



E-14/24-14

REPORT FOR THE HEARING

in Case E-14/24

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Supreme Court of Norway (*Norges Høyesterett*), in the case between

Elmatica AS

and

Confidee AS and Vidar Olsen,

concerning the interpretation of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

I INTRODUCTION

1. By letter of 17 June 2024, registered at the Court on 2 July 2024, the Supreme Court of Norway (*Norges Høyesterett*) requested an advisory opinion in the case pending before it between Elmatica AS (“Elmatica”) as appellants and Confidee AS (“Confidee”) and Vidar Olsen as respondents.

2. The case referred involves questions concerning access to evidence relating to trade or business secrets under Section 22-10 and Section 26-7 of the Norwegian Dispute Act (*tvisteloven*) and is a procedural step in a larger set of underlying legal proceedings. In the evidentiary dispute, questions have been raised, in particular, as to whether the court ruling on the question of access to evidence must first obtain the disputed evidence in order to determine whether it is to be adduced in the proceedings. In accordance with the Supreme Court’s case law, the provisions have been applied as meaning that the court has a right, although no obligation, to obtain the evidence.

3. Section 22-10 and Section 26-7 of the Dispute Act are connected to the Norwegian Act on the Protection of Trade Secrets (*forretningshemmelighetsloven*), which, according

to the request, implements Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The Supreme Court requests an interpretation of EEA law clarifying whether EEA law imposes obligations on national courts to the effect that a court which is to rule on questions concerning access to evidence must have the disputed documents “at its disposal” in cases involving trade secrets.

II LEGAL BACKGROUND

EEA law

4. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (“Directive 2016/943”) (OJ 2016 L 157, p. 1; and Norwegian EEA Supplement 2020 No 33, p. 480) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 91/2019 of 29 March 2019 (OJ 2020 L 210, p. 76; and Norwegian EEA Supplement 2020 No 44, p. 92) (“Decision No 91/2019”). Directive 2016/943 is referred to at point 13 of Annex XVII (Intellectual Property) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein, and Norway. The requirements were fulfilled by 6 November 2020, and the decision entered into force on 1 January 2021.

5. Article 1 of Decision No 91/2019 reads as follows:

The following is inserted after point 12 (Regulation (EU) 2017/1128 of the European Parliament and of the Council) of Annex XVII to the EEA Agreement:

‘13. 32016 L 0943: Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1).

The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

(a) In Article 1(1), the term “TFEU” shall, for the EFTA States, be read as “EEA Agreement”

(b) The reference in Article 1(2)(a) and Article 5(a) to “the right to freedom of expression and information as set out in the Charter” shall, for the EFTA States, be read as “the fundamental right to freedom of expression and information”.

(c) In Article 1(2)(b) and (c), the term “Union or national rules” shall, for the EFTA States, be read as “EEA rules or national rules”.

(d) The reference in Article 1(2)(c) to “Union institutions and bodies” shall, for the EFTA States, be read as including “EEA EFTA institutions and bodies”.

(e) In Article 1(2)(c) and (3)(c), Article 3(2) and Article 5(c) and (d), the term “Union or national law” shall, for the EFTA States, be read as “EEA law or national law”.

(f) In Article 1(2)(d) and Article 3(1)(c), the term “Union law and national laws and practices” shall, for the EFTA States, be read as “EEA law and national laws and practices”.

6. Recitals 4, 14, 15, 24 and 25 and, in extract, recitals 29 and 30 of Directive 2016/943 read as follows:

(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related cross-border activity within the internal market are undermined, and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.

(14) It is important to establish a homogenous definition of a trade secret without restricting the subject matter to be protected against misappropriation. Such definition should therefore be constructed so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved. Furthermore, such know-how or information should have a commercial value, whether actual or potential. Such know-how or information should be considered to have a commercial value, for example, where its unlawful acquisition, use or disclosure is likely to harm the interests of the person lawfully controlling it, in that it undermines that person's scientific and technical potential,

business or financial interests, strategic positions or ability to compete. The definition of trade secret excludes trivial information and the experience and skills gained by employees in the normal course of their employment, and also excludes information which is generally known among, or is readily accessible to, persons within the circles that normally deal with the kind of information in question.

(15) It is also important to identify the circumstances in which legal protection of trade secrets is justified. For this reason, it is necessary to establish the conduct and practices which are to be regarded as unlawful acquisition, use or disclosure of a trade secret.

(24) The prospect of losing the confidentiality of a trade secret in the course of legal proceedings often deters legitimate trade secret holders from instituting legal proceedings to defend their trade secrets, thus jeopardising the effectiveness of the measures, procedures and remedies provided for. For this reason, it is necessary to establish, subject to appropriate safeguards ensuring the right to an effective remedy and to a fair trial, specific requirements aimed at protecting the confidentiality of the litigated trade secret in the course of legal proceedings instituted for its defence. Such protection should remain in force after the legal proceedings have ended and for as long as the information constituting the trade secret is not in the public domain.

(25) Such requirements should include, as a minimum, the possibility of restricting the circle of persons entitled to have access to evidence or hearings, bearing in mind that all such persons should be subject to the confidentiality requirements set out in this Directive, and of publishing only the non-confidential elements of judicial decisions. In this context, considering that assessing the nature of the information which is the subject of a dispute is one of the main purposes of legal proceedings, it is particularly important to ensure both the effective protection of the confidentiality of trade secrets and respect for the right of the parties to those proceedings to an effective remedy and to a fair trial. The restricted circle of persons should therefore consist of at least one natural person from each of the parties as well as the respective lawyers of the parties and, where applicable, other representatives appropriately qualified in accordance with national law in order to defend, represent or serve the interests of a party in legal proceedings covered by this Directive, who should all have full access to such evidence or hearings. In the event that one of the parties is a legal person, that party should be able to propose a natural person or natural persons who ought to form part of that circle of persons so as to ensure proper representation of that legal person, subject to appropriate judicial control to prevent the objective of the restriction of access to evidence and hearings from being undermined. Such safeguards should not be understood as requiring the parties to be represented by a lawyer or another representative in the course of legal proceedings where such representation is not

required by national law. Nor should they be understood as restricting the competence of the courts to decide, in conformity with the applicable rules and practices of the Member State concerned, whether and to what extent relevant court officials should also have full access to evidence and hearings for the exercise of their duties.

(29) A person could have originally acquired a trade secret in good faith, but only become aware at a later stage, including upon notice served by the original trade secret holder, that that person's knowledge of the trade secret in question derived from sources using or disclosing the relevant trade secret in an unlawful manner.

...

(30) ... This Directive should not prevent Member States from providing in their national law that the liability for damages of employees is restricted in cases where they have acted without intent.

7. Article 1(1) and (3) of Directive 2016/943, entitled “Subject matter and scope”, reads:

1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

Member States may, in compliance with the provisions of the TFEU, provide for more far-reaching protection against the unlawful acquisition, use or disclosure of trade secrets than that required by this Directive, provided that compliance with Articles 3, 5, 6, Article 7(1), Article 8, the second subparagraph of Article 9(1), Article 9(3) and (4), Article 10(2), Articles 11, 13 and Article 15(3) is ensured.

3. Nothing in this Directive shall be understood to offer any ground for restricting the mobility of employees. In particular, in relation to the exercise of such mobility, this Directive shall not offer any ground for:

(a) limiting employees' use of information that does not constitute a trade secret as defined in point (1) of Article 2;

(b) limiting employees' use of experience and skills honestly acquired in the normal course of their employment;

(c) imposing any additional restrictions on employees in their employment contracts other than restrictions imposed in accordance with Union or national law.

8. Article 2 of Directive 2016/943, entitled “Definitions”, reads:

For the purposes of this Directive, the following definitions apply:

(1) 'trade secret' means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

(2) 'trade secret holder' means any natural or legal person lawfully controlling a trade secret;

(3) 'infringer' means any natural or legal person who has unlawfully acquired, used or disclosed a trade secret;

(4) 'infringing goods' means goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from trade secrets unlawfully acquired, used or disclosed.

9. Article 3 of Directive 2016/943, entitled "Lawful acquisition, use and disclosure of trade secrets", reads:

1. The acquisition of a trade secret shall be considered lawful when the trade secret is obtained by any of the following means:

(a) independent discovery or creation;

(b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;

(c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices;

(d) any other practice which, under the circumstances, is in conformity with honest commercial practices.

2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.

10. Article 4 of Directive 2016/943, entitled “Unlawful acquisition, use and disclosure of trade secrets”, reads:

1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret.

2. The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:

(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;

(b) any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

3. The use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder, by a person who is found to meet any of the following conditions:

(a) having acquired the trade secret unlawfully;

(b) being in breach of a confidentiality agreement or any other duty not to disclose the trade secret;

(c) being in breach of a contractual or any other duty to limit the use of the trade secret.

4. The acquisition, use or disclosure of a trade secret shall also be considered unlawful whenever a person, at the time of the acquisition, use or disclosure, knew or ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully within the meaning of paragraph 3.

5. The production, offering or placing on the market of infringing goods, or the importation, export or storage of infringing goods for those purposes, shall also be considered an unlawful use of a trade secret where the person carrying out such

activities knew, or ought, under the circumstances, to have known that the trade secret was used unlawfully within the meaning of paragraph 3.

11. Article 6 of Directive 2016/943, entitled “General obligation”, reads:

1. Member 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.

2. The measures, procedures and remedies referred to in paragraph 1 shall:

(a) be fair and equitable;

(b) not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; and

(c) be effective and dissuasive.

12. Article 7 of Directive 2016/943, entitled “Proportionality and abuse of process”, reads:

1. The measures, procedures and remedies provided for in this Directive shall be applied in a manner that:

(a) is proportionate;

(b) avoids the creation of barriers to legitimate trade in the internal market; and

(c) provides for safeguards against their abuse.

2. Member States shall ensure that competent judicial authorities may, upon the request of the respondent, apply appropriate measures as provided for in national law, where an application concerning the unlawful acquisition, use or disclosure of a trade secret is manifestly unfounded and the applicant is found to have initiated the legal proceedings abusively or in bad faith. Such measures may, as appropriate, include awarding damages to the respondent, imposing sanctions on the applicant or ordering the dissemination of information concerning a decision as referred to in Article 15.

Member States may provide that measures as referred to in the first subparagraph are dealt with in separate legal proceedings.

13. Article 9 of Directive 2016/943, entitled “Preservation of confidentiality of trade secrets in the course of legal proceedings”, reads:

1. Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.

The obligation referred to in the first subparagraph shall remain in force after the legal proceedings have ended. However, such obligation shall cease to exist in any of the following circumstances:

(a) where the alleged trade secret is found, by a final decision, not to meet the requirements set out in point (1) of Article 2; or

(b) where over time, the information in question becomes generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

2. Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The measures referred to in the first subparagraph shall at least include the possibility:

(a) of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;

(b) of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;

(c) of making available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.

3. When deciding on the measures referred to in paragraph 2 and assessing their proportionality, the competent judicial authorities shall take into account the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures.

4. Any processing of personal data pursuant to paragraphs 1, 2 or 3 shall be carried out in accordance with Directive 95/46/EC.

14. Chapter III, Section 2, of Directive 2016/943, entitled “Provisional and precautionary measures” contains Articles 10 and 11.

15. Article 10 of Directive 2016/943, entitled “Provisional and precautionary measures”, reads:

1. Member States shall ensure that the competent judicial authorities may, at the request of the trade secret holder, order any of the following provisional and precautionary measures against the alleged infringer:

(a) the cessation of or, as the case may be, the prohibition of the use or disclosure of the trade secret on a provisional basis;

(b) the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes;

(c) the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into, or circulation on, the market.

2. Member States shall ensure that the judicial authorities may, as an alternative to the measures referred to in paragraph 1, make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to

ensure the compensation of the trade secret holder. Disclosure of a trade secret in return for the lodging of guarantees shall not be allowed.

16. Article 11(1) of Directive 2016/943, entitled “Conditions of application and safeguards”, reads:

1. Member States shall ensure that the competent judicial authorities have, in respect of the measures referred to in Article 10, the authority to require the applicant to provide evidence that may reasonably be considered available in order to satisfy themselves with a sufficient degree of certainty that:

(a) a trade secret exists;

(b) the applicant is the trade secret holder; and

(c) the trade secret has been acquired unlawfully, is being unlawfully used or disclosed, or unlawful acquisition, use or disclosure of the trade secret is imminent.

17. Article 14(1) of Directive 2016/943, entitled “Damages”, reads:

1. Member States shall ensure that the competent judicial authorities, upon the request of the injured party, order an infringer who knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.

Member States may limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent.

National law¹

18. Act No 90 of 17 June 2005 on mediation and proceedings in civil disputes (*Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven)*) (“the Dispute Act”) contains rules on evidence.

19. The first paragraph of Section 21-3 of the Dispute Act reads:

¹ All translations of national law are unofficial.

(1) The parties are entitled to present such evidence as they wish. Limitations on the right to present evidence are set out in Sections 21-7 and 21-8, Chapter 22 and the other evidence provisions in this Act.

20. According to the request, it follows from the first paragraph of Section 21-4 of the Dispute Act that the parties are under an obligation to put forward the evidence they have in their possession and which is necessary in order for correct and comprehensive information to be in the case file. There are, however, statutory exceptions to those general rules; one of these is found in Section 22-10 of the Dispute Act.

21. Section 22-10 of the Dispute Act, entitled “Exemption for evidence of trade or business secrets”, reads:

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.

22. According to the request, under the first sentence of that provision, a party or witness may refuse to allow an adversary access to evidence containing trade or business secrets. The second sentence, however, provides that a national court may nevertheless order a party to make evidence containing trade or business secrets available if, after balancing the relevant interests, the court finds this to be necessary. Such an order must contain a solid statement of reasons and the court must weigh up considerations of proper disclosure of the case against the need for protecting secrets. The threshold for issuing an order will be higher when the counterparty is a competitor, and an assessment must be made of whether the counterparty will be sufficiently assisted by being granted access to the information in anonymised form, e.g. with particularly sensitive information redacted.

23. Section 26-7 of the Dispute Act, entitled “Disputes concerning access to evidence”, reads:

(1) In disputes concerning access to items of evidence, the court may demand that the item be presented in order to determine whether it constitutes evidence.

(2) If the application for access to evidence is disputed on the grounds that the evidence is prohibited or exempted, the item of evidence cannot be presented unless the court is empowered, pursuant to a special statutory provision, to decide that the evidence nonetheless shall be presented. If only part of the item of evidence is prohibited or exempted, the remainder shall be presented if possible. Section 24-8(3) second and third sentences applies correspondingly.

(3) The court shall determine in more detail and to the extent necessary how the evidence is to be made available, how it shall be stored and other issues of

relevance to the presentation of such evidence. The evidence shall not be made known until the dispute regarding access to evidence has been resolved in a binding manner.

III FACTS AND PROCEDURE

24. On 29 March 2023, Elmatica instituted legal proceedings against Confidee and Mr Vidar Olsen. Mr Olsen is a former employee of Elmatica, and was one of the founders of Confidee after resigning from his post at Elmatica. In the writ of summons lodged with Oslo District Court (*Oslo tingrett*), Elmatica put forward a claim for compensation for financial loss sustained in connection with the respondents' establishment and launch of a competing business. Elmatica claims that Mr Olsen and Confidee violated the obligation of loyalty inherent in an employment relationship, the general clause on good business practice and the Act on the Protection of Trade Secrets. Mr Olsen and Confidee dispute those assertions.

25. During the preparatory stages of the proceedings before the District Court, both parties put forward a number of claims concerning access to evidence. One of the pieces of evidence to which Elmatica requested access is Confidee's application for a tax deduction for research and development in an innovative business (*Skattefradrag for Forskning og Utvikling i et Nyskapende Næringsliv*, abbreviated as "SkatteFUNN"). The application concerns a tax deduction for a project concerning the development of a new IT platform for the purchase and sale of circuit boards and was submitted to the Research Council of Norway (*Forskningsrådet*) on 21 September 2022. The parties do not dispute that the SkatteFUNN application contains trade secrets belonging to Confidee and that it, therefore, in principle, comes within the evidentiary exception provided for in Section 22-10 of the Dispute Act. A redacted version of the application, with annexes, has been submitted as evidence. Elmatica wishes to have access to the unredacted version with annexes because, in its submission, it may contain information liable to shed light on the question whether Elmatica's protection of trade secrets has been breached.

26. On 25 September 2023, Oslo District Court dismissed Elmatica's claim to have the SkatteFUNN application adduced in evidence. Elmatica appealed against that ruling to Borgarting Court of Appeal (*Borgarting lagmannsrett*) in so far as the ruling concerned the claim to have the application adduced in evidence.

27. On 8 January 2024, Borgarting Court of Appeal dismissed Elmatica's appeal. Neither Oslo District Court nor Borgarting Court of Appeal obtained the disputed document before they addressed the issue of whether it should be adduced in evidence.

28. Elmatica lodged an appeal with the Supreme Court of Norway on 23 January 2024. The principal point of appeal concerns the application of the law, whilst the point of appeal put forward in the alternative concerns the interpretation of the law. As the case

stands before the Supreme Court, it concerns only the SkatteFUNN application being adduced in evidence.

29. According to the request, Section 22-10 of the Dispute Act is silent as to the approach to be taken by the court in balancing interests. In its decision of 4 October 2023 (HR-2023-1857-U), the Appeals Selection Committee of the Supreme Court (*Høyesteretts ankeutvalg*) held that the courts have a right, but are under no obligation, to order that evidence be presented in connection with the balancing of interests under Section 22-10 of the Dispute Act. As stated in the request, the legal basis for such presentation of evidence is found in Section 26-7 of the Dispute Act.

30. In the request, the referring court observes that the Appeals Selection Committee of the Supreme Court ruled the following, in paragraph 13 of its decision HR-2023-1857-U, with regard to Section 26-7 of the Dispute Act:

The first paragraph of Section 26-7 allows the court to order the presentation of evidence in order to determine whether it has evidentiary value. The second paragraph of Section 26-7 regulates those situations where a request for access to evidence is opposed on grounds of the evidence being prohibited or exempted, in which case the evidence may be presented only if the court has authority to decide that the evidence nevertheless is to be adduced.

31. According to the referring court, in paragraphs 15–17 of decision HR-2023-1857-U, the Appeals Selection Committee of the Supreme Court ruled further:

This means that the second paragraph of Section 26-7 allowed the Court of Appeal to order that the evidence in question be presented. It follows from the relationship between the provisions that the Court of Appeal also had this authority to rule on questions of exceptions on which the court must rule under Section 22-10. This position finds support in the preparatory works for the second paragraph of Section 26-7: see Ot.prp. nr. 51 (2004–2005), page 468.

What cannot be inferred from those rules, however, is an obligation to require presentation of the document before the court rules on whether an exception to disclose the evidence applies and, if so, which parts of the evidence are covered by an exception and, if so, whether an order is to be made.

Nor can any such obligation be inferred from other rules. It is therefore up to the court to determine whether it will request that the document be presented before the court rules on the questions raised under Section 22-10 including, as the case may be, what is to be redacted.

32. The referring court observes further that the state of the law under the provisions of the Dispute Act is thus that the court has a power, but is under no obligation, to obtain

the disputed document before the balancing provided for in Section 22-10 of the Dispute Act is undertaken.

33. According to the request, Section 22-10 of the Dispute Act was amended by the Act on the Protection of Trade Secrets, which implemented Directive 2016/943. According to the preparatory works concerning the provision, the implementation of that Directive did not entail any changes to the scope of the exception to the disclosure of evidence; rather, the formulation of the provision was modernised in line with the Act on the Protection of Trade Secrets.

34. The referring court observes that, in the appeal, the judgment of the European Court of Justice of 7 September 2021 in Case C-927/19 *Klaipėdos regiono*, concerning public procurement law, is considered to be of key importance. For the referring court the question arises as to whether the statements in that judgment can be transposed to evidentiary disputes in cases concerning remedies relating to trade secrets and thus clarifying whether national courts are obliged to obtain disputed evidence which may contain protected trade secrets, in order to determine whether that evidence is to be adduced in the legal proceedings.

35. Consequently, by letter of 17 June 2024, registered at the Court on 2 July 2024, the Supreme Court of Norway submitted a request to the Court for an advisory opinion on the following questions:

- 1. In disputes concerning access to evidence in cases concerning remedies relating to trade secrets, does EEA law require national courts to weigh one party's right to remedy breaches of its alleged trade secrets against the other party's right to protection of its alleged trade secrets?**
- 2. In that connection, does EEA law place an obligation on national courts to obtain and examine disputed evidence which may contain trade secrets in order to determine whether that evidence is to be adduced in the proceedings, or is it sufficient that national courts may, at their discretion, obtain the evidence in question in those cases where they deem it necessary in order to conduct a proper assessment of whether the evidence is to be adduced?**

IV WRITTEN OBSERVATIONS

36. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Elmatica, represented by Rajvinder Singh Bains and Ketil Sellæg Ramberg, attorneys;

- Confidee and Vidar Olsen, represented by Hallvard Gilje Aarseth and Siri Nyhus Kolbjørnsen, attorneys;
- the Norwegian Government, represented by Emil Moss Skjelland and Fredrik Bergsjø, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Claire Simpson, Erlend Møinichen Leonhardsen and Melpo-Menie Joséphidès, acting as Agents; and
- the European Commission (“the Commission”), represented by Jan Szczodrowski and Julie Samnadda, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

Elmatica

37. Elmatica proposes that the questions referred should be answered as follows:

1. EEA law requires national courts to weigh one party’s right to remedy breaches of its alleged trade secrets against the other party’s right to protection of its alleged trade secrets in cases concerning remedies relating to trade secrets. Such a weighing up must take into account the information asymmetry and must ensure that the rights that a legitimate trade secret holder has under the Trade Secrets Directive are not rendered nugatory.

2. For the purposes of the Trade Secrets Directive, where a party subject to a dispute may argue restrictions on access to evidence claiming it may contain trade secrets, EEA law does place an obligation on national courts to obtain and examine the evidence in question. Once received, unless it is strictly necessary to not disclose the evidence, the national court shall determine a proper confidentiality regime safeguarding both parties’ interests.

Confidee and Vidal Olsen

38. Confidee and Mr Olsen submit that the questions referred should be answered as follows:

1. In disputes concerning access to evidence in cases concerning remedies relating to trade secrets, EEA law requires national courts to weigh one party’s right to remedy breaches of its alleged trade secrets against the other party’s right to protection of its alleged trade secrets.

2. It is compatible with Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, that the national courts in disputes over disclosure of evidence which may contain trade secrets, may, at their discretion, obtain the evidence in question in those cases where they deem it necessary in order to conduct a proper assessment of whether the evidence is to be adduced.

The Norwegian Government

39. The Norwegian Government proposes that the questions referred be answered as follows:

1. When determining whether disputed evidence is to be adduced in the proceedings in cases concerning remedies relating to trade secrets, EEA law requires that one party's right to remedy breaches of its alleged trade secrets is balanced against another party's right to protection of its alleged trade secrets.

2. National courts are not under an obligation to obtain and examine all evidence invoked by the parties that may or may not contain trade secrets. They must, however, obtain and examine evidence to the extent necessary to make a proper assessment of the balancing interests as set out in the answer to question 1, and in accordance with relevant EEA law, including the principle of effectiveness and the right to an effective remedy.

ESA

40. ESA proposes that the questions referred be answered as follows:

1. In disputes concerning access to evidence in cases concerning remedies relating to trade secrets, EEA law requires national courts to weigh on a case-by-case basis one party's right to remedy breaches of its alleged trade secrets against the other party's right to protection of its alleged trade secrets.

2. In such cases, it is sufficient that national courts may obtain and examine the evidence in question, if they consider it necessary to conduct a proper assessment of whether the evidence is to be disclosed, provided always that any such discretion is exercised in accordance with general principles of EEA law, in particular the right to an effective remedy and to effective judicial protection.

The Commission

41. The Commission proposes that the questions referred be answered as follows:

1. In proceedings concerning remedies relating to trade secrets and access to evidence, EEA law should be interpreted to the effect that national courts should weigh up the respective protected interests on a case by case basis in order to strike a balance between the requirements of effective legal protection or the interest of a due examination of the substance of a claim and the safeguarding of business confidentiality.

2. In that connection, there is no obligation in EEA law for the national court to obtain and examine disputed evidence which may contain trade secrets in order to determine whether that evidence is to be adduced in the proceedings;

The method and the extent of disclosure of evidence depends on a weighing-up of the protected interests on a case-by-case basis by the national courts and tribunals whereby national courts may, at their discretion, obtain the evidence in question in those cases where they deem it necessary in order to conduct a proper assessment of whether the evidence is to be adduced.

Bernd Hammermann

Judge-Rapporteur