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Case No: 92483
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
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and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-14/24

Elmatica AS

v

Confidee AS and Vidar Olsen

in which the Supreme Court of Norway (*Norges Høyesterett*) requests the EFTA Court to give an advisory opinion, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, concerning the interpretation of EEA law governing access to evidence containing trade or business secrets.

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1 INTRODUCTION / THE FACTS OF THE CASE

1. The present case concerns access to evidence in a claim brought by Elmatica AS ("**Elmatica**") for compensation for financial loss sustained in connection with the launch of a competing business by Confidee AS ("**Confidee**") and Vidar Olsen (together, "**the Respondents**"). Mr Olsen founded Confidee, together with others, after resigning from employment with Elmatica. Elmatica claims, *inter alia*, that the Respondents breached the national act on the protection of trade secrets,[1] which, according to the request for an advisory opinion ("**the Request**"), implements Directive (EU) 2016/943 ("**the Trade Secrets Directive**" or "**the Directive**")[2] in Norwegian law.[3]

2. In the course of bringing its claim, Elmatica requested access to Confidee's application for a tax deduction for research and development in an innovative business (also referred to as "**the SkatteFUNN application**"). It is undisputed that this application contains trade secrets belonging to Confidee. A redacted version of it has therefore been submitted in evidence. Elmatica however seeks access to the unredacted version, which it believes may also contain information showing whether the protection of *Elmatica's* trade secrets has been breached.[4]

3. In these circumstances, Norwegian national procedural law (Section 22-10 of the Dispute Act[5]) provides that the court may order disclosure of such evidence after balancing the interests of the parties. Both the Oslo District Court and the Borgarting Court of Appeal have respectively dismissed Elmatica's claim and appeal to have the unredacted SkatteFUNN application submitted in evidence. Elmatica now appeals before the Norwegian Supreme Court (*Norges Høyesterett*) ("**the Referring Court**"). It claims that the lower courts erred in law by not requesting and reviewing the

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[1] *Lov 27 mars 2020 nr. 15 om vern av forretningshemmeligheter* ("**Act on the Protection of Trade Secrets**"): see the Request, para. 5.

[2] 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 Trade Secrets Directive was incorporated into the EEA Agreement on 29 March 2019 by Decision 91/2019 of the EEA Joint Committee, OJ L 210, 2.7.2020, p. 76, with entry into force on 1 January 2021.

[3] Request, paras. 3 and 5.

[4] Request, para. 6.

[5] In Norwegian: *Lov 17 juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven).*

SkatteFUNN application before ruling that such (unredacted) evidence could not be disclosed.[6]

4. The Referring Court essentially seeks an advisory opinion on whether, in such circumstances, EEA law requires national courts:

   (i) to weigh or balance the parties' interests (here, disclosure and the right to remedy alleged breaches of trade secrets versus the protection of trade secrets);
   (ii) to obtain and examine the disputed evidence when ruling on evidential matters, rather than simply having the ability or discretion to obtain and examine such evidence.

5. In summary, the Authority submits:
   (i) it is settled case-law that national courts must weigh up the competing interests of the parties to the proceedings before them. In a case such as the present, this involves in particular weighing one party's right to an effective remedy for an alleged breach of its trade secrets against the other party's right to protection of its alleged trade secrets (**Section 6.1** below);
   (ii) it is sufficient that national courts are able to obtain and examine relevant evidence, if they consider this necessary in order to rule on its disclosure, 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 effective judicial protection (**Section 6.2** below).

2 EEA LAW

6. Recital 10 the Trade Secrets Directive provides (emphasis added):

> "*It is appropriate to provide for rules at Union level to approximate the laws of the Member States so as* ***to ensure that there is a sufficient and consistent level of civil redress in the internal market in the event of unlawful acquisition, use or disclosure of a trade secret****. Those rules should be without prejudice to the possibility for Member States of providing for more far-*

[6] Request, paras. 6-10 and 29.

reaching protection against the unlawful acquisition, use or disclosure of trade secrets, as long as the safeguards provided for in this Directive for protecting the interests of other parties are respected."

7. Recital 26 of the Directive provides, in relevant part (emphasis added):

"*It is essential that such* [interim] *relief be available without having to await a decision on the merits of the case,* ***while having due respect for the right of defence and the principle of proportionality, and having regard to the characteristics of the case***."

8. Article 1(1) of the Directive provides:

"*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 15(3) is ensured."

9. Article 2(1) of the Directive defines "*trade secret*":

"*'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 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* [.]"

10. Article 4(1) of the Directive provides:

"*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*."

11. Article 6 of the Directive ('*General obligation*') provides (emphasis added):

"*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 necessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; and

(c) ***be effective and dissuasive***."

12. Article 9(3) of the Directive provides that, when judicial authorities are taking measures necessary to preserve the confidentiality of any (alleged) trade secret (emphasis added):

> *"…* ***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."*

13. Similarly, Article 11(2) of the Directive ('*Conditions of application and safeguards'*), which relates to provisional and precautionary measures, provides (emphasis added):

> "*Member States shall ensure that in deciding on the granting or rejection of the application and assessing its proportionality,* ***the competent judicial authorities shall be required to take into account the specific circumstances of the case, including, where appropriate****:*
>
> *[…]*
>
> *(e)* ***the legitimate interests of the parties*** *and the impact which the granting or rejection of the measures could have on the parties;*
> *(f)* ***the legitimate interests of third parties****;*
> *(g)* ***the public interest****; and*
> (h) ***the safeguard of fundamental rights***."

14. Article 13(1)(e)-(h) of the Directive ('*Conditions of application, safeguards and alternative measures*') contains similar provisions in relation to the adoption of injunctions and corrective measures.

3 NATIONAL LAW

15. The relevant provisions of Norwegian law are referred to at pages 3-5 of the Request. The main rule is that parties to court proceedings are free to adduce the evidence they wish, under Section 21-3(1) of the Dispute Act. It provides:

> "(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*."[7]

16. As stated by the Referring Court, there are exceptions to this rule.[8] The key exception for the purposes of the present case is Section 22-10 of the Dispute Act, entitled "*Exemption for evidence for trade secrets*". Section 22-10 was amended in connection with the enactment of the Act on the Protection of Trade Secrets, which implements the Trade Secrets Directive.[9] Section 22-10 provides:

> "*A party or witness may refuse to provide access to evidence that cannot be made available without revealing a trade secret. The court can nevertheless order such evidence must be made available if, after balancing the relevant interests, the court finds this to be necessary."*[10]

17. The Referring Court observes that Section 22-10 is itself silent as to how precisely the balancing of interests must be conducted, albeit that any disclosure order must contain a solid statement of reasons, and the court must weigh up considerations for disclosure against the need for protecting business secrets.[11] National case-law however establishes that Norwegian courts have the power but are under no obligation to obtain

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[7] In Norwegian: *"§ 21-3. Rett og plikt til bevisføring*
(1) Partene har rett til å føre de bevis de ønsker. Unntak fra retten til å føre bevis følger av §§ 21-7 og 21-8, kapittel 22 og øvrige bevisregler i loven her."
Unless otherwise stated, translations are as provided by the Norwegian Ministry of Justice, available at https://lovdata.no/pro/#document/NLE/lov/2005-06-17-90.
[8] Request, para. 11.
[9] Request, para. 17.
[10] In Norwegian: "*§ 22-10. Bevisfritak for forretningshemmeligheter*
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."
[11] Request, paras. 12-13.

and examine the disputed evidence before the balancing exercise under Section 22-10 is conducted.[12]

4 THE QUESTIONS REFERRED

18. Against this background, the Referring Court has asked 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?"*

5 PRELIMINARY REMARKS: THE APPLICABILITY OF EEA LAW

19. By way of preliminary remark, the Authority observes that the Request appears to proceed on the basis that the Trade Secrets Directive applies.[13] It is however unclear to the Authority whether the present case properly falls within the scope of the Directive. As this Court and the CJEU have held, the scope of the Directive:

> "*concerns only the **unlawful** acquisition, use or disclosure of trade secrets **and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings**, such as proceedings relating to public procurement*."[14]

20. Whether the Directive applies therefore depends on the nature of the national court proceedings. The Request states simply that Elmatica's claim for compensation for

[12] Request, paras. 12-16.
[13] See e.g. Request, paras. 26-28.
[14] Judgment of 9 August 2024, Case E-11/23 *Låssenteret AS* v *Assa Abloy Opening Solutions Norway AS* ("***Assa Abloy***"), para. 46, and judgment of the Grand Chamber of the CJEU of 7 September 2021, '*Klaipėdos regiono atliekų tvarkymo centras'* v *UAB* ("***Klaipėdos regiono***"), C-927/19, EU:C:2021:700, emphasis added, para. 97. See similarly the Opinion of Advocate General Campos Sánchez-Bordona, EU:C:2021:295, at paras. 43-50.

financial loss in connection with the Respondents' launch of a competing business is, *inter alia,* related to a breach of "*the Act on the protection of trade secrets*", and that Elmatica seeks access to information in the Respondents' possession (the unredacted SkatteFUNN application) which it claims "*may contain information liable to shed light on the question whether Elmatica's protection of trade secrets has been breached*."[15] While it appears that Elmatica claims damages (at least in part) for a breach of the Act on the Protection of Trade Secrets, which implements the Trade Secrets Directive,[16] the Request does not contain sufficient information for the Authority to make more detailed submissions on the issue of whether the Directive applies. This issue is, in any event, also for the Referring Court to assess.

21. If the Trade Secrets Directive does not apply, the question is then whether some other cross-border element or connecting factor with EEA law exists, such that EEA law is engaged. Again, the facts and legal background to the case are not sufficiently detailed for the Authority to conclude on this point.

22. In order to provide a meaningful answer to the Court, the Authority therefore addresses the questions referred on the assumption that EEA law applies. In its answers, the Authority considers the provisions of the Trade Secrets Directive and also more general principles of EEA law (on this point, the Authority observes that the questions referred are phrased in general terms and do not refer to the Directive as such).

6 LEGAL ANALYSIS

6.1 Question 1: EEA law requires a weighing of the relevant interests of the parties to the case

23. By its first question, the Referring Court asks whether, in disputes concerning access to evidence in cases concerning remedies for alleged breaches of trade secrets, EEA

[15] Request, paras. 5-6.

[16] See also the text of the first question referred (emphasis added): "*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?*"

law requires national courts to weigh the right to a remedy of the party alleging breach against the other party's right to protection of its alleged trade secrets.

24. The Authority submits that the answer to this question is "Yes", as follows.

25. First, the Authority notes that the Trade Secrets Directive does not specifically regulate the approach to be taken in disputes about *access to evidence* in cases concerning the unlawful acquisition, use and/or disclosure of trade secrets. The Directive rather lays down minimum harmonisation rules on protection against the unlawful acquisition, use and disclosure of trade secrets. Therefore, whether the Directive applies, or whether EEA law is engaged on some other basis (see **Section 5** above), it is primarily for national procedural law to provide the methods and limitations for the disclosure of information and evidence necessary to pursue a claim for the infringement of trade secrets.

26. Such national rules must however respect the EEA law principles of equivalence and effectiveness.[17] The principle of effectiveness is especially relevant here. Such a principle entails that national procedural rules governing actions for safeguarding rights, which individuals and economic operators derive from EEA law, must not render practically impossible or excessively difficult the exercise of those rights.[18] In addition, EEA law requires "*that national legislation does not undermine the right to effective judicial protection*."[19]

27. Second, where the subject-matter of the dispute engages a right conferred by EEA law, the exercise of national procedural rules must also comply with general principles of EEA law. The Authority recalls the settled case-law according to which the right to the protection of business or trade secrets is a general principle of EU law.[20] The right

[17] Case E-11/23 *Assa Abloy*, para. 44, and judgment of 17 September 2018, Case E-10/17 *Nye Kystlink*, para. 73 and see also paras. 110-111.
[18] Case E-11/23 *Assa Abloy*, para. 44.
[19] Ibid.
[20] C-927/19 *Klaipėdos regiono*, para. 132 and the case-law cited. See further the judgments of the CJEU of 19 June 2018, *Baumeister*, Case C-15/16, EU:C:2018:464, para. 53 (protection of business secrets), of 24 June 1986, *AKZO Chemie* v *Commission*, Case 53/85, EU:C:1986:256, para. 28; and of 19 May 1994, *SEP* v *Commission*, Case C-36/92 P, EU:C:1994:205, paras. 36-37.

to such protection has also been recognised as a general principle of EEA law by the EFTA Court.[21]

28. Third however, settled case-law also recognises that the protection of confidential information, including trade secrets, is not absolute. Rather, the principle of protection must be observed in such a way as to reconcile it with the requirements of effective judicial protection and the rights of defence of the parties, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.[22] Case-law has recognised a variety of legitimate interests which might justify disclosure of trade secrets, including the fundamental right to an effective remedy.[23]

29. Accordingly, fourth, the method and extent of disclosure will necessarily depend on a weighing-up of the (potentially conflicting) protected interests on a case-by-case basis by the national courts. As the Court held in **E-11/23 *Assa Abloy***, in relation to access to evidence containing trade secrets sought in a competition law claim:

> "*They* [national courts and tribunals] *must, first, appraise the interest of the requesting party in obtaining access to the documents in question in order to prepare its action, in particular in the light of other possibilities it might have, and, second, 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 (compare the judgment in Donau Chemie, C-536/11* [EU:C:2013:366]*, paragraphs 34, 44 and 45 and case law cited). In connection with that assessment, in order to counter 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.* […]"[24]

30. The Authority observes, fifth, that the need for a weighing-up of the potentially competing interests of the parties (and of third parties) is also reflected in certain

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[21] Case E-11/23 *Assa Abloy*, para. 46.

[22] Case E-11/23 *Assa Abloy*, paras. 49-50, referring to the judgment of the CJEU of 14 February 2008, *Varec SA* ("***Varec***"), C-450/06, EU:C:2008:91, para. 52 and the case-law cited. On this point see also Article 9(3) of the Trade Secrets Directive.

[23] Case E-11/23 *Assa Abloy*, para. 51 and the case-law cited. The need for effective civil redress is recognised in Article 6 of the Trade Secrets Directive (see also its Recital 10, referring to the need for a "*sufficient and consistent level of redress in the internal market*".)

[24] *Ibid*, para. 55. To combat 'fishing expeditions', the Authority observes that Article 7 of the Trade Secrets Directive requires Member States to ensure that national courts may apply appropriate measures to prevent or punish such abuses of process.

aspects of the Trade Secrets Directive. Article 9(3) of the Trade Secrets Directive requires national courts, when taking measures necessary to protect the confidentiality of any trade secret or alleged trade secret, and assessing their proportionality, to "*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*." For both provisional or precautionary measures and measures following a decision on the merits, the Directive also requires Member States to ensure that the competent national judicial authorities take into account the specific circumstances of the case, including, where appropriate, "*(e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties; (f) the legitimate interests of third parties; (g) the public interest; and (h) the safeguard of fundamental rights*": see Article 11(2)(e)-(h) and Article 13(1)(e)-(h) of the Directive.[25] The weighing-up approach set out in these provisions (which also potentially govern the use or disclosure of the trade secret[26]) is consistent with that of the case-law cited above.

31. Accordingly, national procedural rules (such as the Dispute Act) must ensure and must be applied in such a way that a proper weighing-up of interests of the parties is conducted. Such a weighing-up must ensure that a party's ability to enforce its rights under the Trade Secrets Directive (or under EEA law more generally) is not rendered nugatory by an over-zealous approach to the protection of trade or business secrets, or by an overly rigid interpretation of national procedural rules.[27] Indeed, Article 6 of the Directive requires Member States to provide *effective* civil redress against the unlawful acquisition, use and disclosure of trade secrets.[28] In that context, the Authority

[25] See also Recital 26 to the Directive, which refers to the need to have due respect for the right of defence and the principle of proportionality, and to have regard to the characteristics of the case.
[26] See Articles 10(1)(a) and 12(1)(a) of the Directive.
[27] Case E-11/23 *Assa Abloy*, para. 45. See also judgment of the CJEU of 6 June 2013 in *Donau Chemie* ("***Donau Chemie***"), C-536/11, EU:C:2013:366, para. 31. On the other hand, as also observed by the CJEU in *Donau Chemie* at para. 33 of its judgment, a rule of generalised access under which any document relating to (competition) proceedings must be disclosed to a party seeking compensation is not needed in order to ensure effective judicial protection, and indeed could lead to the infringement of other rights conferred on the other party, such as the right to protection of business secrets. Accordingly, a weighing-up of the various interests must always be conducted on a case-by-case basis.
[28] See also Recital 10 to the Directive, which refers to the need for a "*sufficient and consistent level of civil redress*."

observes that the protection offered by the Trade Secrets Directive is against the "***unlawful*** *acquisition, use and disclosure*" of trade secrets, see Article 1(1). Where a claimant alleges that its trade secret has been unlawfully used or disclosed, in order for its rights to be effective, the defendant should not automatically be able to hide behind a confidentiality claim to avoid *any* disclosure of information which might shed light on whether it has wrongly used or disclosed the trade secret of the claimant, simply on the basis that 'trade secrets' are involved. Rather, the national court must weigh up the competing interests of the parties, for example, through an examination of the contested evidence. This is considered further under the second question, below.

32. As the Court held in **E-11/23 *Assa Abloy***, it is therefore for the national court to take appropriate steps 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. If for example the information is competitively sensitive as well as confidential, this should primarily affect the *method* of disclosure (e.g. through a confidentiality ring), rather than necessarily the *extent* of the disclosure.[29]

33. In conclusion, the Authority submits that the first question should be answered as follows:

> *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.*

6.2 Question 2: national courts must only obtain and examine the disputed evidence where necessary to rule effectively on the matter

34. By its second question, the Referring Court asks if national courts must always obtain and examine disputed evidence, in order to rule on its disclosure, or whether it is sufficient that national courts simply have such powers at their disposal.

[29] Case E-11/23 *Assa Abloy*, paras. 56-57.

35. As observed in **Section 6.1** above, in a case such as the present, the principle of national procedural autonomy applies to the rules on the production and disclosure of evidence. Where however the subject-matter of the dispute engages a right conferred by EEA law (for example, protection of trade secrets), the exercise of such national procedural rules must comply with general principles of EEA law. This means in particular that the national rules must ensure that EEA law rights of redress are *effective*.[30]

36. In the context of a case such as the present, the Authority submits, in line with relevant case-law,[31] that it is sufficient that national courts have the power to obtain and examine the disputed evidence, when necessary. In other words, EEA law does not place an obligation on national courts, when ruling on whether evidence should be disclosed, in *every* case to obtain and examine the evidence in question. Instead, whether the national court must obtain and examine the evidence will depend on whether this is necessary in order *effectively* to balance and protect relevant EEA law rights, in particular the right to an effective remedy and effective judicial protection.[32]

37. The Authority refers here to cases **C-450/06 *Varec***[33] (which was decided prior to the entry into force of the Trade Secrets Directive), **C-927/19 *Klaipėdos regiono***,[34] and **C-54/21 *Antea Polska***.[35] In such cases, the proceedings concerned *inter alia* whether

[30] See also Article 6 of the Directive ('*General obligation'*), which provides (emphasis added):
"*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 necessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays; and
(c) ***be effective and dissuasive***."

[31] See paras. 37-39 below.

[32] Case E-11/23 *Assa Abloy*, para. 51. Article 9(3) of the Trade Secrets Directive requires national courts, when taking measures necessary to protect the confidentiality of any trade secret or alleged trade secret, and assessing their proportionality, to "*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*." The Authority submits that, similarly, whether the national court must obtain and examine the relevant confidential evidence in such cases will depend on whether this is necessary in order *effectively* to balance these interests.

[33] Cited in footnote 22 above.

[34] Cited in footnote 14 above.

[35] Judgment of the CJEU of 17 November 2022, *Antea Polska SA* v *Państwowe Gospodarstwo Wodne Wody Polskie* ("***Antea Polska***"), C-54/21, EU:C:2022:888.

an unsuccessful party to a tender procedure could seek disclosure of confidential information such as trade secrets in a (successful) competitor's tender, in order to challenge the outcome of that tender. While the cases concerned public procurement, the Authority considers that certain statements of principle are also relevant for the present case. In **C-927/19 *Klaipėdos regiono***, the CJEU held (emphasis added):

> *"129* […] *in the context of a review of a decision taken by a contracting authority in relation to a public procurement procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the procurement procedure concerned which has been filed with the body responsible for the review (see, to that effect, judgment of 14 February 2008, Varec, C-450/06, EU:C:2008:91, paragraph 51). On the contrary, as noted, in essence, in paragraph 121 above in relation to the obligations incumbent on contracting authorities in that regard, the obligation to provide the unsuccessful tenderer with sufficient information to safeguard its right to an effective remedy must be weighed against the right of other economic operators to protection of their confidential information and their trade secrets.*
>
> *130 The competent national court must therefore ascertain, taking full account of both the need to safeguard the public interest in maintaining fair competition in public procurement procedures and the need to protect genuinely confidential information and in particular the trade secrets of participants in the procurement procedure, that the contracting authority rightly considered that the information which it refused to disclose to the applicant was confidential.* ***To that end, the competent national court must carry out a full examination of all the relevant matters of fact and law. Accordingly, it must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and trade secrets*** *(see, to that effect, judgment of 14 February 2008, Varec, C-450/06, EU:C:2008:91, paragraph 53).*"[36]

38. In the most recent case of **C-54/21 *Antea Polska***, the CJEU (paragraph 101 of its judgment) relied on the above paragraphs and, in particular, repeated the text in bold highlight.

39. The Authority submits that there is nothing in the above-cited paragraphs which imposes an obligation on national courts systematically to obtain and review *all* confidential information in respect of which disclosure is sought. The language used by the CJEU is rather that the national court must have the relevant information "*at its*

[36] C-927/19 *Klaipėdos regiono*, paras. 129-130.

disposal",[37] which means that it must be *available* to the court, in other words upon request or via some other procedural means, where such information is necessary for the court effectively to decide on the matter, in full knowledge of the facts.

40. Thus, in a case where both parties agree that the evidence in question (say, a secret price list) is competitively sensitive, it may not be necessary for the national court to *itself* examine that document before putting in place an appropriate confidentiality ring, thus protecting the confidentiality of the document while still permitting a claim on the basis of that document to proceed.

41. On the other hand, where the document (or part of the document) in relation to which disclosure is resisted is central or material to the claim, it may be necessary for the national court, in order effectively to protect and balance the relevant EEA rights, to examine that document to properly determine the extent and method of disclosure. In the present case, it appears that the unredacted version of the SkatteFUNN application may contain not only trade secrets of the Respondents, but may also shed light on whether the Respondents have wrongly breached trade secrets of Elmatica.[38] The parties presumably disagree on the nature and importance of information in question. While it is for the national court to decide, in such a case the only way for it to be sure that it has fairly struck a balance between ensuring (for example) the effectiveness of Elmatica's right to redress and the protection of the Respondents' trade secrets, *may* be for it to look at the unredacted document to decide on the scope and method of disclosure, so that the national court has considered "*all the issues of fact and law that are relevant for resolving the case before it*".[39]

42. That said, if the Referring Court concludes:

    (i) having weighed up the interests of the parties to the case, and

    (ii) having had regard to the procedures available to it under national law for the protection of trade secrets,

[37] The Authority has reviewed other language versions of the judgment, which are expressed in similar terms ("*Aussi doit-elle nécessairement* ***pouvoir disposer*** *des informations requises*"), ("*Bijgevolg moet zij noodzakelijkerwijs* ***kunnen beschikken*** *over de informatie"*), ("*Daher muss es zwingend über die erforderlichen Informationen, einschließlich vertraulicher Informationen und Geschäftsgeheimnisse,* ***verfügen können****"*).

[38] Request, para. 6.

[39] Case E-11/23 *Assa Abloy*, para. 51.

that it can effectively balance the competing interests (in particular effective judicial protection and the protection of trade secrets) so as to rule on the evidential dispute without it itself obtaining and examining the unredacted version of the evidence constituting trade secrets, such a conclusion is permissible as a matter of EEA law.

43. Accordingly, the Authority proposes that the second question be answered as follows:

> *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.*

7 CONCLUSION

Accordingly, the Authority respectfully submits that the Court should answer the questions referred 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.*

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