requiring the defendant to create *ex novo* documents.[70]

229. Here, the CJEU was called on to rule on the legality of requiring participants in an infringement of competition law, in the context of a *follow-on* damages claim, to not only

[70] Judgment of 10 November 2022, *PACCAR*, C-163/21, ECLI:EU:C:2022:863.

disclose existing evidence but to create new documents compiling information which must be disclosed to the claimant.

230. Setting the tone, the CJEU led by highlighting, once again, the information asymmetry between parties in a private enforcement case since 'by definition, the infringer knows what it has done and or has been accused of doing, if anything.'[71] The CJEU also makes a general point about the necessity of gaining access to evidence as part of the principle of equality of arms.[72]

231. Then the CJEU goes on to consider that 'for the claimant to be provided only with unprocessed, pre-existing and possibly very numerous documents would correspond only imperfectly with its request'. Instead, the CJEU considers that Article 5(1) must be applied 'effectively so as to provide injured parties with tools that are capable of compensating for the information asymmetry between the parties to a dispute.'[73]

232. Going further still, the CJEU points out that to exclude the possibility of requesting disclosure of documents or other evidence that the defendant would have to create *ex novo* 'would, in some cases, lead to the creation of obstacles making the private enforcement of EU competition rules more difficult'.[74] This would go against the spirit of the Damages Directive which is, amongst others, to *facilitate* enforcement of the EU competition rules.

233. However, ordering *ex novo* production would, quite obviously, have to weighted as part of the proportionality assessment. As such the CJEU considered that weight must be given to whether the request, taking into account all factors, is excessive or entails a disproportionate burden.

234. Nonetheless, this is a role which is to be carried out by the national court which must 'carry out a rigorous examination of the request' taking account of the relevance of the evidence, the link with the claim, the sufficiency of the degree of precision of that evidence and the proportionality of that evidence.[75]

235. The CJEU in *Paccar* accordingly goes far in protecting and enabling access to evidence, whilst also balancing the interests of the disclosing party. Here, the CJEU has interpreted the disclosure requirements to go also beyond what is explicitly stated in the Damages Directive.

---

71 *Paccar*, n.70, para 59.
72 *Ibid*, para. 47.
73 *Ibid*, para 61
74 *Ibid*, para 62.
75 *Ibid*, para. 64.

This is a clear indication that the principle enshrined in Article 5 itself, and as will be shown in Section 4.4.2, is but a codification of existing principles – and a dynamic one at that.

236. It can also be noted that the CJEUs judgement was based on a teleological interpretation of the Directive, taking into account its aim and purpose which, it should be reminded, is: the effectiveness of private enforcement and the fact of remedying information asymmetry.[76]

237. These issues are just as relevant, if not more so, in the matter at hand. Conscious of the risk of making an argument *ad nauseam*, it is reminded that Låssenteret has received access to none of the evidence it requested.

238. What emerges from the jurisprudence and the Damages Directive is accordingly that, in private enforcement claims, the balancing act is not so much about *whether* access to evidence held by the defendant should be given or not. Indeed, the legitimate interest in obtaining such access trumps almost all of the interests of the defendant. Rather, the balancing that must be carried out is *how* access to that information must be provided.

4.3.4 The protection of confidential information is not absolute and is restricted by several other considerations

239. Whilst there can be no doubt that the principle of effectiveness requires a balancing of interests prior to ordering access to evidence, it would for the purposes of the present case be helpful if this Court also clarifies which rights and interests must be balanced.

240. First, the CJEU has clearly recognised that the protection of confidential information is a general principle of EU law.[77]

241. However, information will only be considered confidential if it comprises information about the undertakings business activity, the disclosure of which could result in serious harm.[78] Indeed, the information must also to have a confidential quality to it. This has been confirmed by the CJEU which held that the information in issue would, if released, 'prejudice the legitimate commercial interests of particular undertakings'.[79]

242. In the present case, it would therefore be necessary to identify the legitimate commercial interests of AAOS which would be damaged by providing access to the documents requested by Låssenteret *in the format considered*. Seeking to avoid a private enforcement action is not a legitimate interest worth of protection, and this is something that this Court could usefully restate. Taking into account that the confidentiality ring that Låssenteret seeks to

---

[76] Opinion of 7 April 2022 (AG Szpunar), *PACCAR*, C-163/21, ECLI:EU:C:2022:286, para 85.
[77] Judgment of 14 February 2008, *Varec*, C-450/06, ECLI:EU:C:2008:91, para 49 and the case-law cited.
[78] Judgment of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, para. 68.
[79] *Varec*, n.77, para 68.

establish would limit the disclosure to a small group of external advisors without any commercial interest in the information, aside from litigating a claim, the risk to AAOS's commercial interests, beyond the litigation itself, seems non-existent.

243. Second, the fact that information is confidential is not in itself sufficient grounds to protect it from disclosure.

244. This is a point unequivocally made in the Confidentiality Communication, which states 'the fact that information is of a confidential nature is no absolute bar to its disclosure in national proceedings'.[80]

245. What emerges instead is that the confidential nature of information must be respected. But this does not mean that it is afforded absolute protection and does not outweigh, as such, a claimant's legitimate interest to access crucial evidence.

246. To this end, the Damages Directive clarifies that national courts must have the power to order the disclosure of confidential information as evidence. However, when ordering the disclosure of such information, national courts must also possess effective measures to protect this information. Those measures could, pursuant to Recital (18), include redacting sensitive passages, conducting hearings *in camera*, limiting those allowed to view the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise nonconfidential form (also suggested by Låssenteret).

247. These principles are followed up on in the Confidentiality Communication, which goes to great lengths to explain how courts can accommodate the competing interests of the parties when granting access to confidential information in private enforcement proceedings.

248. It is these principles which Låssenteret seeks to apply and which would give full force to the principle of effectiveness by balancing the interests of AAOS to the protection of its confidential information, whilst recognising and enabling Låssenteret's equally legitimate right to bring a private enforcement suit.

249. Third, as has already been mentioned in the foregoing Section, the CJEUs judgements in *Donau Chemie* and *Pfleiderer* clearly set a high bar in terms of which legitimate interests merit protection.

250. Even though these cases involve specific facts regarding leniency procedures, it should be noted that the CJEU never once raised the protection of the confidential nature of these documents as a legitimate concern. Although there can be no doubt that the leniency

[80] Confidentiality Communication, para 18 with references at footnote 19.

documents were indeed confidential and known only to a select few within the organisation. Nonetheless, the *only* interest that the CJEU considered in support of the defendants was not personal to them, rather it was the general principle of protecting public enforcement reliant on leniency statements to detect and deter infringements. Only this interest trumped the claimant's right to enforce EEA rights and maintain effective competition.

251. Despite these differences, Låssenteret situation fits neatly into the same frame of reference as its disclosure requests are precisely such as to allow it to enforce a claim for breach of Article 54 EEA. However, AAOS' pleas for protection from disclosure are not accompanied by any legitimate interest other than protecting its own information from disclosure.

252. Fourth, another noteworthy right which must be taken into account in the balancing exercise is the right to a fair trial, including the necessity of giving access to evidence by party representative. As regards these points, we refer to the considerations in Section 4.2.4, above. Suffice to say here that the right to a fair trial and protection of attorney-client relations, cannot and should be an obstacle to the legitimate right to enforce Article 54 EEA, but should rather be taken into account with regards to which arrangements are put in place to enable access to evidence in manner that respects these interests.

4.3.5 The Principle of Homogeneity

253. Låssenteret furthermore considers that the principle of homogeneity requires there to be equivalent possibilities to privately enforce competition rules in the EEA and the EU alike.

254. Access to evidence is, as demonstrated, a fundamental prerequisite to private enforcement in competition cases.

255. Låssenteret refers to its considerations regarding the principle of homogeneity under Section 4.4.3 below, which also apply to Question 5.

4.3.6 Conclusion

256. Based on the above, Låssenteret proposes to answer the fifth Question as follows:

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.

4.4 Question 6: National law must be interpreted in accordance with Article 5 of the Damages Directive

4.4.1 Introduction

257. It follows from the Request that the national court seeks guidance as to the significance of Article 5 of the Damages Directive for the interpretation of national procedural law, and specifically, if national law is to be interpreted in accordance with this provision.

258. The background to the request is that the Damages Directive has, to date, not been implemented into the EEA Agreement. A decision of the EEA joint committee is pending.

259. The reason for this delay appears to be the division of competences when it comes to the enforcement of Articles 53 and 54 EEA between ESA and the European Commission, and the latter's view that the national competition authorities of the EEA EFTA States lack the competence to enforce those provisions.

260. The foregoing is however irrelevant for the referred Question, which needs to be seen and understood in the context of the proceedings before the national court. The national court is, in essence, uncertain as to the requirements stemming from the EEA law as regards access to evidence (containing confidential information) in cases concerning the enforcement of Article 54 EEA.

261. Thus, even if this Court were to consider that Article 5 of the Damages Directive is *not* directly applicable when interpreting EEA law, it should in Låssenteret's view nonetheless provide guidance on whether EEA law *as such* entails the same or similar requirements regarding access to evidence as this provision, and what that would entail for this case.

262. Låssenteret considers in any event that the national procedural law needs to be interpreted in accordance with Article 5, or alternatively, its material content. In Låssenteret's view, there are three separate, albeit interlinked, compelling reasons for this conclusion.

263. First, Article 5 codifies pre-existing case law concerning articles 101 and 102 of the TFEU. Accordingly, the provision does not create new EEA law, but reflects existing *acquis*. For that reason alone, it is necessary to interpret national procedural law in accordance with Article 5 of the Damages Directive.

264. Second, whilst the Damages Directive is not implemented yet, there can be no doubt that its Article 5 is EEA-relevant. It is established case law that national courts need to take account

also of non-implemented EEA law in their interpretation of national law, in order to adhere to the principle of homogeneity. Further, that principle requires that individuals are granted the same possibilities to enforce the rights bestowed upon them through the EEA Agreement as if those individuals could rely on corresponding provisions of EU law.

265. Third, even if it cannot be determined with certainty that Article 5 is but a codification, or that the principle of homogeneity requires national procedural rules to be interpreted in accordance with this provision, the mechanisms the provision require national law to contain are required by the principle of effectiveness. Article 5 merely spells out the requirements stemming from the principle of effectiveness as regards access to evidence, in particular also as regards access to evidence that constitute confidential information, including business and trade secrets.

266. Låssenteret will elaborate below on the aforementioned grounds.

4.4.2 Article 5 of the Damages Directive codifies existing EEA law on access to evidence in competition cases - national procedural rules must therefore be interpreted in accordance with this provision or its material content

267. The EFTA Court has held in *Color Line* that the Damages Directive is partly a codification of existing EEA-relevant case law.[81] The CJEU has also indicated that several of the Damages Directive's provisions are merely 'codifying the Court's case law'.[82]

268. To date, however, the EEA Courts have not considered if Article 5 is among the provisions codifying existing case law.

269. Låssenteret considers that this is the case.

270. Strong indications are provided in the Commission's staff working paper accompanying its White Paper on damages actions for breach of the EC antitrust rules.[83] Here, the Commission provides its account of the *acquis communautaire* on access to evidence[84], and recalls, inter alia, the following in paragraph 91 (emphasis added):

> The principle of effectiveness requires Member States to apply their domestic law in such a manner that the exercise of Community rights is practically possible and not excessively

---

[81] Judgment of 17 September 2018 in case E-10/17, *Color Line*, para 73.

[82] See for example Judgment of 16 February 2023 in case C-312/21, *Tráficos Manuel Ferrer*, ECLI:EU:C:2023:99 para 61. See further opinion of AG Kokott of 22 September 2022 in the same case, ECLI:EU:C:2022:712, para 37: 'On a preliminary note, it should be noted in that regard that, in so far as the provisions of the directive codify, in a purely declaratory manner, principles that have previously been recognised by the case-law, those principles continue to apply without it being relevant whether the relevant provisions of the directive are to be categorised as substantive for the purposes of Article 22(1)'.

[83] Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, available here: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:52008SC0404

[84] See Chapter 3 of the Commission staff working paper, section B.

> difficult. From this follows, first, that in law suits on EC antitrust damages, Member States must make full use of any rules that may exist under national law so that victims can exercise their right to compensation effectively. This concerns in the present context particularly rules and principles on the facilitation of bringing evidence, for example in situations of information asymmetry such as those mentioned above. The Court of Justice has explicitly held that "if the national court finds that the fact of requiring a [company] to prove that wholesale distributors are overcompensated [...] is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a [company] will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

271. The working paper is based on case law existing at the time.

272. Of particular note for the present case is *Donau Chemie*, where AG Jääskinen opines (emphasis added):[85]

> ... what is required, under the imperative of effet utile, is a facility in the hands of a national judge deciding on third party access to the court file to conduct a weighing exercise of the kind foreshadowed in Pfleiderer. Such an exercise would allow the national judge to set all of the competing factors against each other, such as the protection of legitimate business secrets of the undertakings having participated in the restriction against the duty of Member States under Article 19(1) TEU to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law'. The national legislator may regulate the factors to be taken into account in such a balancing exercise, but not preclude it from taking place, except for, perhaps, the information provided by undertakings benefiting from leniency.

273. The CJEU followed the AG's recommendation and confirmed that 'any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case.'[86]

274. Against the background of that the description of the *acquis* in the foregoing, it becomes apparent that Article 5(1) of the Damages Directive merely reiterates what was already case law at the time, namely that '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 requirement thus existed, demonstrably, in the *acquis* prior to the adoption of the Damages Directive.

275. Article 5(4), which is of most direct relevance for the present case, does not do more than to clarify that the principle in Article 5(1) also applies to confidential information, for which, naturally, mechanisms need to exist to protect it. Note also that the case-law predating the Damages Directive concerned confidential information.

---

[85] Opinion *Donau Chemie*, n.47, para 66.
[86] Judgment in *Donau Chemie*, n.51, para 43.

276. The case law before the adoption of the Damages Directive had thus established that access to evidence could not in principle be barred due to the interest of protecting its confidentiality. In any event, could it be argued that this is not an inevitable consequence of the requirement of enabling access to evidence, modified for the particularities of confidential information?

277. In Låssenteret's view Article 5(4), as well as the remainder of that paragraph, are nothing but applications of the principle expressed in Article 5(1) to specific situations, taking into account other fundamental principles of EEA law such as due process.

278. This means that the pre-Damages Directive case law on the principle of effectiveness provided that national courts are *required* to request parties in a competition lawsuit to produce evidence that is decisive for one of the parties to substantiate its claim. In Låssenteret's view, Article 5 of the Damages Directive does not, in substance, add much, if anything, to the *acquis* existing then.

279. An additional indication that Article 5 is but a codification stems from a different consideration. The Damages Directive is based on Article 103 of the TFEU, which provides the EU with the legislative competence to 'give effect to the principles set out in Articles 101 and 102'. Regulations based on this Article cannot materially affect or widen the material content of Article 101 and 102.

280. The CJEU has held the following in *Towercast,* relating to a comparable situation regarding the potential implications of the Merger Regulation for the interpretation of Article 101 and 102 TFEU (emphasis added):[87]

> […] the Merger Regulation also serves to implement Articles 101 and 102 TFEU and forms part of a legislative whole intended to ensure the protection of competition in the internal market in a comprehensive manner. This shows, in turn, that that regulation is neither on a level with Articles 101 and 102 TFEU in the hierarchy of norms, nor capable, as an implementing provision, of modifying, let alone limiting, the scope of those reference provisions.

281. In the light of the foregoing, Låssenteret considers that there are compelling reasons to conclude that Article 5 of the Damages Directive is but a codification of existing EEA law, and that accordingly, national procedural law must be interpreted in accordance with its material content.

---

[87] Opinion of 13 October 2022 (AG Kokott), *Towercast,* C-449/21, ECLI:EU:C:2022:777, para 35.

4.4.3 The principle of homogeneity requires that national law is interpreted in accordance with Article 5 of the Damages Directive and that individuals are granted equivalent possibilities to privately enforce the EEA rules on competition.

282. The principle of homogeneity is probably the most important methodological principle in the EEA Agreement. It is intended to ensure that the legal structure and interpretation in the internal market extended by the three EFTA states Iceland, Liechtenstein and Norway are as uniform as possible – *homogenous*.

283. The preamble to the EEA Agreement makes clear that (emphasis added):

> The objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.

284. There are multiple additional provisions in the EEA Agreement, in particular the remainder of the preamble and Articles 1, 6 and 105-108, concerning homogeneity. They clarify that the overarching goal of the EEA Agreement is to ensure a uniform application of the EEA Agreements' material provisions, including those on competition in Articles 53 and 54.

285. This Court has repeatedly emphasised the importance of the principle of homogeneity in its jurisprudence.[88] It has confirmed that this principle entails both the obligation to interpret and apply the material provisions of the EEA Agreement in an identical manner to the corresponding provisions of the EU Treaties, and that individuals and economic operators are granted 'equal treatment and equal conditions of competition, as well as adequate means of enforcement'.[89]

286. In Låssenteret's view, the principle of homogeneity is to be given special importance when it comes to the EEA Agreement's core provisions such as those on competition, which mirror those in the EU Treaties. In that regard, it is important to recall that Article 58 EEA calls for 'a homogeneous implementation, application and interpretation' of those provisions.

287. This Court has also held that the principle of homogeneity entails the obligation for national courts to interpret national law, *as far as possible*, in conformity with EEA Law.[90] In

---

88 Judgment of 10 December 1998, *Sveinsbjørnsdottir*, E-9/97, paras 47-60.

89 *Ibid*, para 57.

90 See Judgment of 3 October 2007, *Criminal proceedings against A*, E-1/07, para 39: 'Moreover, it is inherent in the objectives of the EEA Agreement referred to in paragraph 37 above, as well as in Article 3 EEA, that national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methos recognized by national law as far as possible to achieve the result sought by the relevant EEA rule.'

Karlsson, this Court also held that this obligation applies to implemented and non-implemented EEA law alike.[91]

288. In view of the foregoing, Låssenteret considers that national procedural law must be interpreted in accordance with Article 5 the Damages Directive.

289. First, there can be no doubt that the Damages Directive, and in particular its Article 5, is to be considered as non-implemented EEA law for interpretation purposes. The Damages Directive is marked as EEA-relevant and is based on Articles 103 and 114 TFEU. These provisions provide the EU with competences to 'give effect to the principles set out in Articles 101 and 102' and 'adopt the measures [...] which have as their object the establishment and functioning of the internal market'. This means that the Damages Directive falls squarely within the scope of the EEA Agreement and relates directly to the core of its material provisions, namely the rules on competition and the internal market.

290. Second, while some of the Damages Directive's provisions may create tension with the division of enforcement competences between the supranational and national level, this cannot conceivably be the case for Article 5. Article 5 will therefore, undoubtedly, become EEA law also formally. As shown above, the provision's material content *is* EEA law. The EFTA Court's considerations in *Karlsson* as regards the interpretative value of non-implemented EEA law should therefore apply.

291. Third, this Court's judgement in *Jæger* further supports that view.[92]

292. In that case, the Court considered that a block exemption regulation, providing an exception from the general prohibition in Article 53 of the EEA Agreement that had not yet entered into force in Norway, could not be considered to apply to a situation when the regulation had not been in force. Yet the Court also considered that 'one cannot *interpret* the general prohibition in Article 53(1) EEA in order to bring it within the terms of a block exemption which, in itself, is not an interpretation of the provision but an exemption, i.e. something which derogates from the provision'[93] (emphasis added). In contrast to the issue at stake in *Jæger*, the present case *is* about the interpretation of provision of national law, which can be interpreted in the light of, and in accordance with, Article 5 of the Damages Directive.

293. In that regard, Låssenteret considers that in view of the significant delay in incorporating the Damages Directive into the EEA Agreement, national courts have a particularly important

---

[91] Judgment of 30 May 2002, *Karlsson*, E-4/01, para 28: 'National courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law.'

[92] Judgment of 1 April 1988, *Jæger*, E-3/97.

[93] *Ibid*, para 32.

role to play in ensuring homogeneity and must apply the interpretative methods recognized by national law as far as possible to achieve the result sought by the relevant EEA rule, which is Article 5 in the present case.

294. Fourth, in *Sveinsbjørnsdottir* the EFTA Court held that: [94]

> The homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.

295. The Court thus relied on the principle of homogeneity to establish that an institute of state liability akin to that of the EU is also present in the EEA Agreement.

296. In Låssenteret's view, similar considerations should also apply to a minimum level of procedural requirements as regards access to evidence, particularly in competition cases. In Låssenteret's view, that is what Article 5 of the Damages Directive provides.

297. Indeed, were this Court to consider that national procedural rules do not need to be interpreted in accordance with Article 5 of the Damages Directive, nor its material content, economic operators such as Låssenteret could be deprived of benefitting from equal treatment and equal opportunities compared to those in the EU and could not effectively enforce the rights bestowed upon them by the EEA Agreement before national courts. While Article 5 has not added much, if anything, in terms of substance, it is *easier* to understand and to apply for a national court than a framework based on jurisprudence alone.

298. In view of the foregoing, Låssenteret considers that the principle of homogeneity requires national procedural law to be interpreted in accordance with Article 5 of the Damages Directive, or alternatively, its material content.

4.4.4 The principle of effectiveness requires that national law is interpreted in accordance with Article 5 of the Damages Directive

299. Låssenteret has in Section 4.3.2 briefly set out what the principle of effectiveness entails. The Damages Directive, and in particular Article 5 thereof, is an expression of that principle.

300. This can be illustrated by reference to numerous of the Damages Directive's recitals and the preparatory documents referred to previously.

301. By means of example, Låssenteret invites the Court to consider the following Recitals (emphasis added):

---

[94] *Sveinsbjørnsdottir*, n.88, para 57.

(3) The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions.

(4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law. [...]

(11) All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, [...] must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions.

302. In view of the foregoing, the principle of effectiveness, and its application to private enforcement of the EEA's rules on competition, is clearly the origin and basis for the Damages Directive.

303. The Recitals quoted above clarify that the principle of effectiveness requires the possibility to claim damages for infringements of competition rules, and further, for there to be a national procedural framework that allows doing so in an effective manner.

304. Access to evidence is, as explained, a fundamental prerequisite to effective enforcement. Being denied any access at all, as happened to Låssenteret before the SFDC, makes it impossible to effectively enforce the right to compensation.

305. The Damages Directive thus recognizes the fundamental importance of access to evidence for effective private enforcement: [95]

306. As indicated above, the right of a claimant to obtain relevant evidence is a central aspect of the principle of effectiveness, in particular in the realm of competition law. That right extends also to confidential information, as the Damages Directive clarifies: 'Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.'[96]

307. If access to evidence can be categorically denied merely because it contains confidential information – or even 'trade secrets' for that matter – effective enforcement of competition

[95] Recital (15) Damages Directive.
[96] Recital (18) Damages Directive.

rules would be made impossible, and the principle of effectiveness would be infringed. Article 5 of the Damages Directive contains a minimum standard that national procedural rules must adhere to in order to avoid this. Accordingly, Article 5 is nothing but a codification, clarification or plausibly a spelling out of the inevitable consequences of the principle of effectiveness for national rules on access to evidence.

308. Therefore, Låssenteret considers that national procedural law must be interpreted in light of Article 5 of the Damages Directive, or alternatively, its material content. Were the provision and its content disregarded, there would be a grave risk of national procedural rules being applied in a manner that would infringe the principle of effectiveness.

309. In the light of the foregoing Låssenteret proposes that Question 6 is answered as follows:

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.

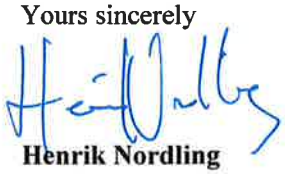
* * *

5. CONCLUSION

310. Låssenteret submits that this Court answer the referred Questions 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.**

Yours sincerely



Henrik Nordling
advokat

Peter Hallsteinsen
advokat

List of Annexes

Annex I	Oslo Economics, *Analysis of cylinder locks in commercial and public buildings*, 26 July 2023
Annex II	Letter to the EFTA Court – Request to amend the English version of the Request, 3 October 2023