ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the EFTA court

OSLO, 9.9.2024

# Written observations by the Kingdom of Norway

represented by Mr. Emil Moss Skjelland, advocate at the Office of the Attorney General for Civil Affairs, and Mr. Fredrik Bergsjø, adviser at the Ministry of Foreign Affairs, acting as agents, in

**E-14/24 Elmatica AS v Confidee AS and Vidar Olsen**

concerning a request for an advisory opinion made by Norges Høyesterett (the Supreme Court of Norway) pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA).

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## 1 INTRODUCTION

(1) The request for an advisory opinion concerns a dispute regarding access to evidence and raises specific questions related to EEA law on the treatment of trade secrets in legal proceedings.

(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 ("the Trade Secrets Directive" or "the Directive"), is of particular relevance in this regard. However, the questions from the Supreme Court are not limited to an interpretation of the Directive, as they refer to "EEA law" in general.

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## 2 THE DISPUTE IN THE MAIN PROCEEDINGS

(3) The factual background of the case is set out in Section 3 of the request for an advisory opinion. The Norwegian Government refers to this description and will only make a few comments in this regard.

(4) Firstly, the Government notes that both parties to the main proceedings seem to invoke the protection of trade secrets in their favour in the access to evidence dispute. Elmatica maintains that its right to protection of trade secrets has been breached, and that Confidee's application for a tax deduction for research and development (SkatteFUNN) should be disclosed as it may contain information liable to shed light on this fact. Vidar Olsen and Confidee, on the other hand, seem to rely on the fact that the said application cannot be disclosed because it contains trade secrets (the latter is not in dispute, cf. paragraph 6 of the request).

(5) Secondly, the Government also notes that the request for an advisory opinion does not specify why Oslo District Court and Borgarting Court of Appeal dismissed Elmatica's claim to have the SkatteFUNN application adduced in evidence, nor why it was not obtained and examined before the claim was dismissed.[1]

## 3 RELEVANT NATIONAL LAW

(6) Sections 1 and 4 in the request for an advisory opinion contains descriptions of relevant national legislation. The Government will limit itself to a few additional comments in this respect.

(7) As pointed out in Section 1 of the request, Sections 22-10 and 26-7 of the Dispute Act are connected with the Norwegian Act on the protection of trade secrets, which implements the Trade Secrets Directive. The Government adds that these provisions must also be interpretated in conformity with other EEA rules and principles, as far as such rules are implemented in Norwegian law, cf. Section 1 of the Norwegian EEA Act and (to the extent relevant) Section 2.

(8) The Supreme Court has pointed to the ruling in HR-2023-1857-U from the Appeals Selection Committee of the Supreme Court (Høyesteretts ankeutvalg).[2] For the sake of good order, the Government would also like to inform the Court of the ruling in HR-2023-2281-U, which appears to be the most recent decision on Section 26-7 of the Dispute Act. In this ruling, the following is stated in paragraph 22 (our translation):

> *The use of the word "may" in § 26-7 Subsection 1 of the Dispute Act indicates that the court does not have a duty to obtain the evidence in order to assess whether the evidence is exempt from disclosure. The fact that the court "can" - not "must" - require the evidence to be presented is also set forth in the preparatory work for the Dispute*

[1] The request for an advisory opinion paras. 7-8.
[2] The request for an advisory opinion paras. 13-14.

*Act, cf. NOU 2001:32 B page 981. This was followed up in Ot.prp.nr.51 (2004– 2005) page 468. The same is laid down in HR-2023-1857-U paragraphs 16 and 17. The decisive factor must be whether the court, based on the information provided, can make a proper assessment without having the evidence presented.*

## 4 QUESTIONS 1 AND 2

(9) By its first and second question, which should be examined together, the Supreme Court seeks the Court's interpretation of EEA law in the context of disputes concerning access to and disclosure of evidence in cases concerning remedies relating to trade secrets. In essence, the Supreme Court asks whether national courts in such cases are required to balance one party's right to remedy alleged breaches of its right to protection of trade secrets against the other party's right to protection of its alleged trade secrets, and whether – as a part of this assessment – they are obliged to obtain and examine disputed evidence which may contain trade secrets in order to determine whether that evidence is to be adduced.

(10) As a preliminary remark, the Government interprets Question 1 as relating to the content of decisions by national courts on access to evidence – in other words, the considerations which must be made for such decisions to be in conformity with EEA law. Question 2, on the other hand, seemingly relates to the method that the national court uses to ensure such conformity. These elements are, as indicated by the questions, connected: On the one hand, the use of a discretionary competence to obtain and examine the evidence (i.e. the method) may be required in an individual case if this is deemed "necessary" for the "proper assessment" of whether the evidence is to be adduced (i.e. the content). The alternative seems to be that national courts are under an absolute obligation to obtain and examine the evidence, even where this is not deemed "necessary" for the proper assessment of whether the evidence should be adduced.

(11) The starting point for the assessment of the referred questions is the principle of national procedural autonomy. In the absence of EEA rules governing the matter, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law.[3]

(12) Consequently, it is firstly necessary to assess whether there are EEA rules governing the situation at hand and in this regard, the relevant framework is first and foremost the Trade Secrets Directive.

(13) The scope of the Directive is defined in its Article 1(1) and Chapter II,[4] and is not further examined here. The observations below are based on the premise that the rights provided by the Directive are invokable by either of the parties in the case, including the right to

[3] Cf. for instance Cases E-11/23 *Låssenteret* paragraph 44 and E-11/22 *RS* para. 55 and case law cited therein.

[4] Cf. also E-11/23 *Låssenteret* para. 35-37 in this regard.

protection of trade secrets under Article 4 or the preservation of confidentiality of trade secrets in the course of legal proceedings under Article 9.

(14) As emphasised by the Supreme Court, the Trade Secrets Directive does not contain any provisions expressly regulating the questions raised in the request for an advisory opinion. However, certain provisions of the Directive might be of relevance and requires further assessment.

(15) Article 9 concerns the preservation of confidentiality of trade secrets in the course of legal proceedings related to the unlawful acquisition, use or disclosure of a trade secrets. Article 9(3) gives clear directions on the content of the national court's decisions regarding measures under Article 9(2):

> *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.* (emphasis added)

(16) Article 9(3), therefore, stipulates the interests and considerations the national court must consider. However, neither Article 9(3) nor any other provision of the Directive provide specific directions as to how the national court should ensure that these elements are taken "into account".

(17) Article 9(3) obliges the national courts to assess the proportionality of decisions on measures referred to in Article 9(2), while taking "into account" the elements specified in Article 9(3). This may essentially be described as an assessment that must balance the interests of the parties. It cannot be ruled out that this assessment may in individual cases necessitate the national court to obtain and examine specific evidence. However, the Directive does not give reason to conclude that national courts are under an absolute obligation in all cases to obtain and examine any evidence invoked by the parties.

(18) Consequently, provided that the Trade Secrets Directive does not regulate the questions at hand, the principle of national procedural autonomy entails that it is for the individual states to lay down the procedural rules to apply in these situations.

(19) However, the national procedural autonomy is not unlimited and must be exercised within the boundaries of relevant general principles of EEA law, cf. inter alia the Court's statements in Case E-11/23 *Låssenteret*, which concerned both trade secrets and competition law, paragraphs 44, 46, 50 and 51:

> *44 In the absence of EEA rules governing the matter, in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each EEA State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals and economic operators derive from EEA law. […]t is for the referring*

*court to assess whether the national rules in question respect the principles of equivalence and effectiveness […] EEA law requires, in addition to observance of the principles of equivalence and effectiveness, that national legislation does not undermine the right to effective judicial protection [….]*

*46 Furthermore, the Court recalls that all EEA law must be interpreted in the light of general principles of EEA law, including fundamental rights which form part of these principles. The European Convention on Human Rights ("ECHR") and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights […]The fundamental right to respect for private life and one's correspondence, as also reflected in Article 8 ECHR, as well as a right to the protection of trade secrets, which the European Court of Justice has acknowledged as a general principle of EU law, are general principles of EEA law that may require the protection of genuinely confidential information, including trade secrets […]*

*50 The principle of the protection of confidential information and of trade secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial […]*

*51 Legitimate interests, which could justify the disclosure of confidential information, including trade secrets, are, inter alia, the 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 […] The essence of the right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed by EEA law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it […]*[5]

(20) For the purpose of the dispute in the main proceedings, the principle of equivalence does not come into play, as the domestic rules and practice do not differentiate according to whether a dispute is based on EEA provisions or purely internal law.

(21) As for the principle of effectiveness and the right to effective judicial protection, the essence in the application of these principles in this context appears to be a balancing of the interests of the parties. Their precise impact and application will, however, vary with *inter alia* the circumstances of the case and also the area of EEA law (which also seems indicated in *Låssenteret* paragraph 45, 52 and 53).

(22) In extension of this, an application of these general principles may in individual cases warrant the national court to obtain and examine specific evidence before its decision on whether that evidence is to be adduced. However, in the Government's view, they do not

[5] E-11/23 *Låssenteret* para. 44-46 and 50-51.

give rise to an absolute and general obligation to obtain and examine all disputed evidence which may contain trade secrets when deciding whether that evidence is to be adduced in the proceedings.

(23) It should be underlined that this view does not mean that the national court may substitute its own assessment with that of the party claiming that the evidence contains trade secrets. The national court must consider all relevant facts and law when deciding whether the evidence should be adduced. It does, however, mean that if the national court in the particular case is able to conduct a proper assessment without obtaining and examining the evidence, for instance in light of other evidence or the legal questions in the case, non-obtainment does not automatically or *per se* amount to a violation of the principle of effectiveness or the right to an effective remedy.

(24) While not diminishing the importance of a sufficient basis for court decisions, it should be noted that not all evidence contributes to the clarification of a case in a way that justifies that resources are invested in its introduction to the case. If the national court is obliged to obtain and examine all evidence alleged to contain trade secrets before deciding on their disclosure, regardless of their evidential value and whether the national court deems this necessary after a proper assessment, this may (unjustifiably) affect the effectiveness of legal proceedings and resources of the national courts in a negative manner.

(25) The view outlined above may at first reading seem at odds with the Grand Chamber judgment in Case C-927/19 *Klaipėdos*, referred to in the request for an advisory opinion.[6] The case concerned the interpretation of the directives on public procurement and remedies and review procedures concerning the award of public contracts.[7] Point 6 of the operative part of that judgment is quoted by the Supreme Court[8]:

> *"The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the competent national court, hearing an action brought against a decision of a contracting authority refusing to disclose to an economic operator information deemed confidential in the documents submitted by the competitor to which the contract has been awarded or an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a decision, is required to weigh the applicant's right to an effective remedy against its competitor's right to protection of its confidential information and trade secrets. To that end, that court, which must necessarily have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine, with full knowledge of the facts, whether that information can be*

[6] See, in particular, request for an advisory opinion para. 20-21.
[7] Directives 2014/24/EU and 2014/23/EU and Directives 89/665 and 2007/66/EC.
[8] The request for an advisory opinion para. 24.

*disclosed, must examine all the relevant matters of fact and of law. (…)" (emphasis added)*

(26) In the Government's view, statements in this case law do not, however, entail an absolute obligation for national courts to obtain and examine disputed evidence which may contain trade secrets when deciding whether that evidence is to be adduced in the proceedings.

(27) Arguably, the emphasised statement may be interpreted as presuming an obligation on national courts in public procurement cases to obtain and examine disputed evidence which may contain trade secrets, when deciding whether the evidence can be disclosed to an economic operator (at least in the context of the acts that that judgment concerned, see below). There are, however, objections to be made with regard to this reading.

(28) First, a closer, literal reading may rather indicate that the statement is *not* intended as an absolute obligation to obtain and examine disputed information. The wording "at its disposal" seems superfluous if this was indeed the intention (the wording "have the information" seems sufficient). Furthermore, the wording "have at its disposal" indicates that the information is available to the court. Hence, the wording seems more likely to indicate that the national court must *have the legal and actual possibility to* easily make relevant evidence available[9] for itself (should this be required in order to "weigh the applicant's right to an effective remedy against its competitor's right to protection of its confidential information and trade secrets" and "examine all the relevant matters of fact and of law" in a proper manner).

(29) Second, it is noteworthy that in paragraph 130 of the same ruling CJEU uses the phrase "…must necessarily be able to have" (our underlining), which in the Government's view supports the alternative interpretation put forward in the preceding paragraph.[10] Paragraph 130 refers further to case C-450/06 *Varec*[11], where the same phrase is used, while at the same time referring to case C-438/04 *Mobistar*, where seemingly both the phrase "…must necessarily have" and "…must necessarily be able to have", as well as the phrase "must have at its disposal all the information necessary in order to decide …. including, if necessary, confidential information", is used.[12] Finally, in Case C-54/21 *Antea Polska* CJEU seems to use the phrase "…must necessarily be able to have", while at the same time referring to case C-927/19 *Klaipėdos* paragraphs 129 and 130.

(30) In other words, it seems – at the very least – to be a cause for caution with regard to reading the phrase "have at its disposal" as an absolute obligation to obtain and examine evidence.[13]

[9] See, in this regard, Merriam-Webster - At someone's disposal - Definition & Meaning.
[10] This also seems to be pointed out by the Respondents, cf. the request for an advisory opinion para. 30. The statement "must necessarily have at its disposal" is used, as mentioned above, in Point 6 of the operative part of that judgment and in para. 137.
[11] Case C-450/06 *Varec* para. 40.
[12] Case C-438/04 *Mobistar* para. 40, 43 and 44 (point 3 of the operative part of the judgement).
[13] Case C-927/19 *Klaipėdos*,is the only Grand Chamber judgment.

(31) Leaving the literal interpretation of the different phrases aside, it may also be questioned to what extent these judgements can be directly applied outside the area of EEA law that they concerned.[14] The relevant parts of the judgments do indeed refer in part to considerations and principles of a general scope (for instance the right to an effective remedy).[15] However, the same parts also refer to considerations relating to the specific area of EEA law that are dealt with in those judgements, e.g., the specific obligation in Directives 89/665/EEC as amended by Directive 2007/66/EC imposed on EEA States to ensure that decisions taken by contracting authorities in respect of public contracts may be reviewed effectively. In this connection it may be recalled, as noted in paragraph 21 above, that the specific application and implication of the general principles of EEA law may vary with, inter alia, the area of EEA law.

(32) In this regard, the differences between the Trade Secrets Directive on the one hand, and Directive 89/665 and Directive 2014/24/EU on the other, as pointed out in the request for an advisory opinion[16], must be noted. It may also be noted that the CJEU has pointed out that the scope of the protection of confidentiality set out in Directive 2014/24/EU is broader than that of protection covering trade secrets alone.[17] Further, the EFTA Court has pointed out that there is no single definition of "trade secret" in EEA law and that the concept of trade secret used in the context of Directive (EU) 2016/943 does not necessarily coincide with how it is applied in relation to other provisions or principles of EEA law.[18] In other words, the Government questions whether the assessments in these judgements can – at any rate – be directly applied outside their specific area of EEA law in all their aspects.

(33) To summarize, the Government's view is that the national courts are responsible for applying the general principles of EEA law, to the extent relevant, in individual disputes regarding access to evidence which may contain trade secrets. However, case law does not give sufficient grounds for concluding that this entails an absolute obligation to obtain and examine disputed evidence which may contain trade secrets. At any rate, statements in case law regarding specific areas of EEA law, cannot in this context be directly applied outside their specific area.

[14] Cases C-450/06 *Varec*, C-927/19, *Klaipėdos*, and C-54/21 *Antea Polska* concerned the area of public procurement.
[15] See Case C-927/19 *Klaipėdos* para. 128-135, C-450/06 *Varec* para. 42-52 and C-54/21 *Antea Polska* para. 100-101.
[16] See. in particular. the request for an advisory opinion para. 27.
[17] See C-54/21 Antea Polska para. 55 (with further reference to Advocate General Campos Sánchez-Bordona opinion in the case, points 34 and 35).
[18] See E-11/23 *Låssenteret* para 49.

## 5 ANSWER TO THE QUESTIONS

(34) Based on the foregoing, the Norwegian Government respectfully submits that the questions posed by the referring court should 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.*

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