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Disclosure in Antitrust Damages Actions in **Norway**
Can the EFTA Court kick start private enforcement?
University of Vienna, 3 November 2023
CMS Kluge

Overview and status

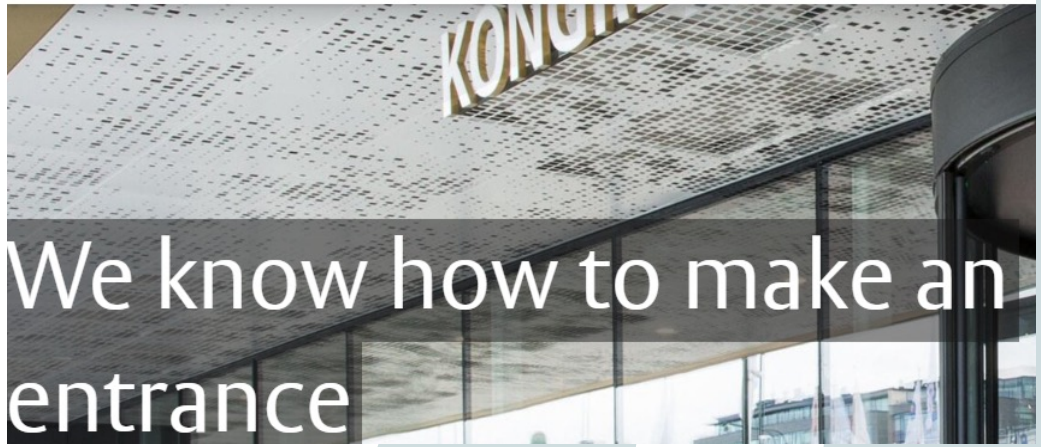
- Norwegian disclosure rules broadly in line with continental traditions
- The Damages Directive is not yet incorporated in the EEA Agreement
  - Norwegian (procedural) law nonetheless considered to be in conformity with the Directive
- Private enforcement of antitrust in Norway still in its infancy but slowly gaining traction
  - Follow-on damages claim rejected in 2023 (*Trucks*)
    - Disclosure of confidential information handled through inter alia redaction of SO and a (consensual) confidentiality ring
    - Appeal pending
  - Third-party financing possibilities limited for opt-out class actions (*Alarm Customer Association*)

<u>Disclosure issues will now take center stage:</u>

- Pending EFTA Court case E-11/23 *Låssenteret AS v Assa Abloy Opening Solutions Norway AS*

Background to the case

- Stand alone abuse of dominance case under Norwegian and EEA provisions
- Assa is Europes leading player in access solutions and alleged to be dominant in the market for locks and in after-sale markets in Norway
- Låssenteret is Norway largest locksmith company, and installs and maintains ca. 14,000 locking systems, many of which are Assa Abloy
- Abuse regards Discriminatory treatment of Låssenteret as regards partnership and license agreements, pricing and delivery terms
- Multiple disclosure requests and methods proposed
- Disclosure through confidentiality ring (without Låssenteret as a party) dismissed by District Court (with reference to Trade Secrets Directive!)
  - This dismissal was appealed
- Reference for a preliminary ruling to the EFTA Court by the Court of Appeal



Case E-11/23

- Questions 1-4 pertain to the material scope of directive of 2016/943, and its relevance in particular for confidentiality rings without representation by the parties

- Art 9 (2): *Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings ….The number of persons […] 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*

EFTA COURT

Request for an Advisory Opinion from the EFTA Court by Eidsivating Court of Appeal in the case of Låssenteret AS v Assa Abloy Opening Solutions Norway AS

(Case E-11/23)

A request has been made to the EFTA Court dated 28 August 2023 from Eidsivating Court of Appeal (*Eidsivating lagmannsrett*), which was received at the Court Registry on 31 August 2023, for an Advisory Opinion in the case of *Låssenteret AS* v *Assa Abloy Opening Solutions Norway AS* on the following 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 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?*"

- The answer is obviously no, but provides the Court with an opportunity to give guidance on how to balance effectiveness and protection of confidential information / trade secrets

- First case on proportionality of disclosure?

Conclusion

- For Norway, the outcome of this case will significant impact on the future of private enforcement and in particular the use of confidentiality rings

- For the EU, it could have also have a significant impact:
  - AG Emiliou in C-128/22: *Evidently, the Court is not bound by the decisions of the EFTA Court. Nonetheless, in my opinion, the general international law principle of respect for contractual commitments (pacta sunt servanda), the 'special relationship between the European Union, its Member States and the EFTA States', and the necessity to ensure, as far as possible, the uniform application of the EEA Agreement in all Contracting Parties, mean that the Court must take those decisions into account for the purpose of interpreting that agreement.* ***In fact, I would suggest that it should follow them, unless there are compelling reasons not to do so.***

- P.S. Question 6 is on whether the Damages Directive needs to be taken account of anyhow

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Thank you for your attention!

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