Låssenteret AS v. Assa Abloy Opening Solutions Norway AS: Keeping the Norwegian Security Systems Market Under Lock

I. OVERVIEW 661
II. BACKGROUND 663
A. Law of the European Economic Area 663
B. Norwegian Competition Law 665
C. Trade Secrets vs. Confidential Information 665
D. Unique Evidentiary Difficulties in Competition Cases 666
III. THE COURT'S DECISION 666
IV. ANALYSIS 670
V. CONCLUSION 671

I. OVERVIEW

After a prominent security systems manufacturer was accused of abusing its dominant market position, the European Free Trade Association (EFTA) Court was forced to consider whether the laws of individual nation states or the laws of the European Economic Area (EEA) govern what kind of evidence can be used to prove an abuse of a dominant market position and, thus, a violation of competition law.[1] Låssenteret, a Norwegian company, sells, installs, and maintains locks and security systems.[2] Assa Abloy, a Swedish company, produces and sells locks, keys, door handles, and door closers and services in the access control field for individuals and professional operators.[3] Since this dispute is cross-border, the rules of the EEA apply.[4] Assa Abloy operates a dealer concept for mechanical lock systems, TrioVing Sikkerhetssenter (TVSS), in which a dealer can become a "partner," allowing them to use the TVSS trademark and enter into a cooperation agreement for the marketing, trial, and testing of new Assa Abloy products.[5] Additionally, Assa Abloy offers a licensed locksmith (LLS) agreement, which allows the dealer to design

1. Låssenteret AS v. Assa Abloy Opening Solutions Norway AS, Case E-11/23, 1 (Eur. Free Trade Ass'n Ct., Aug. 9, 2024), https://eftacourt.int/download/11-23-judgment/?wpdmdl=9720.
2. *Id.* at 12.
3. *Id.* at 13.
4. *Id.*
5. *Id.* at 13.

and produce lock systems based on system codes from Assa Abloy.[6] From 2017 to 2019, Låssenteret had both TVSS and LLS agreements with Assa Abloy, but on December 2, 2019, Assa Abloy terminated the TVSS cooperation with Låssenteret.[7] On September 25, 2020, Assa Abloy also ended its LLS with Låssenteret.[8] Låssenteret disputes the lawfulness of these terminations.[9]

Låssenteret claims that Assa Abloy has a dominant position in the market for mechanical and electromechanical lock systems.[10] Låssenteret further alleges that Assa Abloy abused its position by terminating Låssenteret's TVSS and LSS agreements on insufficient grounds and actively attempting to force Låssenteret out of the market.[11] Låssenteret alleges that this has taken the form of Assa Abloy sharing market-sensitive information with Låssenteret's competitors, disfavoring Låssenteret in terms of production capacity and logistical matters, and speaking negatively about Låssenteret to potential customers.[12] Assa Abloy disputes all of Låssenteret's claims.[13] Låssenteret's evidentiary requests in this case concern internal documents and correspondence about Assa Abloy's market position in Norway and Europe in the security systems market.[14] The parties agree that the evidence sought contains confidential information, but the parties disagree over whether this information constitutes "trade secrets" and how this evidence should be handled.[15] Due to the nature of the disagreement between the parties and their conflicting interpretations of EEA law and Norwegian law, the Eidsivating Court of Appeal stayed the proceeding and referred the questions in dispute to the EFTA Court.[16]

The European Free Trade Association Court *held* that, pursuant to EEA law, the protection of trade secrets against their unlawful acquisition, use, or disclosure concerns only the unlawful acquisition, use, or disclosure of trade secrets and is not designed to cover other types of proceedings; therefore it is for the individual nation states of the EEA to weigh the interests of the parties to determine whether the proposed

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 14.
12. *Id.*
13. *Id.* at 14.
14. *Id.*
15. *Id.* at 15.
16. *Id.* at 15-16.

evidence should be allowed in order to prove an abuse of a dominant market position.

II. BACKGROUND

A. Law of the European Economic Area

The European Free Trade Association consists of the nations of Iceland, Liechtenstein, and Norway.[17] The Agreement of the European Economic Area (EEA Agreement) brings together the EFTA member states with the twenty-seven member states of the European Union (EU) with the

> objective of establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties.[18]

The EEA Agreement calls for an equal treatment of individuals and economic operators with regard to the "four freedoms" of the EU, namely, (a) the free movement of goods, (b) the free movement of persons, (c) the free movement of services, and (d) the free movement of capital.[19] In promoting these freedoms, the EEA Agreement calls for homogeneity and cooperation among member states, while also allowing "full deference to the independence of the courts."[20]

Article 54 of the EEA Agreement governs competition between contracting parties, specifically with regard to dominant market positions.[21] This Article explains that abuse of a dominant market position is prohibited under EEA law.[22] Such abuses include the imposition of unfair pricing or trading conditions, limitations on production to the detriment of customers, the application of different conditions to similar transactions with the goal of disadvantaging certain trade partners, and the inclusion of unrelated obligations in contracts to the disadvantage of trade partners.[23]

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17. *The European Free Trade Association*, https://www.efta.int/about-efta/european-free-trade-association.

18. *Agreement on the European Economic Area*, May 2, 1992, EUR-Lex 21994A0103 (74) (entered into force Jan. 1, 1994).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Agreement on the European Economic Area*, *supra* note 18.

23. *Id.*

In addition to the specifically enumerated articles of the EEA Agreement, directives from the European Union, including those issued by the European Parliament or Council, are to be read in accordance with the EEA Agreement.[24] For evidentiary matters concerning trade secrets[25] Directive 2016/943 (the Trade Secrets Directive) is pertinent, specifically paragraph 4 of Article 5 which reads that member states shall ensure that the national courts have the power to order the disclosure of confidential information where it is considered relevant, while also ensuring adequate protection of such information.[26]

Recitals 24 and 25 of the Trade Secrets Directive speak to the nature of protecting confidential information in legal proceedings.[27] Recital 24 notes that measures should be in place to prevent unauthorized disclosure of trade secrets during court proceedings, balancing the protection of trade secrets with the right to a fair trial.[28] It calls for measures such as restricting access to documents, limiting the number of people with access, or holding private hearings if necessary.[29] Recital 25 complements Recital 24 by saying that protections as to confidential information shall remain in effect even after the legal proceeding ends in order to reinforce the private enforcement of competition law without discouraging holders of confidential information from acting out of fear of exposure.[30]

The necessary question in evaluating the scope of the Trade Secrets Directive is whether it applies only in cases where the acquisition, use, or disclosure of trade secrets is the subject matter of the dispute or whether it should be read to apply to disputes where evidence of the trade secret is offered with the sole purpose of proving a dominant market position.[31]

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24. *Id.*

25. Article 2 of Directive (EU) 2016/943 defines "trade secret" as any information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; and (c) it has been subject to reasonable steps under the circumstances by the person lawfully in control of the information, to keep it secret.

26. *Låssenteret* at 11.

27. Directive 2016/943 (the *Trade Secrets Directive*), (June 8, 2016), data.europa.eu/eli/dir/2016/943/oj.

28. *Trade Secrets Directive*, *supra* note 27.

29. *Id.*

30. *Id.*

31. *Written Observations of the European Commission*, Case E-11/23, Doc. No. 1406848, 1, 7 (Nov. 28, 2023).

B. Norwegian Competition Law

Provisions of EU law which are not part of the EEA Agreement do not have any implications for Norwegian procedural law, apart from the indirect implications they may have through more general rules of the EU and EEA law, such as the duty of loyalty and the general rule that EU and EEA law provisions are to be interpreted in a uniform manner.[32]

The first paragraph of section 21-3 of Act 90 on Norway's Mediation and Procedure of Civil Disputes (the Dispute Act) provides that parties to a dispute are "entitled to present such evidence as they wish."[33] Section 21-10 of the Dispute Act provides an exception to this rule when the evidence offered is trade secrets:

> A party or witness may refuse to provide access to evidence that cannot be made available without revealing trade or business secrets. The court may nevertheless order such evidence to be made available if, after balancing the relevant interests, the court finds this to be necessary.[34]

It is for the national court to decide whether trade secret evidence is to be allowed into a proceeding and how it is to be handled.[35] Furthermore, section 22-12 of the Act allows the court to impose a duty of confidentiality or decide that oral hearing of the evidence should be held in camera.[36] In special cases, the evidence may be further limited based on the discretion of the court.[37]

C. Trade Secrets vs. Confidential Information

While all trade secrets fit into the category of confidential information, not all confidential information constitutes trade secrets.[38] In *Antea Polska*, the Court of Justice of the European Union (CJEU) held that the concept of a "trade secret" in the context of the Trade Secrets Directive is much narrower than the concept of "confidential information."[39] This designation is important because the Trade Secrets Directive only applies to disputes involving unlawfully acquired trade

32. *Id.* at 16.
33. *Id.* at 11.
34. *Id.* at 11-12.
35. *Id.* at 12 (referencing section 26-12 of the Dispute Act).
36. *Id.*
37. *Id.*
38. *Written Observations of Låssenteret AS*, Case E-11/23 (Nov. 28, 2023), at 10.
39. *Id.* at 12 (citing *Antea Polska*, Judgment, Case C-54/21, ECLI:EU:C:2022:888, para. 55 (Nov. 17, 2022)).

secrets.[40] If it is determined that the unlawful acquisition of trade secrets is not the subject matter of the proceeding, then the stricter guidance surrounding trade secrets will not come into play.[41] This is relevant because the purpose and enforcement of the Trade Secrets Directive is entirely different from the private enforcement of competition law.[42] In competition cases, the confidentiality of trade secrets plays an important, but not necessarily central, role in enforcing the law.[43] If trade secrets are lawfully acquired, as in a case enforcing competition law, then general principles of EEA law governing competition will rule.[44]

D. Unique Evidentiary Difficulties in Competition Cases

Information asymmetry is very often a trademark in the enforcement of competition law cases.[45] Because of this, courts recognize that effective enforcement of competition cases requires the disclosure of confidential information.[46] Thus, a court must balance one party's procedural rights against another party's right to effective enforcement and a fair trial.[47] In *Mobistar*, the CJEU held that it is for the respective national court to decide "to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of th[e] information . . ." taking into account the rights of the parties, in general, and the right to a fair trial and access to information, specifically.[48]

III. THE COURT'S DECISION

In the noted case, the European Free Trade Association Court considered whether Låssenteret's evidentiary requests fall within the scope of the Trade Secrets Directive.[49] Låssenteret initially brought its claims against Assa Abloy before the Follo and Nordre Østfold District Court, which dismissed certain requests for evidence pursuant to the

40. *Written Observations of Låssenteret AS*, *supra* note 38, at 12 (citing *Antea Polska*, Judgment, Case C-54/21, ECLI:EU:C:2022:888, para. 55 (Nov. 17, 2022)).

41. *Id.*

42. *Written Observations of Låssenteret AS*, *supra* note 38, at 13.

43. *Id.* at 23.

44. *Id.* at 14.

45. *Id.* at 17.

46. *Id.*

47. *Id.* at 18.

48. *Written Observations of Låssenteret AS*, *supra* note 38, at 26 (citing *Mobistar*, Judgment, Case C-438/04, ECLI:EU:C:2008:91, paras. 52-55 (Feb. 14, 2008)).

49. *Låssenteret* at 1.

directive.[50] The Eidsivating Court of Appeal referred the question of whether the Trade Secrets Directive applies in a case such as this to the EFTA Court for consideration.[51] In addition to the main question of whether Låssenteret's evidentiary requests fall within the scope of the Trade Secrets Directive, the Court of Appeal also asked the EFTA Court: (1) whether the Directive allows the creation of a confidentiality ring, one of the methods for protecting confidential information in a legal proceeding, (2) if such a ring requires the presence of a "natural person" from each party or only the legal representatives of the parties, (3) if evidence of trade secrets must be disclosed under order of the court without a weighing up of the parties interests, and (4) whether, in accordance with the EU's principles of effectiveness and homogeneity, other directives of the EU must be adhered to, though they are not incorporated into the EEA Agreement.[52]

Despite the parties' differing opinions on the scope of the Trade Secrets Directive, Recital 38 of the directive clearly states that the Trade Secrets Directive should not affect the application of competition law rules and should not be used to unduly affect competition.[53] The EFTA Court expanded, finding that the purpose set out in Article 1 of the directive is to protect the benefits of business research and development in order to incentivize greater research and development.[54] It necessarily follows then that the directive concerns only those proceedings in which trade secrets are improperly acquired, not all legal proceedings in which trade secrets may be used as evidence.[55]

Furthermore, the Trade Secrets Directive is to be read to provide that the acquisition, use, or disclosure of a trade secret is to be considered lawful to the extent that it is required or allowed by EEA or national law.[56] Thus, in acquiring any information from Assa Abloy through this proceeding, Assa Abloy cannot later claim that Låssenteret unlawfully acquired their trade secrets.[57] Though there may be fear that this rule could lead to injustices if a party can access another's confidential information by making a "fishing expedition" of a competition law proceeding, such a possibility is insufficient in itself to prevent a full disclosure of evidence

50. *Written Observations of the EFTA Surveillance Authority*, Case E-11/23, Doc. No. 1406848 (Nov. 28, 2023).

51. *Låssenteret* at 16.

52. *Id.* at 16-17.

53. *Id.* at 17.

54. *Trade Secrets Directive*, *supra* note 27.

55. *Låssenteret* at 18.

56. *Id.* (referencing the judgment in *Klaipėdos regiono*, C-927/19, EU:C:2021:700).

57. *Id.*

since the court is ultimately in a position to safeguard against such tactics.[58]

In answering the question of whether the formation of a confidentiality ring made up of at least one natural person from each party is allowed as a method of protecting the confidentiality of trade secrets, the EFTA Court held that it was, based on its interpretation of the last sentence of Article 9(2) of the Trade Secrets Directive.[59] In pertinent part, this sentence states that the number of persons allowed as part of the confidentiality ring should be no greater than the number 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."[60]

However, in adopting the Dispute Act, the Norwegian legislature may have intended a broader scope of the Trade Secrets Directive than that intended under the EEA.[61] Since provisions of EEA law are to be construed uniformly with national law, the Trade Secrets Directive and the Dispute Act should be construed consistently with one another.[62] However, since the EFTA Court only has jurisdiction over matters of EEA law, it is for the national court—here, the Norwegian district court—to determine how the Trade Secrets Directive and the Dispute Act are to be applied in a consistent manner.[63]

The EFTA Court observed that applying the Trade Secrets Directive outside of its intended scope requires reconciling that application with other rules of EEA law.[64] Since the EEA lacks clear statutory guidance on the scope of the Trade Secrets Directive in relation to national law, it is for the national courts to determine the procedural guidelines for actions safeguarding the rights which parties derive from EEA law.[65] At its forefront, EEA law requires the observance of the principles of "equivalence and effectiveness."[66] When evaluating whether the national

58. *Id.* at 20 (referencing *Written Observations of Assa Abloy*, Case E-11/23, Doc. No. 11697115/1 (Nov. 28, 2023)).

59. *Låssenteret* at 18.

60. *Trade Secrets Directive*, *supra* note 27.

61. *Låssenteret* at 19.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 19.

66. *Id.* ("This entails that the procedural rules governing actions for damages arising from infringement of the competition rules of the EEA Agreement must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness)."). The principle of equivalence carries the same meaning as the principle of homogeneity.

rules of a particular EEA nation state reflect these principles, it is for the referring court to make such an assessment.[67] Furthermore, EEA law requires that national legislation does not undermine the right to effective judicial protection and this extends to ensuring proper evidentiary disclosures in competition cases.[68]

The EFTA Court determined that the protection of confidential information, including trade secrets, is not absolute, nor does it require that the preservation of its confidentiality in legal proceedings be confined to the methods stated in the Trade Secrets Directive.[69] Again, it is for the national courts of the EEA member states to weigh the interests of the parties to determine not only whether evidence of trade secrets is allowed into a proceeding, but also how.[70] The Court went on to create a non-exhaustive list of legitimate interests that weigh in favor of introducing confidential information or trade secrets.[71] This list includes:

> [T]he principle of effective judicial protection, including the right to a fair trial, which comprises, in particular, the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal and the right to be advised, defended and represented, as well as the fundamental right to an effective remedy, which are general principles of EEA law.[72]

An additional interest for the court to consider is the effective private enforcement of EEA competition law.[73] The reason for this justification, the EFTA Court posits, is that private enforcement of the EEA's competition rules ought to be encouraged, as it can make a significant contribution to the maintenance of effective competition in the EEA.[74] The Court goes on to say that the private enforcement of competition law benefits the public and serves to protect the public interest.[75]

Since it is for the national legal system to determine the methods and limitations of confidential information disclosures, the weighing of interests is of vital importance to the enforcement of EEA laws.[76] The evaluation should take the form of, first, appraising the interest of the requesting party in obtaining access to the documents in question in order

67. *Id.* at 19.
68. *Id.*
69. *Id.* at 20.
70. *Id.*
71. *Id.* at 21.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 22.

to prepare its action, and, second, taking into consideration the actual harmful consequences which may result from such access, having regard to public interests or the legitimate interests of other parties.[77]

Furthermore, to avoid potential fishing expeditions, national courts must determine if the requested evidence is relevant for the claim, and, separately, whether measures are necessary to safeguard the confidentiality of the said evidence.[78] The EFTA Court notes that a confidentiality ring that is formed solely of the parties' legal advisers may be an effective method of facilitating disclosure in compliance with EEA law, and any interpretation of national rules that rule out this possibility serves to undermine the effective enforcement of EEA competition law.[79] Thus, the EFTA Court concluded that the Trade Secrets Directive does allow the creation of a confidentiality ring as a method for disclosing confidential information or trade secrets, at the discretion of the national court's weighing of interests before the evidence is allowed into the confidentiality ring.[80]

IV. ANALYSIS

By requiring the national courts of the EEA member states to conduct individual interest weighing to determine whether confidential information or trade secret evidence can come into a legal proceeding that does not concern the unlawful acquisition, use, or disclosure of trade secrets, the EFTA Court ultimately decided that the private enforcement of EEA competition law is an important cornerstone of the EEA. If the Trade Secrets Directive were to be read to not allow evidence of trade secrets to be used to show a dominant market position in a competition case, the goals of competition law would be seriously undermined.[81] Without access to potentially confidential information, a party alleging abuse of a dominant market position might have no way of demonstrating that a dominant market position even exists, let alone that it is being abused. Such a characterization of the Trade Secrets Directive would essentially render any attempts at EEA enforcement of competition law moot and the directive certainly cannot be read to call for such an outcome.

77. *Id.*
78. *Id.* at 22.
79. *Id.*
80. *Id.* at 23.
81. *Written Observations of Låssenteret AS*, *supra* note 34 ("[A]pplying the TSD to the private enforcement of competition law would go well beyond its narrow scope and clearly be ultra vires.").

Of course, it is of equal importance that the EFTA Court did not disavow the Trade Secrets Directive by allowing trade secret evidence to be used in a legal proceeding without first establishing that the evidence will be relevant, that the evidence weighs in the interest of being included, and that the evidence will be kept confidential once admitted.[82] Such guidelines help counteract the potential for fishing expeditions to gather otherwise unavailable confidential information.[83] Since the Norwegian court will now be responsible for conducting a weighing of the parties' interests, including the relevance of the evidence and the circumstances surrounding the case, Assa Abloy may very well be able to demonstrate that Låssenteret's action is merely pretense to acquire otherwise inaccessible trade secrets from Assa Abloy. If this happens to be the case, then the trade secrets evidence will not be allowed into the proceeding and will demonstrate the very necessity of the EFTA Court's ruling in this case.

This type of case is not one in which a bright-line rule will squarely apply to every matter. Thus, by granting discretion to the lower courts of the EEA member states to decide whether trade secret evidence is allowed into a proceeding on a case-by-case basis, the EFTA Court adheres to the EEA principle of allowing the national courts to be the enforcers of EEA competition law.[84] The way the Norwegian national court applies the holding in this case will have implications for future Norwegian competition law proceedings under the EEA Agreement, and may extend, at a minimum, to proceedings in the national courts of Iceland and Liechtenstein, as well.

V. CONCLUSION

The EFTA Court's decision in *Låssenteret AS v. Assa Abloy Opening Solutions Norway AS* shows the Court's commitment to enforcing EEA law standards, specifically relating to competition law. In establishing guidelines for the interpretation of the Trade Secrets Directive in conjunction with Norwegian national law, the Court reconciled the differences between the two to create a system highlighting the fundamental principles of EEA law, namely, the principles of homogeneity and effectiveness.[85] This decision stresses the importance of

82. *Låssenteret* at 20-22.
83. *Id.* at 22.
84. *Id.*
85. *Id.* at 22.

the private enforcement of competition law by allowing the national courts to dictate what kind of evidence can be used in such a proceeding.

A party should not be allowed to interfere with the legal process of the European Economic Area by withholding confidential information that could potentially play a role in determining whether that party has a dominant market position thereby violating EEA competition law. This is Låssenteret's claim, and it is equally as important as Assa Abloy's claim that a party should not be allowed to interfere with the market by using a legal proceeding as a fishing expedition to acquire otherwise confidential information from its competitors.[86] This dichotomy stresses the importance of the balancing test proscribed by the EFTA Court in this case. Balancing is an important tool in the toolbox of courts around the world for good reason. Parties in any adversary proceeding will have interests at odds with one another, but someone must come out on top. This determination is best suited to the courts, as triers of fact, to weigh the interests of the parties, as well as the goals of the legislature, to determine what outcome is best suited to the needs of the governing law, in this case, the enforcement of EEA competition law.[87]

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86. *See generally id.*

87. *Id.*

 The author would like to thank the members of the *Journal* for their dedication and assistance in the publication of Volume 33, Issue 2. The author is also grateful to her family and friends for their unconditional support.