Advokatfirma DLA Piper Norway DA
Bryggegata 6
Postboks 1364 Vika
N-0114 Oslo
Norway
T: +47 24 13 15 00
E: info.norway@dlapiper.com
dlapiper.com

EFTA Court
e-EFTACourt portal

Oslo, 9 September 2024

WRITTEN OBSERVATIONS

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

ELMATICA AS

represented by
Rajvinder Singh Bains, Advokat and Ketil Sellæg Ramberg, Advokat
in

CASE E-14/24

Elmatica AS
v
Confidee AS and Vidar Olsen

in which the Norwegian Supreme Court (Norges Høyesterett) requests the EFTA Court to give an Advisory Opinion pursuant to Article 34 of the Surveillance and Court Agreement in its case 24-016726SIV-HRET.

TABLE OF CONTENTS

1. INTRODUCTION

1.1 Background

(1) Elmatica AS (**Elmatica** or the **Appellant**) initiated legal proceedings with a claim for compensation etc. against Confidee AS (**Confidee** or the **Respondent**) and Vidar Olsen (**Olsen**) as the CEO on 29th March 2023 before Oslo District Court. The background was that in the period from January until November 2022, 18 employees of Elmatica – with various qualifications and work experience - had resigned from their positions in a suspicious way, including Olsen himself.

(2) Elmatica was founded in 1971. Confidee was formally established by registration in the Norwegian Companies Register on 1st July 2022. The Company was later "launched" as a competitor to Elmatica in Printed Circuit Boards Industry (**PCB**) on the 2nd of January 2023[1]. Confidee and Elmatica share the same market and customer base. As of this date, ten (10) out of eleven (11) employees of Confidee were former Elmatica employees and so are, for all practical purposes, the consecutively arrived employees contributing to Confidee's rocket growth.

(3) A (new) competitor being established in any given market is not uncommon, but competition must take place under fair play conditions respecting the applicable legislations and regulations. However, the establishment of Confidee in no time is in Elmatica's view not a fair competition, but an intentional and systematic attrition of employees from Elmatica without any remuneration whatsoever.

(4) Elmatica had and have strong reasons to suspect exploitation of Elmatica's trade secrets and the request for access to specified evidence referred to as the SkatteFUNN application submitted by Confidee 21st September 2022, to the Research Council of Norway. It follows from the redacted Confidee application form that less than two and a half months after the company's inception by registration, Confidee already had 19 employees.

(5) As stated in the Request for an Advisory Opinion from the Supreme Court, on 25th September 2023 Oslo District Court denied Elmatica's claim for access to the unredacted version of Confidee's application without having obtained and examined the evidence and without considering, and accordingly, not establishing a ring of confidentiality as suggested by Elmatica.

---

[1] Confidee launch press: The cat's out of the bag – meet Europe's newest PCB company (evertiq.com)

(6) Borgarting Court of Appeals denied Elmatica's appeal in its decision 8th January 2024, without having obtained the requested evidence for its own examination before adopting its decision, notwithstanding the fact that Elmatica had even suggested to limit the circuit of recipients of the evidence to only the acting attorneys and possible engaged experts on both sides.

(7) Both Oslo District Court and Borgarting Court of Appeals denied Elmatica access more or less only taking into account Confidee's statement that the SkatteFUNN application contains trade secrets.

(8) Elmatica has appealed to the Norwegian Supreme Court because the interpretation of national law is contrary to EEA-law. The decisions of the subordinate courts entail preference to the protection of the alleged trade secrets of a newly established business compared to its competitor with – at least an equally strong – interest in protecting its trade secrets. The imbalance becomes especially evident between businesses that are not competitors at an arm's length but concerns a dispute where a new business is "born out of an established one", consecutively becoming a competitor.

1.2 The questions referred by the Norwegian Supreme Court

(9) On this basis, the Supreme Court has referred the following questions to the EFTA Court:

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?

2. THE MAIN PROCEEDINGS – OVERVIEW

(10) The main proceedings relate to a dispute concerning the Trade Secrets Directive and other breaches of Norwegian law between private parties, including inter alia the Norwegian Marketing Control Act of June 1st 2009 section 25 governing good practices (among traders) (*Nw:* Markedsføringsloven) and loyalty obligations between employees and employers.

(11) As correctly described by the Supreme Court, the case before the EFTA Court is a procedural step in those larger main proceedings relating to Elmatica's claim for damages.

(12) This procedural step – specific request for access to Confidee's application to SkatteFUNN as evidence – is necessary for the Appellant to be able to determine its legal position – merely what in Elmatica's view may be the unlawful acquisition, use and disclosure of trade secrets – as well as the scope of damages to be claimed from the Respondent.

(13) SkatteFUNN (Tax Deduction for Research and Development in an Innovate Business Sector), introduced in 2002, is a right-based, public, tax deduction scheme for Norwegian Companies offered by The Research Council of Norway (*Nw:* Forskningsrådet**).** By grant of SkatteFUNN, companies may receive a tax deduction for 19 per cent of the costs of a research and development (R&D) project. The payment is made through the tax (return) assessment, either as a reduction in tax or as a payment for companies that are not in a tax position.

(14) An R&D project may qualify for funding under the SkatteFUNN-scheme if i) it aims to develop or improve an existing product, service or production process, ii) generate new knowledge or use existing knowledge in new ways and/or iii) be targeted and limited, so that it is possible to separate the project from normal operations and activities of the Company.

(15) In short, in order to qualify for SkatteFUNN, one must prove towards the authorities, here the Norwegian Research Council, that the outcome of the project is something *new* and not merely a part of ordinary business proceedings.

(16) Elmatica – founded in 1971 – submitted an application for SkatteFUNN in August 2012 and the second application in August 2018. Confidee – founded in July 2022 – submitted an application for SkatteFUNN on September 21st 2022. At least five (5) of Confidee's employees participated in Elmatica's latest SkatteFUNN submission.

3. NATIONAL LAW OF RELEVANCE

3.1 The Norwegian Dispute Act

(17) In general, Elmatica agrees with the Norwegian Supreme Court's description of the relevant Norwegian law, as follows from paragraph 2, 3 and 11 – 15.

(18) Elmatica further, and also in general, agrees with the Norwegian Supreme Court's conclusion in paragraph 16, i.e. that Norwegian court's "[h]as 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."

(19) Accordingly, both the District Court's and the Appellate Court's decisions did not as such err, according to Norwegian national law, when they found that the document at issue could be withheld from Elmatica, due to its (alleged) character as a trade secret.

(20) The question for the court is however, whether or not, EEA law will impose requirements on access to evidence in matters where the underlying dispute is a dispute concerning the Trade Secrets Directive such as in the case at hand.

(21) Elmatica's position on these EEA law requirements will be elaborated in the following.

3.2 The Norwegian Trade Secrets Act

(22) The Trade Secrets Directive is implemented into Norwegian law by the Act on the Protection of Trade Secrets (*Nw.* Forretningshemmelighetsloven).

(23) The Norwegian Trade Secrets Act provides for protection in section 3:

> No one may infringe a trade secret by obtaining knowledge or possession of a trade secret by
>
> a. unlawfully gaining access to, taking away, or copying documents or objects
>
> b. other conduct contrary to good business practice
>
> No one may infringe a trade secret by unlawfully using or communicating a trade secret of which he or she has gained knowledge or possession
>
> a. in violation of the first paragraph
>
> b. in connection with an official, fiduciary or business relationship
>
> c. pursuant to the provisions of a law or regulation

3.3 The Norwegian Penal Code

(24) The Norwegian Penal Code (*Nw.* Straffeloven) prescribes the consequences in case of a breach of a court decision. Section 170 reads:

> "A penalty of a fine or imprisonment for a term not exceeding six months shall be applied to any person who:
>
> a. contravenes a prohibition established by a court,
>
> b. exercises a right that he/she has been deprived of by final judgment, or
>
> […]"

(25) The Penal Code literally imposes fines or imprisonment to any person who contravenes a prohibition established by a court. Applied to a hypothetical – any person who would breach a duty of confidentiality – or a confidentiality ring for that matter – imposed by a competent court could such sanctions as mentioned in the Norwegian Penal Code. The existence of such a penal clause under Norwegian law, is relevant when assessing the consequences for a potential exploitation of a disclosed trade secret versus the consequence of breaching a court-imposed confidentiality order which may incur criminal liability.

4. INTERNATIONAL LAW

4.1 EEA-law

(26) In general, Elmatica agrees with the Norwegian Supreme Court's description of the relevant EEA law, including case law, as follows from paragraph 17-25.

4.2 European Convention on Human Rights (ECHR) on fair trial

(27) For the sake of completeness, the Appellant would like to draw the attention of the Court towards ECHR article 6 nr. 1 and the right to fair trial:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

(28) ECHR article 6 nr. 1 is further outlined in the Appellant's analysis and answer to question 2 in section 5.2 below.

5. LEGAL ANALYSIS AND CONCLUSIONS

5.1 Question 1

(29) By its first question the Supreme Court essentially asks whether 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 its alleged trade secrets.

(30) Elmatica submits that the answer to this question is “Yes”, for the following reasons.

(31) First, it follows from the principle of effectiveness that procedural rules where a right under the EEA agreement is at play, "[m]ust not be framed in such a way that as to render impossible in practice or excessively difficult the exercise of rights conferred by the EEA law" (see e.g. Case **E-11/23 *Låssenteret AS***, § 44, with further references).

(32) Second, a materially similar question has been answered by the EFTA court in Case **E-11/23 *Låssenteret AS***. In that case, the question for the court, was in essence whether a claimant in a matter concerning EEA and national competition law rules, could gain access to evidence which were alleged to be trade secrets.

(33) The EFTA Court held, in § 62 of that judgement, that:

"The answer to the fifth question must be that, also in a case involving abuse of a dominant position under Article 54 EEA, EEA law requires a national court to weigh up the parties' interests prior to ordering a party alleged to have abused its dominant position to disclose evidence constituting trade secrets while ensuring the effectiveness of EEA law."

(34) Even though the question in that matter arose from another field of law, namely competition law, than the field of law at issue here, namely trade secrets law, the essence of the question remains the same, whether EEA law requires a proper weighing-up of the parties interests before the national court decides to order a party to disclose evidence.

(35) There are, in Elmatica's view, no relevant differences between the two legal regimes. It is necessary, both under the competition law and trade secrets regime, that national courts consider both parties' interests in a proper weighing-up exercise, while the effectiveness of EEA law is ensured.

(36) Thirdly, the CJEU, has in **Case C-536/11 *Donau Chemie***, paragraph 31 held that:

"That weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals."

Further, in paragraph 32, CJEU held that:

"On the one hand, it is clear that a rule under which access to any document forming part of competition proceedings must be refused is liable to make it impossible or, at the very least, excessively difficult to protect the right to compensation conferred on parties adversely affected by an infringement of Article 101 TFEU. This is the case inter alia when only access to the documents relating to the proceedings before the competent national competition authorities enables those parties to obtain the evidence needed to establish their claim for damages. Where those parties have no other way of obtaining that evidence, a refusal to grant them access to the file renders nugatory the right to compensation which they derive directly from European Union law."

The same reasoning, namely that a rule cannot overprotect either parties' interests or make a right under a directive nugatory, applies to a case concerning rights under the Trade Secrets Directive as well.

(37) Accordingly, and to conclude, national procedural rules must ensure that a proper weighing-up of the parties' interests is performed, in accordance with the settled case law mentioned in paragraphs 31-33 and 36 above. Such weighing-up must take into account the "information asymmetry" between a claimant, with no evidence at hand, and the defendant, which has full control over the evidence at issue, and thus not favor or over-protect the defendants trade secrets, while rendering the effective prosecution of a legitimate trade secret impossible and the rights under the Trade Secrets Directive nugatory.

(38) The "information asymmetry" can only be neutralized if the court acts as a guarantor of scrutiny towards a party withholding evidence or arguing protection. The fact that two parties are competitors may not in itself dictate the balancing of interests to the detriment of the claimant in a given case regarding access to evidence allegedly containing trade secrets. To the contrary, it is Elmatica's view that a proper weighing-up of the parties' interests is only possible if the courts proactively engage in seeking proof of the parties' claims for access or protection in this assessment, see further Elmatica's answer to question 2 below. In doing so, the risk of so-called "fishing expeditions" will similarly be ruled out.

5.2 Question 2

(39) By its second question, the Supreme Court essentially asks whether EEA law place an obligation on national courts to obtain and examine evidence in dispute which may contain trade secrets, or if it is satisfactory from an EEA law perspective that courts, at their discretion, where the courts deem it necessary, demand the counterparty to disclose the evidence.

(40) Elmatica submits that the answer to this question is "Yes", for the following reasons.

(41) First, all EEA law must be interpreted in the light of general principles of EEA law. This includes fundamental rights, which encompass the European Convention of Human Rights ("ECHR") and the judgements from the European Court of Human Rights ("ECtHR") (see e.g. Case **E-11/23 *Låssenteret AS***, § *46,* with further references*).*

(42) On such right is the right to a fair hearing and right to a fair trial, which follows from ECHR art 6, with a corresponding body of law.

(43) As a starting point, the European Court of Human Rights, has held, on numerous actions, that it is a fundamental aspect of the right to a fair hearing, in all proceedings, both criminal and civil, that both parties are heard and enjoy equality of arms. This so that each party may observe and review the evidence submitted by the other party, and comment on them (see e.g. ***Aksoy (Eroglu)****,* No. 59741/00, § 21 (ECtHR)).

(44) As is given from the above, this gives the effect that were a court, or another body of review, takes evidence into account, that court or that body of review, necessarily must make such evidence available for all parties.

(45) However, this does not necessarily, at least directly, answer the question posed by the Supreme Court, which in substance asks whether a court, or a review body, are in breach of EEA law, if the evidence at issue is not disclosed, either to that court, or as an effect of the abovementioned paragraph 45, to the concerned party. Indeed, the ECtHR has held that, and even in criminal cases, that evidence may be withheld.

(46) Such an order to withhold evidence, must however, firstly preserve a fundamental right of another individual. Secondly, it follows that if one party's right to a fair hearing and a fair trial is restricted, such a restriction must be deemed strictly necessary and further, that any difficulties caused by a limitation on its rights must be balanced (see e.g. ***V. v Finland****,* No 40412/98*,* § 75 (ECtHR).

(47) With that said Elmatica recognise that trade secrets are a right that receives protection as a general principle of EEA law, a right under the Trade Secrets Directive and also as a right under Article 1 of Protocol No. 1 (protection of property) under the ECHR. However, this right is not unqualified and this is especially the case where access to a counterparty's trade secrets is necessary in order to protect the claimant own trade secrets e.g. in litigation.

(48) Second, the CJEU has in, **Case C-927/19 *Klaipėdos regiono***, § 137, held that:

"In the light of the foregoing considerations, the answer to the fourth, eighth and ninth questions is that:

[...]

the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter, 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 refusal decision, is required to weigh the applicant's right to an effective remedy against the 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 disclosed, must examine all the relevant matters of fact and of law. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law. (emphasis added)"

As follows from the above, the CJEU, has in a matter concerning public procurement law, stated that the court, which is to make a decision in an evidentiary dispute, necessarily must have at its disposal the required information, to make that decision, and that this includes confidential information and trade secrets.

(49) Accordingly, it is Elmatica's position that a national court has a duty to, under the ECHR, and under general principles of EEA law, to order evidence to be disclosed to that court. Further, and to that point, such evidence must be made available to the relevant parties in a form that makes the underlying right, here a right derived from the Trade Secrets Directive, *effective*. In doing so, the court may impose different regimes of confidentiality, to protect the relevant trade secret, but unless it is strictly necessary such a measure may not include a right for the defending party to withhold the relevant evidence.

6. PROPOSED RESPONSES

(50) In light of the observations above, the Appellant proposes to the Court the following answers to the questions referred to it by the Norwegian Supreme Court in request of an Advisory Opinion:

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.

*****

Rajvinder Singh Bains
Advokat
raj.bains@dlapiper.com

Ketil Sellæg Ramberg
Advokat
ketil.ramberg@dlapiper.com

[*Electronically signed*]