BAHR

Oslo, 28 November 2023

To the President and Members of the EFTA Court

WRITTEN OBSERVATIONS

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

ASSA ABLOY OPENING SOLUTIONS NORWAY AS

Represented by

Beret Sundet, Advokat and Simen Skjold Søgaard, Advokat

In

CASE E-11/23

Låssenteret AS

v

Assa Abloy Opening Solutions Norway AS

Concerning a request for an Advisory Opinion from the EFTA Court by the Eidsivating Court of Appeal (Eidsivating lagmannsrett), received on 31 August 2023 in the case of Låssenteret AS v Assa Abloy Opening Solutions Norway AS under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Contents

1. Introduction

(1) On 28 August 2023, the Eidsivating Court of Appeal (the "**Referring Court**") submitted a Request for an Advisory Opinion to the EFTA Court (the "**Request**"). By its questions, the National Court seeks, in essence, to determine whether the Norwegian civil procedural rules on access to trade secrets are compatible with EEA law.

(2) Prior to making specific remarks to the questions submitted to the EFTA Court, Assa Abloy Openings Solutions Norway AS ("**AAOS**") will in Section 2 below provide necessary information on the factual background of the case, and in Section 3 provide an overview of the dispute before the Referring Court related to access to trade secrets, including a description of the Norwegian legislation and the assessment of the court of first instance (Follo og Nordre Østfold tingrett, the "**District Court**"). In Section 4, AAOS will comment on questions 5 and 6, especially relating to the principle of effectiveness, while Section 5 will focus on questions 1 to 4 (relating to the interpretation of Directive 2016/943 (the "**Trade Secrets Directive**")). Finally, in Section 6, AAOS will propose answers that the EFTA Court might provide to the Referring Court.

2. Factual background

2.1 Introduction

(3) To ensure that the EFTA Court has a full understanding of relevant facts of the case pending before the Norwegian courts, AAOS will below supplement the description of the facts contained in the Request.

(4) AAOS is a company within the ASSA ABLOY Group. AAOS provides door openings and access solutions used in private and business properties. It distributes its products to end customers through a network of locksmiths, building material stores and electrical installers.

(5) Låssenteret AS ("**Låssenteret**") is a locksmith company distributing AAOS products together with locks and safety products from a number of other manufacturers. Låssenteret has several departments across Norway.

(6) AAOS is not active in the locksmith market and is therefore only a supplier, and not a competitor, to Låssenteret.[1]

(7) The case under consideration pertains to a request from Låssenteret for the disclosure of sensitive trade secrets, in an action against AAOS in which Låssenteret argues that AAOS has abused an alleged position of dominance in breach of Article 54 of the EEA Agreement, by negatively discriminating Låssenteret and thereby allegedly distorting competition in the downstream market for locksmith services (secondary-line discrimination). The trade secrets requested are competitively sensitive and include current information about AAOS and AAOS' customers that, if disclosed, can harm both AAOS' position and the functioning of competition in Norway. The trade secrets relating to AAOS' customers are protected by agreed confidentiality restrictions included in the agreement between AAOS and its customers.

(8) In the main proceedings, AAOS has argued that there is no secondary-line discrimination and that Låssenteret has failed to prove or show any factual basis for AAOS holding a dominant position in any relevant market or AAOS having acted in a way that would have been considered an abuse of any such position. AAOS has not applied dissimilar conditions to equivalent transactions and has therefore not placed Låssenteret at a competitive disadvantage. Further, Låssenteret has never demonstrated how the alleged discrimination has impacted Låssenteret's ability to compete with other locksmiths.

(9) Given the pure vertical relationship between Låssenteret and AAOS, AAOS obviously lacks any incentive whatsoever to discriminate Låssenteret compared to other distributors of AAOS products.

(10) Conclusively, Låssenteret has not, despite the fact that it carries the burden of proof, presented any evidence to suggest that there is a basis for finding AAOS liable for secondary-line discrimination. The lawsuit is fully based on the hope that any trade secrets AAOS may be required to disclose, in Låssenteret's opinion somehow can

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[1] Up until 16 September 2021, AAOS owned the locksmith company Certego. On 16 September 2021, Nalka Invest AB completed its acquisition of Certego from AAOS.

provide support to the (unfounded) lawsuit. Hence, the case is a classic example of a "fishing expedition".

2.2 AAOS' business in Norway

2.2.1 The products

(11) AAOS' products and services include (i) mechanical locks, (ii) electromechanical locks and (iii) electronical access solutions, as well as (iv) a wide range of other access-related products such as door handles and door closers.

(12) Mechanical locks are traditional keys and cylinders. Electromechanical locks are locks where electronic signals (through a door switch, card, code pad etc.) are used to open the lock. Electronic access solutions are software programs used to program access (and are unrelated to the underlying locking solution).

(13) In Norway, mechanical and electromechanical locking solutions are manufactured by suppliers such as [redacted] supply electromechanical locking solutions. Electronic access solutions are supplied by, *inter alia*, [redacted]. Within other access-related products, such as door handles and door closers, a wide range of suppliers exists, e.g. [redacted].

2.2.2 The markets

(14) Mechanical locks and electronic access solutions belong to separate product markets,[2] mainly because the products have different areas of use, and the market players are significantly different. The mechanical (and electromechanical) solutions supplied by AAOS are installed by a locksmith whereas installation of electronic access solutions require special competence and are mainly installed by alarm companies and electricians.

(15) Although Låssenteret has the burden of proof, Låssenteret has not presented any evidence to demonstrate a position of dominance in any relevant market. AAOS is not

[2] The EU Commission has in its practice considered that electronic access solutions belong to a different market than mechanical locking solutions. Electronic access solutions have rather been considered part of a market for electronic security systems (ESS), see M.5735 *UTC/GE Security*, M.9408 *Assa Abloy/Agta Record.*

aware of [redacted]. This has been explained by AAOS in the statement of defense. With that statement, AAOS also submitted [redacted].[3]

(16) Låssenteret's justification for why the requested trade secrets are considered relevant for the main proceedings is not based on a firm position as to whether mechanical locks, electromechanical locks or electronic access solutions belong to the same product market, separate product markets or any other combination. Låssenteret's position is described in its appeal over the District Court's decision not to order disclosure of the trade secrets (office translation):

> *Låssenteret's view is that, as of now, there is no basis for separating mechanical, electrical, and electromechanical locks and components into separate subcategories (separate markets for competition law purposes). AAOS states, as we understand it, that mechanical locking systems and electronic access control constitute separate product markets.*[4]

(17) AAOS has several times requested Låssenteret to once and for all conclude on which markets it considers that the alleged dominance and abuse relates to (i.e. what the basis for the lawsuit actually is), but Låssenteret has refused to do so despite Låssenteret having the burden of proof. Låssenteret's strategy seems to be to conclude after Låssenteret has reviewed the different trade secrets requested (concerning all the previously mentioned products/services that AAOS offers), i.e. after Låssenteret knows the outcome of the (extremely broad) "fishing expedition".

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[3] Attachment 1 to the statement of defense.
[4] Låssenteret's appeal, p. 3, No: «*Låssenterets syn er videre, på nåværende tidspunkt, at det ikke er grunnlag for å dele opp mekaniske, elektriske og elektromekaniske låser og komponenter i separate underkategorier (egne markeder i konkurranserettslig forstand). AAOS anfører slik vi forstår det på sin side at mekaniske låssystemer og elektronisk adgangskontroll utgjør separate produktmarkeder.*»

2.2.3 Distribution levels

(18) For mechanical locks, AAOS, previously under the name "TrioVing", operates with three locksmith distribution levels (none of which provides for exclusivity for AAOS):

Retailer: the standard/basis level, making the locksmith entitled to re-sell any and all of AAOS' pre-build lock systems. This is a pure transactional model where there is no obligation on the retailer/locksmith to cooperate with AAOS towards the end-customer, product development or market processing. Låssenteret has the status of Retailer as of today, i.e. it enjoys the same rights as other locksmith with Retailer status.

LLS: the locksmith has a license to build and produce AAOS' lock systems based on system codes assigned by AAOS. The system codes represent an important security element. The standardized LLS agreement requires that the locksmith adheres to strict quality and safety standards set by AAOS, such as training and vetting of personnel for production of lock systems, and use of facilities and computers with given security standards. This is important because the building of the locks towards end-customers reflects upon AAOS and AAOS' trademark in the market. The cooperation towards the end-customers (ensuring these essential quality and safety requirements) is from time to time likely to create friction in the relationship between AAOS and the locksmith, and it is therefore necessary to escalate a number of specific issues to the leadership level for efficient handling, for example in relation to allocation of responsibility for complaints, delays, follow up of qualified personnel and security audits etc. For this to work in practice, there must be a fundamental trust and basis for good cooperation in place between the locksmith and AAOS.

TVSS (TrioVing Safety Center)[5]: a close partnership between the locksmith and AAOS. The standardized TVSS agreement requires that the locksmith collaborates with AAOS on customer and market development, participates in product development, tests new products and promotes the products and markets under the "TVSS umbrella". Since the TVSS partners' reciprocal obligations are not compensated separately, the TVSS partners also have access to prices that may reflect

[5] No.: TrioVing Sikkerhetssenter

the expected and assumed reciprocal obligations of the locksmith toward AAOS. All TVSS partners also have an LLS agreement.

(19) The electronic access solutions can be installed by a locksmith with the required electronical qualifications or by an electrical installer. The basic status is "Certified".[6] AAOS also offers a partnership program with two levels: "Partner" and "Partner+". Approximately one third of Låssenteret's departments are resellers on the Certified level. No department owned by Låssenteret has ever been appointed Partner (neither before nor after the termination of the TVSS and LLS agreements).[7]

(20) The distribution models for mechanical and electromechanical locks on the one hand and electronic access solutions on the other, are not interlinked. As such, for example, one and the same distributor can be a Partner+ and not a TVSS, or vice versa, or one and the same distributor can hold an LLS and not be included in the electronic access solutions distribution program. However, an important common and basic requirement for being granted any license level above "Retailer" (mechanical and electromechanical) or "Certified" (electronic access solutions) is that AAOS and the distributor can cooperate effectively and closely as partners towards the end customer based on trust.

2.3 The background for AAOS's termination of Låssenteret's TVSS and LLS agreements

(21) AAOS and Låssenteret (under the direction of the CEO, Mr. Raa) have endured a long and difficult history, ultimately leaving AAOS with no alternative but to terminate the TVSS partnership agreements and the LLS agreements.

(22) The difficulties relate to Mr. Raa's actions toward AAOS in his capacity as CEO of Låssenteret. Prior to the terminations, Mr. Raa – over a number of years and in a number of ways/situations – directly opposed AAOS' activities and interests. For example, Mr. Raa (acting through Raa Invest AS) unlawfully and with no explanation

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[6] No. "Sertifisert"
[7] Departments that have been acquired by Låssenteret may have had a status as Partner or Partner+ prior to the acquisition. After the departments have been merged into Låssenteret they have been adjusted to the Certified-level as the Partner-concept requires trust between the parties.

registered two companies under AAOS' protected trademark ("TrioVing"). Mr. Raa also, on numerous occasions, sent emails to AAOS' customers, TVSS partners and employees, as well as to the top management of the ASSA ABLOY Group, where he, *inter alia*, disloyally informed about his personal (and totally unfounded) views and dissatisfactions with respect to AAOS' leadership, business model and principles for cooperation with the locksmiths.

(23) The trust and cooperation between AAOS and Låssenteret greatly suffered due to Mr. Raa's unacceptable behavior. Such lack of trust and cooperation is impossible to align with TVSS and LLS status. On 2 December 2019, AAOS terminated the TVSS partnership agreement for mechanical locking solutions with Låssenteret. The parties agree that AAOS adhered to the termination terms of the contract. Following a notice period of 6 months, the termination was effective. Unfortunately, Mr. Raa continued to email (and partly harass) AAOS' customers, TVSS partners and employees, as well as the top management of the ASSA ABLOY Group. AAOS even had to file a complaint to the Norwegian Data Protection Authority, which resulted in Låssenteret receiving guidance on its obligations under the Personal Data Act and the General Data Protection Regulation (GDPR) when processing personal data.

(24) On 25 September 2020, AAOS terminated Låssenteret's LLS agreement for mechanical locking solutions. AAOS adhered to the termination clauses of the LLS agreement and offered Låssenteret a license to serve the aftermarket as well as to buy back certain components.

(25) After the termination was effective, Låssenteret filed a lawsuit against AAOS related to the payment received for the components. The case was later settled. Hence, the case before the EFTA Court stems from the second of two lawsuits filed by Låssenteret against AAOS in recent years.

(26) Today, all of Låssenteret's departments have the standard status of Retailer of mechanical locks (with an additional separate license to build locks in the aftermarket). Within electronic access solutions, Låssenteret is still a "Certified" distributor.

2.4 Låssenteret's unsuccessful complaint to the Norwegian Competition Authority

(27) Låssenteret had a meeting with the Norwegian Competition Authority ("**NCA**") on 2 February and 18 March 2021 and filed a written complaint on 2 February 2022. Låssenteret argued that AAOS has terminated the LLS agreement on unreasonable grounds, that Låssenteret is exposed to price discrimination and that AAOS has tried to force Låssenteret out of the market. Hence, the complaint concerned the same unfounded allegations of secondary-line discrimination as the lawsuit pending before the District Court.

(28) By letter of 9 March 2023, the NCA informed Låssenteret that it had decided not to pursue the matter further (prioritizing not to further investigate the allegations).

2.5 Låssenteret's lawsuit

(29) On 24 October 2022, Låssenteret filed a writ of summons whereby Låssenteret alleged that AAOS has abused its dominant position contrary to the Norwegian Competition Act Section 11 and the EEA Agreement Section 54. In the writ of summons, Låssenteret made the same arguments as in the complaint to the NCA (cf. Section 2.4). Further, just like in the complaint to the NCA, Låssenteret demonstrated no factual basis to back up the serious allegations against AAOS. For example, the writ of summons did not contain any evidence of AAOS holding a dominant position in any market, nor did it specify to which market the alleged dominance relates.

(30) AAOS has engaged leading expert professors Espen R. Moen and Christian Riis (Oeconomica DA) to review Låssenteret's allegations. In their report, Dr. Moen and Dr. Riis do not evaluate whether dominance exists in any relevant market but have been asked to evaluate the situation *if* the national courts were to find that dominance exists (as the question of abuse would not otherwise be of any relevance). Their report dated 7 July 2023 confirms that even if dominance is assumed in any relevant market (which there is no evidence to conclude), AAOS has in any event not engaged in an abuse of such dominance through secondary-line discrimination. The report supports that AAOS has not applied dissimilar conditions to equivalent transactions, and even if this was the case, such actions are not likely to have resulted in a competitive disadvantage for Låssenteret.

(31) Låssenteret's writ of summons did not include any evidence of economic loss suffered by Låssenteret. Låssenteret has later, upon the District Court's request, submitted two reports attempting to substantiate an economic loss. The total alleged loss is limited to MNOK 22.4 (approx. MEUR 2.22[8]) excluding interest. The reports do not consider/explain how such alleged loss is sufficient to place Låssenteret at a competitive disadvantage. Further, the loss (if any) is obviously lower than Låssenteret's economic reports conclude: [redacted], public information reveals that Låssenteret's has made several acquisitions and experienced a spectacular development in both operating income and results during the same period (cf. Figure to the right).[10]

[redacted]

(32) [redacted], a fact that is also confirmed by Låssenteret's first economic report (office translation): [redacted][11]

[8] Using the Norwegian Central Banks annual exchange rate for 2022 1 EUR = 10.1040 NOK.

[9] [redacted]

[10] [redacted]

[11] [redacted]

(33) The above clearly demonstrates (i) that AAOS does not hold a dominant position and (ii) that Låssenteret has not been placed at a competitive disadvantage as a result of AAOS' termination of the TVSS and the LLS agreements.

3. The dispute related to access to trade secrets

3.1 The nature of the trade secrets requested by Låssenteret

(34) In its pleading of 23 January 2023, Låssenteret requested access to evidence from AAOS, including sensitive trade secrets. Shortly thereafter, on 2 February 2023, AAOS voluntarily submitted all the documents requested that were not legally privileged (Norwegian Dispute Act Section 22-5) or covered by the exemption (unless otherwise decided by the national court) for trade secrets (Norwegian Dispute Act Section 22-10, further described in Section 3.2 below). The Request is limited to Låssenteret's request for access to evidence that the parties agree are trade secrets pursuant to Section 22-10 of the Norwegian Dispute Act.[12]

(35) Låssenteret's request for trade secrets is broadly scoped and concerns, *inter alia*, mechanical locks, electromechanical locks, electronic access solutions and other components, in and outside of Norway and from 2019 onwards.

(36) The request for trade secrets includes highly competitively sensitive information. The information concerns, *inter alia*, current information about AAOS' ten largest customers (all being competitors to Låssenteret) on sales, prices and rebates, including all agreements and prices agreed with Certego [redacted], as well as AAOS' strategy documents and internal market analyses. Some of the evidence that Låssenteret requests access to would constitute a violation of Article 53 of the EEA Agreement as illegal information exchange.

(37) In Norway, the locksmith market consists of a few big national players, such as [redacted], and many smaller regional players. Disclosure of the trade secrets sought would harm competition in the locksmith market by artificially

[12] Cf. the Request, page 2: *"The parties agree that a number of the requests relate to trade secrets that fall within the evidentiary exemption under Section 22-10 of the Norwegian Dispute Act (tvisteloven). The case raises doubts about the implications of EEA law for the interpretation of Section 22-12(2) and (3) of the Dispute Act, read in conjunction with Section 22-10, or whether there are provisions in EEA legislation that take precedence."*

increasing transparency and creating information asymmetry between Låssenteret and its competitors. For example, if Låssenteret gains access to Certego's terms and conditions with AAOS, Låssenteret would have insight into a main component of Certego's pricing. This information could in turn be used by Låssenteret in their own pricing towards the market which would hamper competition and also increase the risk of a collusive outcome. This can result in higher prices for the end-customer.

(38) Låssenteret's access to the trade secrets sought would also harm AAOS, as Låssenteret could use the information to gain better terms and conditions with competitors of AAOS. This in turn could harm AAOS' sales.

3.2 Relevant Norwegian legislation

(39) AAOS generally agrees with the Referring Court's description of relevant Norwegian legislation albeit considers it necessary to highlight and supplement a few aspects of the description contained in pages 4 to 5 of the Request.

(40) As explained in the Request, the starting point under Norwegian civil procedural law is that parties are free to submit and invoke the evidence they wish. There is a general rule that, upon the request of the opposing party, a party must disclose evidence that may be relevant to the dispute. The threshold for considering evidence as relevant is very low. For example, the fact that the disclosing party disagrees as to the relevance does not matter: The relevance test is solely based on the legal and factual assumptions of the requesting party (without an assessment of whether these assumptions are valid or not). It is therefore irrelevant whether the party's material claim in the case is plausible or in any way substantiated at the time the request for access is put forward.

(41) Hence, the general rule in the Dispute Act is that a plaintiff in a civil lawsuit arguing that a defendant has breached competition law regulations, such as Article 54 of the EEA Agreement, can require the defendant to disclose any information held of relevance to the lawsuit (based on the plaintiff's untested legal and factual assumptions). If a party refuses to disclose such evidence, the court may issue an order to disclose, if no exemptions apply.

(42) Of course, sometimes it is necessary to take into consideration not solely the requesting party's interest in the evidence, but also other valid and legitimate considerations. The Dispute Act therefore sets out a list of exemptions, including, for example, if the evidence requested is a trade secret. If the evidence constitutes a trade secret, it may be necessary to balance the requesting party's interest in access to the evidence against the legitimate interest of the opposing party in the protection of that trade secret. The system in the Dispute Act is that the balancing of the two colliding (but often separately legitimate) interests is subject to the discretionary assessment of the national court in each case and based on the specific facts and circumstances at hand. If the national court finds disclosure of the trade secrets *"necessary"*, the evidence must be disclosed to the requesting party, cf. the Dispute Act Section 22-10:

> *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.*[13]

(43) A few points should be made in this respect:

(44) First, Section 22-10 only relates to trade secrets, and no other categories of confidential information (which is a much broader term). Hence, information that is merely confidential, but does not constitute trade secrets, must be disclosed upon request without hinderance of Section 22-10.[14] The parties agree that the Request only relates to disclosure of trade secrets (and not other information of a confidential nature).

(45) Second, the court's assessment and balancing of interests are specific to the case at hand. The court shall take into account, *inter alia*, the importance of each trade secret to the dispute, how compelling the other party's reasons for denying access are, and the potential harm a disclosure would represent. The greater the concerns that arise, the

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[13] Unofficial translation of the Norwegian Dispute Act provided by the Norwegian Ministry of Justice and Public Security. No.: «*En part eller et vitne kan nekte å gi tilgang til bevis som ikke kan gjøres tilgjengelig uten å røpe en forretningshemmelighet. Retten kan likevel gi pålegg om at beviset skal gjøres tilgjengelig når den etter en avveining finner det påkrevd*».

[14] Information covered by a statutory duty of confidentiality, such as attorney-client privilege, is subject to a separate rule in Section 22-3 of the Dispute Act.

stronger the requesting party's need for access to the specific document must be. The exemption from access to evidence in Section 22-10 of the Dispute Act is therefore relative.

(46) Third, in its discretionary assessment of a proper balance, the court will also take into consideration whether the interest of the requesting party can be sufficiently safeguarded by granting access to the information in *anonymized form*, such as by redacting particularly sensitive information in the documents. In the case at hand, Låssenteret has not been interested in receiving the relevant documents in such a form.

(47) Fourth, pursuant to Section 22-12 (3), first sentence of the Dispute Act, where evidence relating to trade secrets is presented pursuant to an order of the national court, the national court shall impose (i) a duty of confidentiality with respect to the trade secrets, and (ii) may decide that oral hearing of the evidence shall be held *in camera*. The court may also, under special circumstances, limit the party's access to the use of co-counsel (in addition to regular counsel) to what the court deems necessary, pursuant to Section 22-12 (3), third sentence of the Dispute Act:

> *(3) When evidence referred to in Section 22-10 is adduced by order of the court, the court shall impose a duty of confidentiality on those present and prohibit the use of the trade secret that can be inferred from the evidence. The court may decide that oral proceedings regarding the evidence shall be conducted in camera. In special cases, the court may curtail the right of the parties to make use of co-counsel pursuant to Section 3-7 to such extent as is deemed necessary by the court.*

(48) Of course, the national court will often find that the disclosure of trade secrets is mandated if the legitimate concerns of the disclosing party are sufficiently safeguarded through such procedural means of action.

(49) As shown, the Norwegian procedural rules rely on a system where the national court, as an independent third party, is entrusted to conclude on the proper balance of interests in each case. Should one of the parties disagree on the court's specific balancing of the

interests at stake, that party may of course appeal the decision (as Låssenteret has done in the case at hand).

3.3 The decision of the District Court

(50) The District Court, following a thorough and specific balancing of interests (Låssenteret's interest in each of the trade secrets requested and AAOS' interest in the protection of each such trade secret) pursuant to Section 22-10 of the Dispute Act, rejected Låssenteret's disclosure request in its Court Order dated 8 May 2023.[15]

(51) The District Court found that some (but not all) of the requested trade secrets were simply not relevant for the main proceedings given Låssenteret's own (untested) legal and factual assumptions, cf., for example, Section 5.3.1 of the Court Order.

(52) In its discretionary assessment on the balancing of interests with respect to the trade secrets that satisfies the relevance criteria, the District Court considered the nature of the trade secrets requested, that they concern competitively sensitive information, Låssenteret's justification and alleged need for access to the trade secrets and whether it would be sufficient (to avoid unacceptable harm) to hold the hearing *in camera* and impose a duty of confidentiality on those present pursuant to Section 22-12 (3) of the Dispute Act.

(53) The District Court found that the specific trade secrets Låssenteret has requested are so sensitive that closing the doors of the main hearing and imposing a duty of confidentiality on those present simply would not be sufficient to avoid unacceptable harm being imposed on AAOS, cf., *inter alia,* Section 5.3 of the Court Order (certified translation):

> *The Court is of the view that such information as Låssenteret has referred to in disclosure requests no. 5 - 16 is competition-sensitive by its nature, and Låssenteret would be able to adapt its business on the basis of such information or otherwise exploit it to the detriment of AAOS. A duty of confidentiality and in-*

[15] Court Order of 8 May, Follo and Nordre Østfold District Court, case 22-153101TVI-TFNO/TSKI.

camera proceedings would therefore not mitigate the harmful effects for AAOS if it is ordered to disclose evidence containing such trade secrets.

(54) The District Court also held that Låssenteret's proposed confidentiality regime, where only each party's external counsel and consultants would access the trade secrets (but no representative of the party itself), was not possible under Norwegian law and in breach of the general requirement for a due process and fair trial, cf. pages 31-32 of the Court Order:

> *As far as concerns the claim for disclosure in the present case, it is the view of the Court, having regard for the need to ensure Låssenteret's right to an effective remedy and to a fair trial, that an arrangement cannot be established in which the representative from Låssenteret is not granted access in the event of an order for the disclosure of the trade secrets. The importance of a substantially correct ruling cannot lead to any other conclusion in this regard.*
>
> *Låssenteret's right to invoke arguments and to an adversarial hearing will in such case be curtailed, in that Låssenteret would be unable to provide input to its legal counsel regarding evidence relating to various aspects of the basis for the legal action. Redaction of the judgment, as proposed, might also affect the scope for considering an appeal. The Court agrees with AAOS that such an arrangement would also undermine the fundamental relationship of cooperation and trust between legal counsel and client. The Court also notes that the parties would have asymmetric scope for exercising their procedural rights in that only AAOS would have access to relevant evidence. Even if Låssenteret consents to such an arrangement as proposed, it would be difficult for Låssenteret to fully anticipate the implications of such consent for its procedural rights.*

(55) In this regard the District Court also referred to the Norwegian implementation of Article 9 (2) of the Trade Secrets Directive, but solely to *support* the conclusion that Låssenteret's proposed "confidentiality regime" was impossible under Norwegian law. Hence, the District Court did not hold that the Trade Secrets Directive is directly applicable in this case, and this has never been argued by AAOS.

(56) In any event, the District Court's conclusion would not have changed had such a "confidentiality regime" been possible. After a thorough assessment of Låssenteret's request for disclosure of each specific trade secret (Sections 5.3.1 to 5.3.5 of the Court Order), the District Court found that AAOS' legitimate interest in the protection of the trade secrets in this particular case outweighed Låssenteret's interest in the information for possible use in the main proceedings. The District Court found that none of Låssenteret's particular disclosure requests were *"strongly justified"*, and that disclosure would harm AAOS' position in the market. These are of course important elements in the Court's discretionary balancing of interest – and the outcome in the District Court is therefore not surprising.

3.4 Låssenteret's appeal and the referral to the EFTA Court

(57) Låssenteret did not agree with the District Court's specific balancing of interests in the case at hand and appealed the District Court's decision to the Referring Court. Låssenteret disagreed that the harm following a disclosure of the trade secrets requested outweighed Låssenteret's interest in possibly obtaining evidence for the underlying dispute. Hence, Låssenteret's genuine objections to the District Court's decision are of a case-specific nature and not a general one.

(58) In the appeal, however, Låssenteret also – for the first time – argued that EEA law gave Låssenteret an unconditional right to access AAOS' trade secrets. The Referring Court subsequently sent the Request to the EFTA Court.

(59) The question before the EFTA Court is therefore whether the system in the Norwegian Dispute Act as such, whereby it is for the national courts to balance the interest of the requesting party and the interest of the other party in protection of its trade secrets, on a case-by-case basis, represents a violation of EEA law.

4. Observations related to the principle of effectiveness and the principle of homogeneity

4.1 Introduction

(60) The Referring Court's fifth and sixth question:

Question 5: In a case involving abuse of a dominant position under Article 54 of the EEA Agreement, does EEA law, including the principle of effectiveness or the principle of homogeneity, require a national court to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests?

Question 6: Do EEA law principles, including the principle of effectiveness or the principle of homogeneity, mean that national procedural law must be interpreted in accordance with Article 5 of the Damages Directive (Directive 2014/104/EU), even though it is not incorporated into the EEA Agreement?

(61) In the proceedings before the Referring Court, Låssenteret has in essence claimed that the Dispute Act Section 22-10 is in violation of EEA law since it does not, in cases regarding an alleged violation of the Norwegian Competition Act Section 11 and the EEA Agreement Article 54, give the plaintiff an absolute and unconditional right of access to any trade secret held by the defendant that, based on the plaintiff's (untested) legal and factual assumptions, are relevant for the case.

(62) Låssenteret has furthermore claimed that Directive 2014/104/EU (the "**Damages Directive**") Article 5 is relevant for the interpretation of EEA law, even though it is not part of the EEA Agreement, and that the provision establishes an absolute and unconditional right of access to trade secrets as described directly above.

(63) AAOS rejects Låssenteret's claims concerning such an absolute and unconditional right of access to any relevant trade secrets.

(64) Observations to questions five and six are provided in the following.

4.2 The principle of effectiveness

4.2.1 Introduction

(65) It is settled case law that an individual or economic operator may bring an action for damages before a national court on the basis of a breach of Articles 53 and 54 of the

EEA Agreement.[16] National courts play a key role in the application of EEA competition law, administering and enforcing EEA law provisions. This task is assumed under the *principle of procedural autonomy* whereby, in the absence of harmonising legislation at EEA level, it is for the national legal systems to lay down detailed procedural rules to enforce rights under EEA law.[17] As provided in Section 4.4, the Damages Directive is not incorporated into the EEA Agreement.

(66) However, the lawfulness of national procedural rules is conditioned on EEA law principles: the principles of equivalence, effectiveness, effective judicial protection and full effectiveness of EEA law (*effet utile*).[18] These principles operate as a framework limiting and directing – but in no sense supplanting – the procedural autonomy of the EEA States.

(67) In one way or another, these principles are all expressions of the principle of sincere cooperation enshrined in Article 4 (3) TEU and Article 3 EEA, which requires the EU and EEA States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising from the EU Treaties/the EEA Agreement or resulting from EU legislation incorporated into the EEA Agreement. In jurisprudence of the CJEU, the various expressions relating to the effectiveness of EU law, that is, the principles of effectiveness, effective judicial protection and *effet utile*, are largely intertwined and overlapping in substance.[19] The principle of effectiveness has been the traditional framework of application by the CJEU.[20]

(68) Questions five and six refer explicitly to the principle of effectiveness. For the purposes of assessing the questions relating to disclosure of trade secrets, AAOS submits that the subject-matter should principally be assessed through the lens of the principle of

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[16] Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17, para. 114.
[17] Arnesen et. al., *Oversikt over EØS-retten* (Universitetsforlaget), 2022, p. 522; Judgement of 26 November 2015, *Medeval*, C-166/14, EU:C:2015:779, para. 37; Judgement of 29 August 2014, *Casino Admiral*, E-24/13, para. 72; Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 25; Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17, para. 73.
[18] Lenaerts, EU Procedural Law (2023), p. 121; Ellingsen, *Standing to* Enforce European Union Law before National Courts (Oxford: Hart Publishing, 2021), p. 31 ff.; Judgment of 22 September 2022, *Servicios Prescriptor y Medios de Pagos*, C-215/21, EU:C:2022:723, paras. 35-36.
[19] Lenaerts, EU Procedural Law (2023), p. 127.
[20] Lenaerts, EU Procedural Law (2023), p. 128.

effectiveness. Notions concerning effective judicial protection and the principle of *effet utile* may be utilized if they provide further guidance.[21]

(69) The threshold for when the principle of effectiveness can curtail the principle of national procedural autonomy is high: national rules must make it *"practically impossible or excessively difficult"* to exercise EEA rights.[22] The CJEU – and the EFTA Court – may only mandate the disapplication of national procedural rules or demand new remedies in very limited circumstances.[23] Whether a national procedural provision makes an action for infringement of EEA competition law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.[24] The principle of effectiveness cannot compensate for a plaintiff's deficient grounds for requesting disclosure of evidence from a defendant.

(70) Of course, when the principle of effectiveness is invoked by a party requesting disclosure of trade secrets, it must also be interpreted considering legitimate and fundamental interests of the opposing party and of the procedural system as such, including the interest in the protection of trade secrets and the safeguarding of a fair trial. In its more recent jurisprudence, reference by the CJEU to the principle of effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, has gained prominence when assessing national procedural rules and remedies. While the Charter is not EEA law, effective judicial protection is recognized as a general principle of EEA law, also enshrined in the Articles 6 and 8 of the European Convention on Human Rights (the "**ECHR**").[25]

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[21] Opinion of 14 January 2021, *UH*, C-64/20, EU:C:2021:14, para. 61.
[22] Judgment of 16 December 1976, *Rewe*, 33/76, EU:C:1976:188, para. 5; Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para. 29.
[23] Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para. 40; Judgment of 7 July 1981, *Rewe*, 158/80, EU:C:1981:163, para. 44.
[24] Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17, para. 111.
[25] Judgment of 5 May 2022, *Telenor*, E-12/20, para. 75.

(71) As such, the EEA EFTA states retain significant procedural autonomy concerning procedures for actions claiming infringement of competition rules. Procedural autonomy must therefore be treated as the rule, whereas the principle of effectiveness is the exception. Hence, the relevant question for the EFTA Court is whether the system for handling requests for access to trade secrets under the Dispute Act, taking into account procedural autonomy, makes it impossible or excessively difficult to exercise the right to direct action against alleged infringement of EEA competition rules.

4.2.2 Norwegian procedural law does not render private enforcement impossible or excessively difficult

(72) The CJEU has in its jurisprudence assessed the bearing of the principle of effectiveness on national procedural rules governing the disclosure of evidence in cases of private enforcement of Articles 53/54 EEA and Articles 101/102 TFEU. The CJEU has in none of these cases obliged that national procedural law *must require* a court to order disclosure of trade secrets without weighing up the parties' legitimate interests. Rather, the relevant jurisprudence of the CJEU and EFTA Court has established that account must be taken of the following key elements:

(i) The role of the national rule concerning disclosure of trade secrets, its conduct and its special features, viewed as a whole, taking into consideration the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.

(ii) That national procedural law cannot preclude any possibility for the national courts to order disclosure of evidence where a party has legitimate reasons to refuse to grant access to evidence, without conducting a weighing-up exercise (i.e. also considering the legitimate need for protection of sensitive trade secrets).

(iii) A weighing-up of legitimate interests justifying disclosure of evidence and the protection of information therein can be conducted by the national courts only on a case-by-case basis, according to national law, and taking into account all the relevant factors of the specific case.

(73) In applying these criteria to the case at hand, which not only concerns evidence, but evidence constituting competitively sensitive trade secrets that, if disclosed to Låssenteret, will harm both AAOS and the market as such, it becomes readily apparent that the procedure for weighing-up of the parties' legitimate interests on a case-by-case basis, such as set out in the Dispute Act Section 22-10, falls well within the discretion of procedural autonomy and complies with the principle of effectiveness as according to jurisprudence of the EFTA Court and the CJEU.

(74) First, it is submitted that an assessment of the role of the Dispute Act Section 22-10 in national procedural law confirms that it does not make it impossible or excessively difficult to bring direct action against alleged infringement of EEA competition rules. It is compatible with the principle of effectiveness that national procedural law leaves it to the national court to consider whether disclosure of evidence constituting trade secrets is necessary.

(75) In *Courage and Crehan*, a case concerning a standalone claim for damages stemming from alleged infringements of competition rules, the CJEU found that there should not be *"any absolute bar"* to bringing a claim for damages "*brought by a party to a contract which would be held to violate the competition rules"*.[26] As confirmed by the EFTA Court, the right to bring an action for infringement of EEA competition rules and damages thereto constitutes effective protection against the adverse effects of any infringement of EEA competition rules.[27] This is not controversial, and no such absolute bar exists under Norwegian law.

(76) In jurisprudence since *Courage*, the CJEU has further ruled on the requirements flowing from the principle of effectiveness to national procedural rules, particularly relating to substantive conditions of national law that may hinder plaintiffs bringing a claim for damages as such.[28]

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[26] Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para. 28.
[27] Judgment of 21 December 2012, *DB Schenker,* E-14/11, paras. 132 and 189.
[28] Judgement of 13 July 2006, *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461; Judgement of 16 May 2009, *Danske Slagterier*, C-445/06, EU:C:2009:178; Judgment of 5 June 2014, *Kone*, C-557/12, EU:C:2014:1317, paras. 33 and 37; Judgment of 12 December 2019, *Otis,* C-435/18, EU:C:2019:1069, para. 34; Judgment of 6 October 2021, *Sumal,* C-882/19, EU:C:2021:800, paras. 67 and 75; Judgment of 14 March 2019, *Vantaan kaupunk,* C-724/17, EU:C:2019:204, paras. 46–51; Judgment of 23 April 2020, *Sole-Mizo and Others*, C-13/18 and C-126/18, EU:C:2020:292, para. 56; Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17.

(77) There is significant jurisprudence from the CJEU concerning the principle of effectiveness, also outside competition law. In a pointed summation of that jurisprudence on assessment of compatibility with EEA law of national procedural legislation or practice, Advocate General Bobek in *UH* provides that the essence of that jurisprudence is that national courts should be allowed to find a reasonable relationship between each of the parties' legitimate interests on a case-by-case basis:

> *(...) What is, to my mind, crucial, is that, in each case, the national court should be allowed to find a reasonable (or proportional) relationship between the nature and importance of the right invoked; the seriousness of the infringement or the significance of the harm suffered; and the type of remedy or relief sought. All that should be measured and evaluated within the factual and legal situation at stake.*[29]

(78) As described in Section 3.2, the role of the Dispute Act Section 22-10 is to enable the national court to weigh up and balance the legitimate interests for and against disclosing trade secrets given the facts and circumstances of the case at hand. A national court has several tools available to safeguard protection of trade secrets (such as anonymization, closed doors and order of confidentiality to those present) and may take the possibility of utilizing these tools into account in that weighing-up exercise. As such, its purpose is precisely to find on a case-by-case basis the reasonable balance between the parties' legitimate interests, as Advocate General Bobek prescribes in *UH*.

(79) The assessment under the Dispute Act Section 22-10 thus secures the proper conduct of procedure and the consideration of both the rights and legitimate interests of the defendant and the rights and legitimate interest of the plaintiff in access to evidence so that a materially correct result may be reached – including a possible finding of an infringement of Article 54 EEA.

(80) What Låssenteret in reality is challenging is not the national procedural rule as such, but rather the District Court's specific and discretionary weighing-up of interests given the particular facts in the case at hand, cf. Section 3.4 above. It is submitted that the

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[29] Opinion of 14 January 2021, *UH*, C-64/20, EU:C:2021:14, para. 61.

principle of effectiveness does not require the national court to reach a specific conclusion, that is, that the national court must order disclosure without regard to the legitimate interest of the defendant, such as protection of competitively sensitive trade secrets. Rather, the principle leaves it to the procedural autonomy of the EEA EFTA states to regulate the rules on access to evidence, including regulation that the judges of national courts consider the legitimate interests of the parties – which is exactly what the Dispute Act Section 22-10 provides in Norwegian law. The result of that specific weighing-up exercise is under the procedural autonomy, i.e. an assessment by the national court on a case-by-case basis, and is not influenced by the principle of effectiveness.

(81) Second, it is submitted that jurisprudence from the CJEU concerning specifically private enforcement of competition law confirms that weighing-up the parties' legitimate interests in disclosure of evidence constituting trade secrets, before ordering disclosure, is compatible with the principle of effectiveness.

(82) In *Pfleiderer* and *Donau Chemie,* the CJEU examined national procedural law concerning third-party access to documents provided to a competition authority or court as part of a leniency programme or an investigation by a competition authority.[30]

(83) Such access to evidence in the file of a competition authority or court must, of course, be distinguished from access to evidence directly from another party, which has not been found to infringe EEA competition law in a prior investigation by a competition authority, nor has previously submitted the requested documents to an authority or a court. However, it is submitted that this jurisprudence is relevant for answering the questions before the EFTA Court. The CJEU in *Pfleiderer* and *Donau Chemie* clearly illustrate the general need to balance the alleged injured party's interest in access to trade secrets in cases involving alleged infringement of EEA competition rules against other legitimate concerns. This balancing exercise of legitimate interests is equally valid for private enforcement of competition law in standalone infringement cases.

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

(84) In *Pfleiderer*, the CJEU assessed the right of access, by persons adversely affected by a cartel, to documents submitted to the German competition authority as part of its leniency programme.[31] The CJEU provided that the national court had to weigh up the respective interests of the parties.[32] According to CJEU, that weighing exercise could be conducted by the national courts *"only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case."*[33]

(85) The CJEU confirmed the requirement of a weighing-up exercise in *Donau Chemie,* which, as *Pfleiderer*, concerned access to documents submitted as part of a leniency programme. The CJEU considered the compatibility of a procedural rule in the Austrian competition law stipulating that access to documents in the competition court file (whether as part of the leniency application or not) could only be granted if none of the parties to the proceedings object.[34] Hence, in *Donau Chemie*, the national court was altogether deprived of the possibility to weigh-up the parties' legitimate interests.

(86) The CJEU made it clear that national procedural rules hindering a weighing-up of the parties' interests do not comply with the principle of effectiveness.[35] Rather, national procedures must enable the national court to take into account *"the fact that that access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation"* as it would otherwise be excessively difficult for that party to exercise the right to seek compensation.[36]

(87) The CJEU highlighted that a weighing-up exercise was necessary for and applicable to competition law in general:

> *That weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of*

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[31] Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, para. 23.
[32] Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, para. 30.
[33] Judgment of 14 June 2011, *Pfleiderer*, C-360/09, EU:C:2011:389, para. 31.
[34] The case concerned access to documents in the hand of the Austrian Cartel Court. In Austria, the competition authority is not competent to find infringements of competition law. Instead, it must bring a case before the Cartel Court, which has exclusive jurisdiction to hear actions under the Cartel Act. Thus, while the documents were submitted to the competition authority, the plaintiff had to seek access from the Cartel Court.
[35] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 44.
[36] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 39.

course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals.[37]

(88) The EFTA Court should note that the Dispute Act Section 22-10 precisely enables the national court to perform a weighing-up exercise in spite a party's refusal to grant access to evidence constituting trade secrets.

(89) Third, an assessment under the lens of the principles of *effet utile* and effective judicial protection, leads to the same conclusion as the principle of effectiveness.

(90) The principle of effective judicial protection comprises various elements, such as the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. Furthermore, it requires national courts have power to consider all the questions of fact and law that are relevant to the cases before them.[38] The principle of effective judicial protection is not absolute. The right of access may be limited where that limitation does not undermine the very core of the right of access, pursues a legitimate aim, and where there is a relationship of proportionality between the means employed and the legitimate aim sought achieved.[39]

(91) It is submitted that the opinion of the Advocate General in *Donau Chemie* shows that the principles of *effet utile* and effective judicial protection also require that a weighing-up exercise must take place before ordering disclosure.[40]

(92) Concerning effective judicial protection, the opinion finds that requiring the consent of the infringer for access to public law competition judicial files, was not a proportional limitation of that principle.[41] Rather, a weighing-up of competing interests by a judge was required because *"except for certain situations falling outside the scope of competition law, a balancing exercise that leaves no room for one of the competing interests is not compatible with the principle of proportionality".*[42]

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[37] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 31.
[38] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 52; Judgment of 12 December 2019, *Otis,* C-435/18, EU:C:2019:1069, paras. 48 and 49.
[39] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 54.
[40] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, paras. 47 ff.
[41] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, paras. 51, 53 and 63.
[42] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 63.

(93) Furthermore, instead of requiring consent from all parties before a court can access files compiled in competition law proceedings, a legislative rule would be more appropriate that *"provided absolute protection for the participants in a leniency programme, but which required the interests of other participants to a restrictive practice to be balanced against the interests of the alleged victims"*.[43]

(94) Concerning the principle of *effet utile*, the Advocate General explicitly found that national courts must have the ability to perform a weighing-up exercise, taking into account *"the protection of legitimate business secrets."* It provides that the legislator *"may regulate the factors to be taken into account in such a balancing exercise, but not preclude it from taking place"*.[44]

(95) AAOS thus submits that it also compatible with the principles of *effet utile* and effective judicial protection that national courts perform a weighing-up exercise of the legitimate interests of the parties before ordering disclosure.

(96) Fourth, should a system that stipulates the weighing-up the parties' legitimate interests in disclosure of evidence constituting (competitively sensitive) trade secrets be considered a violation of the principle of effectiveness, it is difficult to understand what alternative national procedural rule would be both acceptable and sound from an EEA law perspective. Obviously, the principle of effectiveness cannot require a rule of generalised access to any relevant document, as that *"could lead to infringement of other rights conferred by EU law, inter alia, on the undertakings concerned, such as the right to protection of professional secrecy or of business secrecy"* as well as *"adversely affect public interests"*, cf. Section 4.2.3.[45]

(97) Fifth, jurisprudence from CJEU and EFTA Court on the corresponding rules on access to documents from proceedings at EU/EEA level confirm that the legitimate interests of the parties must be taken into account before ordering disclosure of trade secrets.[46]

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[43] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 64.
[44] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 66.
[45] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 33.
[46] Judgment of 26 July 2017, *AGC Glass Europe* Case, C-517/15 P, EU:C:2017:598, paras. 41 ff; Judgment of 14 March 2017, *Evonik Degussa GmbH,* C-162/15 P, EU:C:2017:205, paras. 42 ff; Judgment of 21 December 2012, *DB Schenker*, E-14/11, paras. 115 ff.

According to the EFTA Court, it is *"incumbent upon ESA to adopt rules on the processing of access to documents requests, by virtue of its power of internal organisation, which ensure that its internal operation is in conformity with the general principles of EEA law, in particular the principles of procedural homogeneity (...), good administration, and respect for fundamental rights"*.[47] Like national courts (pursuant to the Dispute Act Section 22-10) the EFTA Surveillance Authority performs a weighing-up exercise before providing access to documents in its files, taking into account the protection of *"commercial interests"*.[48] The EFTA Court has confirmed the legitimacy of the Authority's approach and that its decisions must comply with fundamental rights to ensure the protection of economic operators in the EEA.[49]

4.2.3 A national court may take into account harmful effects of disclosure of sensitive trade secrets

(98) The fifth question of the Referring Court relates only to whether a national court is *"required"* to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests. From the above, it is clear that this is not required by the principle of effectiveness.

(99) As described above in Section 3.2, under the Dispute Act Section 22-10, a national court shall take into account, inter alia, the importance of each trade secret to the dispute, how compelling the other party's reasons for denying access are, and the potential harm the disclosure would represent. The greater the concerns that arise from sharing the confidential information, the stronger the need for access to evidence. The exemption from access to evidence in Section 22-10 is therefore relative.

(100) AAOS submits that in that weighing-up exercise, it is within the procedural autonomy of the national courts and compatible with EEA law, including the principle of effectiveness, that national courts consider the (potential) harmful effects of ordering

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[47] Judgment of 7 July 2014, *DB Schenker,* E-5/13, para. 62; Judgment of 21 December 2012, *DB Schenker*, E-14/11, paras. 118 and 123.
[48] Article 4 (4) of EFTA Surveillance Authority Rules On Public Access To Documents, adopted on 3 March 2021 by College Decision No 015/21/COL. See also Article 59 of the Rules of Procedure of the EFTA Court.
[49] Judgment of 21 December 2012, *DB Schenker*, E-14/11, paras. 125-127, 136; Judgment of 7 July 2014, *DB Schenker,* E-5/13, paras. 66, 80; Judgment of 18 April 2012, *Posten Norge,* E-15/10, para. 110.

disclosure of evidence constituting trade secrets, such as the trade secrets being competitively sensitive to the defendant and third parties.

(101) According to the CJEU, in the weighing-up exercise, 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"*.[50]

(102) The EFTA Court should bear in mind that *Donau Chemie* concerned access to evidence in the file of the competition court, which had been submitted from a party as part of a leniency programme. The reference to *"public interests"*, is the interests of the public in enabling a functioning leniency programme where private undertakings are not disincentivized in applying for leniency and submitting evidence to the competition authorities. That particular public interest is not relevant for the case at hand.

(103) Nevertheless, it is clear that the CJEU considers that the principle of effectiveness prescribes that it is relevant for national courts to consider the interests justifying the protection of that information, including the (potential) harmful consequences of ordering access and the legitimate interests of other parties. The CJEU has exemplified that the legitimate interests of such third parties concern *"infringement of other rights conferred by EU law, inter alia, on the undertakings concerned, such as the right to protection of professional secrecy or of business secrecy, or on the individuals concerned, such as the right to protection of personal data"*.[51] The CJEU thus has acknowledged that the protection of trade secrets is a general principle of EU law.[52]

(104) Furthermore, EU/EEA law builds on a fundamental principle that seeks to maintain fair competition and hinder distortions of it, which must be considered a legitimate interest both of the parties to the dispute, the competitors of the parties, and the public.[53]

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[50] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 45.
[51] Judgement of 6 June 2013, *Donau Chemie*, C-536/11, EU:C:2013:366, para. 33.
[52] Judgment of 24 June 1986, *AKZO*, 53/85, EU:C:1986:256, para. 28; Judgment of 7 September 2021, *Klaipėdos*, C-927/19, EU:C:2021:700, para. 132; The CJEU has referred to "business secrets" and "trade secrets" interchangeably, referring to the same concept.
[53] To that effect, see Judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paras. 47-50.

(105) Additionally, the right to private life enshrined in Article 8 of ECHR protects the professional or commercial activities of either natural or legal persons.[54] The EFTA Court has recognized that fundamental rights *"form part of the general principles of EEA law"*, and the provisions of the ECHR and the judgments of the European Court of Human Rights, although not directly considered EEA law, are *"important sources for determining the scope of these fundamental rights"*.[55] In *Arnulf Clauder* the EFTA Court interpreted EEA law in light of Article 8 ECHR, and that fundamental right was a crucial factor in its formulation of its response to the referring court's questions.[56]

(106) Thus, the principle of protection of trade secrets and protection of the right to private life prescribe that the EFTA Court must interpret EEA law to protect the "*the extremely serious damage which could result from improper communication of documents to a competitor*".[57] This must apply also where the trade secrets indirectly affect the defendant, as *"disclosure (...) could result in serious harm to the undertaking"*.[58]

(107) The EFTA Court should note that under CJEU case law, an undertaking that receives competitively sensitive information is presumed to have taken the information into account when determining its own market conduct, which is harmful to competition.[59]

(108) The case at hand concerns evidence constituting trade secrets, also being competitively sensitive to both AAOS and competitors of Låssenteret. The evidence may be competitively sensitive, for example, in that it concerns non-public and current information on prices and applicable commercial term. Any disclosure will thus have harmful consequences, relating not only to business secrecy in general, but directly to the competitive ability of AAOS vis-á-vis its competitors in the upstream market(s) and for Låssenteret's competitors in the downstream markets, cf. Section 3.1 above.

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[54] *Niemietz* v *Germany*, judgment of 16 December 1992, Series A no 251-B, § 29; *Société Colas Est and Others* v *France*, no 37971/97, § 41, ECHR 2002-III; *Peck* v *The United Kingdom* no 44647/98, § 57, ECHR 2003-I.
[55] Judgment of 5 May 2022, *Telenor*, E-12/20, para. 75.
[56] Judgment of 26 July 2011, *Arnulf Clauder,* E-4/11, paras. 49-50; Spano, *The EFTA Court and Fundamental Rights* (European Constitutional Law Review, 13: 475–492, 2017), p. 484.
[57] Judgment of 24 June 1986, *AKZO,* 53/85, EU:C:1986:256, para. 29.
[58] Opinion of 7 June 2012, *Westbahn Management,* Case C-136/11, EU:C:2012:330, para. 33; Judgment of 14 February 2008, *Varec,* C-450/06, EU:C:2008:91, para. 49.
[59] Judgment of 4 June 2009, *T-Mobile,* C-8/08, EU:C:2009:343, paras. 51 and 62.

(109) AAOS thus submits that it is compatible with EEA law and the principle of effectiveness for a national court to take into account the competitively sensitive nature of the evidence requested to be disclosed.

4.2.4 The relevance of jurisprudence requiring national courts to use all procedures available under national law

(110) In a few selected cases, not concerning standalone enforcement of Articles 53/54 EEA, the CJEU has found that a national court is *"required to use all procedures available to it under national law"* to produce, for example, a particular document by one of the parties or a third party.[60]

(111) First, AAOS submits that this line of jurisprudence implicates only that a national court may assess all procedures *"available to it"* under national law, not create *new* remedies.

(112) The jurisprudence of the CJEU leaves it to the national procedural autonomy to decide what procedural safeguards are available and appropriate for safeguarding the protection of competitively sensitive trade secrets. The principle of effectiveness does not prescribe that EEA states must *"create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law"*[61] – this must apply in the same vein for the measures that national legislation provides for safeguarding such information.

(113) It is only where it is *"apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law"*, that the principle of effectiveness would trump barriers in national procedural law.[62] This is an extremely high threshold – in jurisprudence of the CJEU relating for example to where application of national law would prohibit granting interim relief to a party in a case concerning

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[60] Judgment of 7 September 2006, *Laboratoires Boiron,* C-526/04, EU:C:2006:528, para. 55; Judgment of 9 July 2020, *Vueling,* C-86/19, EU:C:2020:538, para. 43; Judgment of 13 February 2014, *Gautzsch Großhandel*, C-479/12, EU:C:2014:75, para. 43; Judgment of 28 January 2010, *Direct Parcel Distribution Belgium,* C-264/08, EU:C:2010:43, para 35.

[61] Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para. 40; Judgment of 7 July 1981, *Rewe,* 158/80, EU:C:1981:163, para. 44; Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 66.

[62] Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, para. 41.

EU law until the CJEU has replied to the national court's reference for a preliminary ruling,[63] or, as provided above regarding *Pfleiderer* and *Donau Chemie*, that disclosure of evidence may be rejected solely by a party refusing consent.

(114) It is clear that EEA law, the principles of effectiveness and effective judicial protection do not require more than that the national courts give due consideration to alternative means of gathering evidence that are available under national law, before deciding what evidence may be disclosed, if any.[64] The effective judicial protection of the plaintiff's right to seek compensation is secured by the fact that the national court take into account its legitimate interests in the weighing-up exercise.

(115) AAOS thus submits that it is compatible with EEA law and the principle of effectiveness that national courts take into account whether available arrangements for protection of trade secrets disclosed are sufficient to protect the trade secrets and the harmful effects on the competitive ability of the parties to the dispute and third parties.

(116) While it is available under national procedural law for a national court to order a confidentiality ring arrangement which includes the representative of a plaintiff being present, such an arrangement will not always sufficiently dispense of the need to protect trade secrets and competitively sensitive information from potential harm to competition.

(117) AAOS submits that the District Court's decision precisely provides an example of a national court assessing all procedures available to it under national law to order evidence produced by the defendant. In this case, the District Court's conclusion was, given the sensitive nature of the trade secrets requested, that the procedural safeguards of Section 22-12 (3), given the nature of the specific trade secrets requested by Låssenteret, were simply not sufficient to avoid unacceptable harm being imposed, cf. Section 3.3 above.

(118) Second, the jurisprudence of the CJEU in those cases where the requirement *"to use all procedures available to it under national law"* is articulated, relate to other areas of

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[63] Judgment of 19 June 1990, *Factortame and Others,* C-213/89, EU:C:1990:257, paras. 19 ff.
[64] Opinion of 7 February 2013, *Donau Chemie*, C-536/11, EU:C:2013:67, para. 68.

law than standalone proceedings for infringement of Articles 53/54 EEA, and the conclusions of the CJEU are highly dependent on the facts of the cases considered.

(119) For example, the case of *Boiron* concerned state aid and whether the Altmark-criteria were fulfilled. According to referring court in that case, *"the failure of [defendant] to produce the evidence necessary for [the plaintiff's] claim to succeed may be the only obstacle to showing that the tax on direct sales amounts to State aid"*.[65] The CJEU furthermore emphasized that previous jurisprudence relating to state aid law had concluded that the specific tax exemption for wholesale distributors should be considered state aid to the extent that it overcompensates the wholesale distributors.[66]

(120) As such, it was clear that the overcompensation of the defendant, which would mean that state aid was present, and which could only be produced by the defendant, was the single way for the plaintiff to prove the alleged infringement of EU law.[67]

(121) In the case before the Referring Court, there is no indication that disclosure of competitively sensitive trade secrets, is the *only* way for which the plaintiff may fulfil its burden of proof with regard to the alleged infringement of Article 54 EEA.

(122) Rather, as described above, the plaintiff has requested disclosure of, *inter alia*, terms and pricing of AAOS to its customers, i.e. competitors of the plaintiff. As the District Court correctly has pointed out, the plaintiff has itself been a TVSS member until 2020 and had LLS agreements until 2021, and should therefore know how the terminations have affected its own position (if at all). It is thus questionable *"how strong a need Låssenteret has for the information in question"* (relating to Låssenteret's competitors).[68] Nothing stands in the way of the plaintiff bringing a case for infringement of Article 54 EEA based on the actual, relevant evidence it already possesses, which may also be sought substantiated by economic experts.

(123) Third, none of the cases in that line of jurisprudence from the CJEU take into account the concerns of disclosing competitively sensitive trade secrets. In contrast, the case

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[65] Judgment of 7 September 2006, *Laboratoires Boiron,* C-526/04, EU:C:2006:528, para. 53.
[66] Judgment of 7 September 2006, *Laboratoires Boiron,* C-526/04, EU:C:2006:528, para. 27.
[67] Judgment of 7 September 2006, *Laboratoires Boiron,* C-526/04, EU:C:2006:528, para. 57.
[68] The District Court judgment, p. 34-35.

before the EFTA Court rather necessitates that proper account is taken to the legitimate need to secure protection of competitively sensitive trade secrets (cf. Section 4.2.3 above).

(124) It is in the nature of current pricing and terms that it is highly confidential and liable to distort both actual and potential competition. Depending on the abuse alleged under such a precedent, and the evidence requested by the plaintiff, there would be no limits to the information that a plaintiff could gain access to – for example, strategic information providing it to potentially enter an upstream market in competition with the defendant.

(125) Fourth, a requirement to *"use all procedures available to it under national law"* clearly cannot be understood as requiring a system under national procedural law where the plaintiff in reality is relieved of his or her burden of proof.

(126) In *Paccar*, the CJEU found that the requirements on a defendant to disclose evidence in its control *"cannot result in defendants to main proceedings taking the place of claimants to main proceedings in their task of demonstrating the existence and scope of damage suffered."* Furthermore, the CJEU found that:

> *That reasoning applies, a fortiori, to proceedings in which no penalty has been previously imposed by the Commission or by a national competition authority for unlawful conduct.*[69]

(127) As such, the requirement on a defendant to disclose evidence in its control clearly cannot be used to compensate for a plaintiff's lack of a factual basis for the lawsuit, and even more so when no previous infringement has been found by competition authorities. The principle of effectiveness cannot require stronger curtailment of the domestic legal order concerning disclosure of evidence than the Damages Directive.

(128) Fifth, the possibility to seek disclosure of evidence based on an unsubstantiated claim of infringement of EEA competition rules carries an inherent risk of abuse, wherein it

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[69] Judgment of 10 November 2022, *Paccar* C-163/21, EU:C:2022:863, para. 66. It related to the requirement under Article 5 of the Damages Directive that an order for disclosure of evidence be limited to that which is proportionate.

may be utilized for "fishing expeditions" (non-specific or overly broad requests for where the plaintiff has no evidence at all to support his or her case) and/or "discovery blackmail" (using disclosure rules to pressure defendants into settlements even though the claim may be weak or unfounded).[70] These notions are also referenced in the Damages Directive.[71] Such a proposition would set a dangerous precedent under EEA law whereby any customer may, in essence, have a legal right to access trade secrets containing current information on the terms that its supplier provides to its competitors, simply by claiming that there is an abuse of dominance by price discrimination and that it cannot prove so other than by gaining insight to the defendant's pricing.

(129) The system in the Dispute Act Section 22-10 with the weighing-up of interests has the benefit of by nature reducing the risk of fishing expeditions and discovery blackmail when a national court assess the importance of the trade secret sought disclosed. This must especially be so, where under Norwegian procedural law, the national court does not test the plausibility of the party's submissions on the underlying claim when considering the relevance of the trade secrets requested – but weighs up the interests of the parties solely based on those submissions, substantiated or not.

4.3 The principle of homogeneity

(130) The EFTA Court has recognized a principle of homogeneity in EEA law, flowing from the wording and purpose of the EEA Agreement.[72] The basic substance of the principle is that *"the EFTA Court follows ECJ, as far as case law is available"*.[73] Its primary function is to secure homogenous application of primary law concerning the internal market under EU and EEA law respectively.[74]

(131) The principle may be applied in the interpretation of the requirements of EEA law for national procedural law, only were there are actual differences between EU and EEA law. Where an assessment of EEA law in isolation would lead to a different result than

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[70] Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law* (Edward Elgar Publishing, 2021), p. 57-58.
[71] In the notion that disclosure must be limited to what is proportionate, according to Damages Directive, Article 5 (3), cf. Recital 23.
[72] Articles 1 (1) and 6 EEA, recital 4 and 15 to the EEA Agreement, and SCA Article 3 (2), cf. Judgment of 10 December 1998, *Sveinbjørnsdottir*, E-9/97, para. 60, cf. paras. 47-56.
[73] Baudenbacher, *Some Reflections on the EFTA Court* (presentation), 2 July 2015.
[74] Fredriksen and Mathisen, EØS-rett (4th ed., Fagbokforlaget, 2022) p. 72.

in EU law, it must be assessed if there is sufficient legal basis in EEA law in order to reach the same result as in EU law.[75] According to the EFTA Court, the principle of homogeneity prescribes that national courts must *"consider any relevant element of EEA law, whether implemented or not, when interpreting national law"*.[76] However, this does not mean that national courts in the EEA states must take into account directives that are not *incorporated* in the EEA Agreement, and as such not part of EEA law.[77]

(132) The EFTA Court must bear in mind that the principle of homogeneity is, however, a principle, and not a rule without limitations. The national sovereignty of the EEA states imposes a strict limit on the application of the principle and requires that there is an actual legal basis in EEA law to reach the same result as in EU law. Whether homogeneity between EU and EEA law is the result of an interpretation of EEA law, is thus a matter of interpretation of the actual legal basis in EEA law case-by-case.

(133) In the case at hand, it is difficult to see that the principle of homogeneity has any independent significance. As shown in Section 4.2 above, the relevant national procedural rules are not in violation of the principle of effectiveness as developed and interpreted by the CJEU and the EFTA Court. Further, as described in Section 4.4 below, the Damages Directive is not incorporated into the EEA Agreement, nor implemented in Norwegian law, and Norwegian procedural rules are in any event not in violation of the Damages Directive.

4.4 The Damages Directive

4.4.1 The Damages Directive Article 5 does not codify EEA-relevant law

(134) The Referring Court asks whether national procedural law must be interpreted in line with Article 5 of the Damages Directive, even though it is yet to be incorporated into the EEA Agreement. In *Kystlink*, the EFTA Court stated that EEA law *"does not set*

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[75] Fredriksen and Mathisen, EØS-rett (4th ed., Fagbokforlaget, 2022), p. 78; Judgment of 26 July 2016, *Jabbi*, E-28/15, para. 68; Judgment of 21 December 2012, *DB Schenker*, E-14/11, para. 78.
[76] Judgment of 30 May 2002, *Karlsson*, E-4/01, para. 28.
[77] Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17, para. 73.

out the procedural rules concerning the right to claim damages for breaches of Articles 53 and 54 EEA" as the Directive is not incorporated into the Agreement.[78]

(135) The effective implementation of Article 54 EEA clearly cannot lead to the incorporation into EEA law of a directive that the EEA EFTA states have not incorporated into the EEA Agreement – this would infringe on their sovereignty.

(136) AAOS submits that parts of the Damages Directive are a codification of EEA-relevant law.[79] However, it is submitted that the considerations in Article 5 of the Directive does not derive their binding effect from EEA primary law. The Directive seeks to harmonise procedural rules by setting out a clearer set of predominantly positive procedural obligations.[80] This does not imply that the new positive obligation in Article 5 establishes the standard by which the principle of effectiveness is to be measured generally. It follows from the recitals of the Directive that it was adopted as it was necessary to coordinate at Union level the enforcement of public and private enforcement to avoid the divergence of applicable rules, which could jeopardize the proper functioning of the internal market.[81]

4.4.2 In the same way as Norwegian legislation, the Damages Directive prescribes a weighing-up exercise

(137) From the wording of the Damages Directive Article 5, and jurisprudence from the CJEU, it is clear that the requirements of Article 5 are already satisfied by way of the Dispute Act Section 22-10, as far as disclosure of trade secrets is concerned.

(138) First, Article 5 does not give rise to an interpretation of EEA law in which national courts are required to order disclosure of competitively sensitive trade secrets.

(139) The wording of Article 5 does not impose requirements on the EU member states to order such disclosure, it merely provides that they shall ensure that national courts *"are*

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[78] Judgment of 17 September 2018, *Nye Kystlink AS*, E-10/17, para. 73.
[79] The Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of EEA competition law (cf. recital 12).
[80] M. Bergström, M. Iacovides og M. Strand (eds.), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart 2016), p. 109; Wagner-von Papp, *Access to Evidence and Leniency Materials* (2016), p. 4; Wagner-von Papp and others, *Disclosure of documents that lie in the control of the parties*, in *Implementation of the EU Damages Directive into Member State law* (Concurrences N°3-2017), paras. 5-6, 8.
[81] Directive 2014/104/EU, Recital 6.

able to order" disclosure. In contrast, the Commission proposal on Article 5 (2) was phrased as a duty that the EU member states *"shall ensure that national courts order the disclosure of evidence"* (emphasis added).[82] The final wording of the Directive must be considered an intentional limitation by the legislator. Thus, Article 5 at no point provides for a duty of a court to order disclosure.[83]

(140) The Directive does not limit the discretion of the national courts, and the Directive cannot be understood to contain rules on the weighting of the factors within the national court's weighing-up of interests. The Directive provides a framework for the protection of confidential information, but it is up to the national courts to apply this framework in the specific case and to weigh the relevant factors based on the circumstances of the case. Therefore, a national court has the discretion to determine any appropriate protective measures for confidential information in the specific case, and the Directive does not prescribe that the court *must* find an arrangement and order disclosure.

(141) For example, as described above concerning the principle of effectiveness, it is within a national court's discretion to consider that a confidentiality regime suggested by a plaintiff, would not sufficiently cater to protect competitively sensitive trade secrets, also considering the basic principles of the domestic judicial system. Thus, the Damages Directive does not exclude that national courts take into account whether disclosure only to external advisor of the plaintiff would undermine the fundamental cooperation and trust relationship between counsel and client, so that the parties will have different opportunities to exercise their procedural rights.

(142) Article 5 does not prescribe an interpretation of EEA law that demands that national procedural law order disclosure of trade secrets at whatever cost to the defendant and in spite of harms to competition. Requiring that national courts take whatever action necessary to disclose trade secrets would render a weighing-up exercise meaningless.

(143) Second, Article 5 prescribes that national courts in the weighing-up exercise where it must *"consider the legitimate interests of all parties and third parties concerned"*,

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[82] Commission Proposal (Article 5 of the Commission Proposal, COM(2013) 404 final of 11 June 2013).
[83] Wagner-von Papp and others, *Disclosure of documents that lie in the control of the parties*, in *Implementation of the EU Damages Directive into Member State law* (Concurrences N°3-2017), para. 5.

"shall" consider, *"in particular"*, *"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."* Furthermore, it prescribes that states 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,"* and that when ordering disclosure, *"national courts have at their disposal effective measures to protect such information."*

(144) AAOS submits that Sections 22-10 and 22-12 (3) enable national courts to order disclosure of trade secrets if relevant for an action for damages, and that the Dispute Act regulates sufficient protective measures. The Dispute Act thus fulfil the Directive's requirements for appropriate protective measures for confidential information.

(145) Third, it is also emphasized in the recitals of the Directive 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"*.[84] Therefore, national courts should *"have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings"*. One such measure is *"restricting the persons allowed to see the evidence"*. Furthermore, it is stated that *"[m]easures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation"*.

(146) AAOS submits that while the recital includes several possibilities for protecting confidential information, these alternatives are merely indicative suggestions.

(147) With regard to the possibility of *"restricting the persons allowed to see the evidence"*, national courts already have the possibility to limit the parties' access to the use of co-counsel (in addition to regular counsel) to what it deems necessary (cf. Section 3.2).

(148) However, due to fundamental principles, *inter alia* in Article 6 ECHR, Norwegian procedural law does not allow "confidentiality rings" where no representative of the

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[84] Directive 2014/104/EU, Recital 18.

plaintiff and/or defendant is present when trade secrets are presented in the oral hearing. These considerations are clearly both legitimate and allowed pursuant to the Directive.

(149) Further, the EU Commission has also highlighted the same legitimate considerations in a Communication.[85] Concerning use of "confidentiality rings", the Communication states that *"national courts may attach importance to the fact that information placed in a confidentiality ring may limit the extent to which it may be accessible and/or used in subsequent stages of the procedure (e.g. hearings, publication, etc.)".*[86]

(150) Hence, a confidentiality ring where only external advisors are included, requires that both national law and the specific circumstances of the case allow it.[87] Whether confidentiality rings are an available tool for disclosure of evidence in cases of direct action before the CJEU/EFTA Court is irrelevant.[88] Under Norwegian procedural law, such a confidentiality ring is not an available tool. Should the EFTA Court find that EEA law requires national procedural law to be able to order such a confidentiality ring, it is submitted that a national court may in the weighing-up exercise under Dispute Act Section 22-10 take the considerations of the Communication into account.

(151) Fourth, the EFTA Court should consider that the system of the Dispute Act ensures a plaintiff's access to trade secrets at least to the standard of the Directive, if not better.

(152) Article 5 (1) of the Directive does not require that national courts must be able to order access to evidence unless *"a justification is provided which includes reasonably available factual information and evidence which, taken together, sufficiently support the plausibility of the claim for damages".* Under the Dispute Act, there is no such requirement for substantiation of the claim in the main action when requesting access to evidence. On the contrary, the assessment as to what evidence is relevant solely relies upon the legal and factual assumptions of the requesting party, see Section 3.2.

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[85] Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020/C 242/01).
[86] Communication (2020/C 242/01), para. 56.
[87] Communication (2020/C 242/01), para. 61.
[88] See e.g. Judgment of 14 May 2020, *NKT Verwaltungs,* C-607/18 P, EU:C:2020:385, paras. 285-288.

(153) In the case before the Referring Court, the plaintiff is far from having substantiated any liability, causation or economic loss, and the plaintiff's claim for access to evidence would clearly not satisfy the requirement of the Directive Article 5 (1).

(154) Furthermore, the Dispute Act Section 22-10 concerns whether disclosure of *"trade secrets"* is *"necessary"*, while the Damages Directive Article 5 (3) and (4), cf. (1), refers the protection of the broader concept of *"confidential information"*.

(155) Comparing the systems under the Directive and the Dispute Act, the latter requiring no substantiation of the claim in the main action when claiming access to trade secrets and only limiting access to trade secrets rather than confidential information, suggests that there is a greater margin for refusing access based on a weighing-up against other considerations. According to the Norwegian Ministry of Trade and Fisheries,[89] as well as a report commissioned by it,[90] the threshold in national law to order disclosure of trade secrets, is fully in line with the Directive, as protection of trade secrets must carry more weight in the weighing-up exercise than confidential information in general. The Ministry found that implementation of the Directive would not require any amendment to the Dispute Act Section 22-10.

(156) Fifth, the Directive aims to harmonise minimum standards, and the implementation of the Directive into the legal order of the EU states has not resulted in a uniform legal order whereby evidence constituting trade secrets must be disclosed. Rather, the confidential nature of a piece of evidence is in jurisdictions such as France, Germany, Italy and the Netherlands taken into account for the proportionality assessment when national courts decide whether to order disclosure.[91]

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[89] The Ministry of Trade and Fisheries, *Høringsnotat – Forslag til endringer i konkurranseloven - gjennomføring i norsk rett av direktiv 2014/104/EU om privat håndheving av EU/EØS-konkurransereglene* (Eng. Proposal for changes to the Competition Act – Implementation into Norwegian law of Directive 2014/104/EU on private enforcement of the EU/EEA competition rules), p. 31-32.

[90] Hjelmeng, Ørstavik and Østerud, *Utredning av rettsspørsmål knyttet til gjennomføring i norsk rett av Parlaments- og Rådsdirektiv 2014/104/EU av 26. november 2014 om visse regler for søksmål i henhold til nasjonal rett angående erstatning for overtredelser av medlemsstatenes og Den europeiske unions konkurranserett* (Eng. Assessment of legal issues related to the implementation into Norwegian law of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) (2014), p. 35, 45-46.

[91] See Wagner-von Papp and others, *Disclosure of documents that lie in the control of the parties*, in *Implementation of the EU Damages Directive into Member State law* (Concurrences N°3-2017), paras. 16-18, 26, 33, 38, and 49-51.

5. Observations related to the interpretation of the Trade Secrets Directive

5.1 Introduction

(157) The Referring Court's first to fourth questions:

> *Question 1: Is the material scope (ratione materiae) of Directive 2016/943 limited to cases in which the subject-matter of the dispute is the use of acquired trade secrets?*
>
> *Question 2: The last sentence of Article 9(2) of the Directive on the protection of trade secrets requires that "[t]he number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings". Despite that wording, does the Directive [on the protection of trade secrets] allow for a national court to establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case?*
>
> *Question 3: Does the last sentence of Article 9(2) of the Directive on the protection of trade secrets express a general EEA law principle to the effect that a national court may not establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case?*
>
> *Question 4: Is it of significance to the answer to one or more of questions 1 to 3 above that the trade secrets that are requested disclosed as evidence are competitively sensitive in relation to the party requesting access to the information?*

5.2 The material scope of the Trade Secrets Directive

(158) On the first question of the Referring Court, the EFTA Court should consider that there seems to be no dispute between the parties concerning the material scope of the Directive. Also, the question is not of relevance for the case before the Referring Court.

The material scope of the Trade Secrets Directive is *"rules on the protection against the unlawful acquisition, use and disclosure of trade secrets"*, cf. Article 1. Article 6 prescribes that EEA EFTA states *"shall provide for the measures, procedures and remedies necessary to ensure the availability of civil redress against the unlawful acquisition, use and disclosure of trade secrets."* Article 9 refers to the protection of confidentiality in *"legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret"*. Hence, Article 9 is only applicable to disputes where the subject-matter is the unlawful acquisition, use or disclosure of a trade secret.

5.3 The relevance of the Trade Secrets Directive for the case at hand

(159) In Norwegian procedural law, the system under Article 9 (2) has been introduced not only for cases in which the subject-matter of the dispute is the unlawful acquisition, use or disclosure of acquired trade secrets, but for the use of trade secrets in civil cases in general.[92] National courts shall (i) impose a duty of confidentiality with respect to the trade secrets, (ii) decide that oral hearing of the trade secrets shall be held *in camera* and may also (iii) limit the party's access to the use of co-counsel[93] (in addition to regular counsel[94]) to what the court deems necessary, cf. Section 3.2. Hence, in line with Article 9 (2) third subsection, the system secures that a "confidentiality ring" includes *"at least, one natural person from each party"*.

(160) The EFTA Court should note that according to Article 1 (2) point (b), the Directive does not affect *"the application of [EEA rules or national rules] requiring trade secret holders to disclose, for reasons of public interest, information, including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities."* Neither does it affect *"the application of competition law*

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[92] Cf. Section 22-12 (3) cited and described in Section 3.2 above. Further described in the preparatory works for the Norwegian law on protection of trade secrets, cf. Section 10.6 of Prop. 5 LS (2019—2020).
[93] No.: rettslig medhjelper.
[94] No.: prosessfullmektig.

rules, in particular Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU')".

(161) Nowhere is it stated in the Directive that the Directive cannot inspire national procedural rules under the procedural autonomy of the EEA EFTA states concerning disclosure of evidence constituting trade secrets *to an opposing party* as part of a case concerning alleged infringement of Article 54 EEA. It is under the national procedural autonomy of the EEA states to decide on the rules of disclosure and protection of trade secrets, including those competitively sensitive, as long as the national courts may weigh-up the legitimate interests of the parties involved and of any third party. The legislator may in compliance with the Directive and EEA law decide to apply the requirements of the Directive to arrangements for disclosure of trade secrets in such cases.

5.4 The trade secrets requested are competitively sensitive

(162) The Trade Secrets Directive's definition of a *"trade secret"* in Article 1 (1) is not limited to *competitively sensitive* trade secrets. Concerning Questions 3 and 4, AAOS submits that it is relevant for interpreting the obligations in Article 9 and under EEA law generally, that the trade secrets requested are competitively sensitive.

(163) According to Article 9 (3) of the Directive, national courts shall when deciding on the specific measures necessary to preserve the confidentiality of trade secrets, take into account *"the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures."*

(164) It is clear that the competitive ability of the defendant and third parties constitutes a legitimate interest of these parties that must be taken into account.[95]

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[95] Recital 38 of the Directive confirms that *"[t]he measures, procedures and remedies provided for in this Directive should not be used to restrict unduly competition in a manner contrary to the TFEU."*

5.5 The wording of Article 9 (2) third subsection of the Trade Secrets Directive requires at least one natural person from each party

(165) In order to determine the scope of a provision of EEA law, its wording, context and objectives must all be taken into account.[96] The wording of Article 9 (2) third subsection of the Directive clearly and unequivocally provides that any restriction of access to documents containing trade secrets to a limited number of persons according to Article 9 (2), second subsection alternative (a), must at minimum, include *"one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings."*

(166) The wording of Article 9 (2) second subsection indicates that the alternatives in letters (a) to (c) are measures that national courts must at a minimum be able to take. However, the objective of the minimum standard of one natural person from each party in the third subsection would be meaningless if an EEA state could disregard it and enable national courts to order access to trade secrets excluding natural persons of a party.

(167) Recital 25 underlines the intentions behind the requirement of at least one natural person accessing trade secrets: *"it is particularly important to ensure both the effective protection of the confidentiality of trade secrets and respect for the right of the parties to those proceedings to an effective remedy and to a fair trial"*, and that *"[t]he restricted circle of persons should <u>therefore</u> consist of at least one natural person from each of the parties as well as the respective lawyers"* (our emphasis).

(168) Hence, this requirement was clearly both intentional and well-founded. Both the initial study, the proposal from the European Parliament and the European Council, and the Commission's impact assessment, include provisions whereby disclosure of documents containing trade secrets could be limited to only the legal representatives of the parties and authorized experts, excluding any natural person(s).[97] In a later amendment from

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[96] Judgment of 15 December 2016, *Azevedo*, C-558/15, EU:C:2016:957, para. 19.
[97] Baker and McKenzie, Study on Trade Secrets and Confidential Business Information in the Internal Market, Final Study (2013) Prepared for the European Commission, p. 155; Proposal For a Directive on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, Article 8 (2) and Recital 14; Commission Staff Working Document Impact Assessment Accompanying the Proposal for a Directive on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, Annex 19, p. 241, and 259-260.

the European Parliament, the requirement in Article 9 (2) third subsection was proposed.[98] It is thus apparent from the origin of Article 9 (2) that the requirement stems from an intentional legislative choice, which must be accorded weight.[99]

(169) Thus, an interpretation of the wording the Directive in view of the legislative background, does not require an EEA EFTA state to give its courts the possibility to establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets.

(170) Consequently, AAOS submits that the Question 2 must be answered in the negative.

5.6 The wording of Article 9 (2) third subsection of the Trade Secrets Directive expresses a general principle of EEA law

(171) AAOS submits that the requirement of Article 9 (2) third subsection of the Directive that any restriction of access to documents containing trade secrets must include, at minimum, one natural person from each party, is an expression of the principle of adversarial due process. The adversarial principle means, as a rule, that the parties have a right to inspect and comment on the evidence and observations submitted to the courts.[100]

(172) The adversarial principle is an integral part of the right to fair trial enshrined in Article 6 ECHR,[101] which forms part of the general principles of EEA law.[102] It is also a basic principle of Norwegian procedural law.[103]

(173) Although an EEA law principle, CJEU jurisprudence provides that the principle must be observed so as to reconcile other fundamental rights.[104] There is no entitlement to disclosure of relevant evidence under EEA law[105] - thus in some cases it may be

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[98] Amendments by the European Parliament to the Commission Proposal 2013/0402 (Cod) Proposal For a Directive on The Protection Of Undisclosed Know-How And Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use And Disclosure, Article 8 (2) and Recital 14.
[99] Judgment of 20 December 2017, Acacia, C-397/16 and C-435/16, EU:C:2017:992, para. 39.
[100] Judgment of 14 February 2008, *Varec,* C-450/06, EU:C:2008:91, para. 47; Judgment of 4 June 2013, *ZZ,* C-300/11, EU:C:2013:363, para. 55.
[101] Judgment of 14 February 2008, *Varec,* C-450/06, EU:C:2008:91, paras. 46-47.
[102] Judgment of 9 February 2021, *Kerim*, E-1/20, para. 43; Judgment of 5 May 2022, *Telenor*, E-12/20, para. 75.
[103] The Dispute Act Section 1-1 and the Human Rights Act Sections 2 and 3.
[104] Judgment of 7 September 2021, *Klaipėdos,* C-927/19, EU:C:2021:700, para. 129.
[105] Opinion of 25 October 2007, *Varec,* Case C-450/06, EU:C:2007:643, para. 39; Judgment of 7 September 2021, *Klaipėdos,* C-927/19, EU:C:2021:700, para. 133.

necessary to reject access in order to preserve the fundamental right to protection of trade secrets or to safeguard an important public interest.[106]

(174) Whether national courts may limit the adversarial principle in a given case by ordering access only to external advisors and not a natural from a party, will depend on the procedures available under national law. It is under the procedural autonomy of the EEA states to legislate what procedures are available for national courts in order to protect trade secrets, for example as provided for in the Dispute Act Section 22-12 (3).

(175) CJEU explicitly provides that public authorities in procurement procedures must be able *"to decide, if necessary, that certain information in the file should not be communicated to the parties or their lawyers"*.[107] That jurisprudence expresses the fact that national courts may exclude all access to trade secrets, and that EEA law does not require that national courts must be able to order access only to the parties' lawyers.

(176) While there are examples in the EEA of regulations that provide for the possibility to limit access to evidence to external advisors only, these are positively established regulations or practices where an active choice has been taken to limit the adversarial principle in lieu of other considerations.[108] Their existence provides simply that EEA law does not restrict the EEA states' procedural autonomy in legislating exceptions to the principle expressed in Article 9 (2) third subsection (outside the Directive's *ratione materiae*). That balancing of interests on which Article 9 (2) third subsection is based, i.e. between the protection of trade secrets and the right of the parties to an adversarial due process and fair trial, is equally relevant outside the material scope of the Directive.

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[106] Judgment of 14 February 2008, *Varec,* C-450/06, EU:C:2008:91, para. 47; *Adomaitis* no. 14833/18, §§ 70-73, 2022; *Rowe and Davis* [GC] no 28901/95, § 61, 2000-II; *V* no 40412/98, § 75, 2007.
[107] Judgment of 7 September 2021, *Klaipėdos,* C-927/19, EU:C:2021:700, para. 133.
[108] For example, in procedures of direct action before the General Court, see Practice rules for the implementation of the Rules of Procedure of the General Court, para. 230; Judgment of 14 March 2014, *Cementos Portland Valderrivas,* T-296/11, EU:T:2014:121, para. 24; in Commission administrative procedures, see Best Practices on the disclosure of information in data room proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, Section 4.3, and Guidance on the use of confidentiality rings in Commission proceedings, para. 9.

6. Proposed answer to the Referring Court's questions

(177) In light of the observations above, AAOS proposes that the EFTA Court answer the questions put to it by the Referring Court as follows:

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

2. *The last sentence of Article 9 (2) of Directive 2016/943 does not allow for a national court to establish a confidentiality ring which does not allow for at least one natural person from each of the parties to the case to be granted access to evidence constituting trade secrets which is submitted as evidence in the case.*

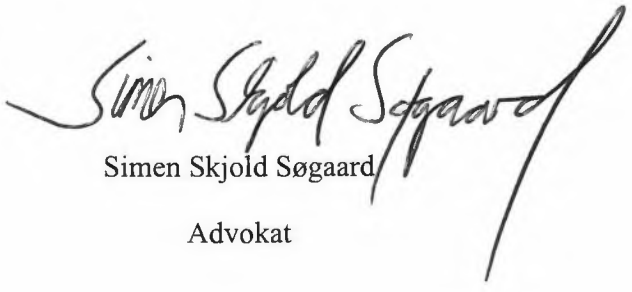
3. *The last sentence of Article 9(2) of the Directive on the protection of trade secrets is an expression of the adversarial principle (part of the fundamental principle of due process and right to a fair trial), which is a general EEA law principle. Whether and to what extent national courts may limit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

4. *It is of significance to the answers to questions 1 to 3 that that the trade secrets that are requested disclosed as evidence are competitively sensitive in relation to the party requesting access to the information.*

5. *In a case involving abuse of a dominant position under Article 54 of the EEA Agreement, EEA law, including the principle of effectiveness or the principle of homogeneity, does not require a national court to order the party alleged to have abused its dominant position to disclose evidence constituting trade secrets, without that court having to weigh up the parties' interests.*

6. *EEA law principles, including the principle of effectiveness or the principle of homogeneity, do not mean that national procedural law must be interpreted in accordance with Article 5 of the Damages Directive (Directive 2014/104/EU).*

Oslo, 28 November 2023



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