



JUDGMENT OF THE COURT

26 February 2025

(Directive (EU) 2016/943 – Rules on evidence and disclosure of confidential information – Trade secrets – Weighing-up of interests – Principle of effective judicial protection)

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,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann (Judge-Rapporteur) and Michael Reiertsen, Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

- Elmatica AS (“Elmatica”), represented by Rajvinder Singh Bains and Ketil Sellæg Ramberg, attorneys;
- Confidee AS (“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,

having regard to the Report for the Hearing,

having heard oral arguments of Elmatica, represented by Rajvinder Singh Bains and Ketil Sellæg Ramberg; Confidee and Vidar Olsen, represented by Hallvard Gilje Aarseth; the Norwegian Government, represented by Emil Moss Skjelland; ESA, represented by Claire Simpson and Erlend Møinichen Leonhardsen; and the Commission, represented by Julie Samnadda, at the hearing on 23 October 2024,

gives the following

JUDGMENT

I LEGAL BACKGROUND

EEA law

- 1 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” or “the Directive”) (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 Agreement on the European Economic Area (“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.
- 2 Recital 4 of Directive 2016/943 reads as follows:

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.

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

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.

4 Article 4(1) of Directive 2016/943, entitled “Unlawful acquisition, use and disclosure of trade secrets”, reads:

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.

5 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.

6 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.

National law

7 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.

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

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.

9 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.

10 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.

- 11 According to the request, under the first sentence of Section 22-10 of the Dispute Act, 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.
- 12 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.*

II FACTS AND PROCEDURE

- 13 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 in 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.

- 14 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*) (“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.
- 15 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 it concerned the claim to have the application adduced in evidence.
- 16 On 8 January 2024, Borgarting Court of Appeal dismissed Elmatica’s appeal. Neither the District Court nor the Court of Appeal obtained the disputed document before they addressed the issue of whether it should be adduced in evidence.
- 17 Elmatica lodged an appeal with the Supreme Court of Norway on 23 January 2024. The case before the Supreme Court concerns the SkatteFUNN application being adduced in evidence.
- 18 According to the request, Section 22-10 of the Dispute Act is silent as to the court’s approach 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.
- 19 In the request, the referring court notes that in the decision in HR-2023-1857-U, the Appeals Selection Committee ruled 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.

- 20 The referring court notes that in its decision the Appeals Selection Committee further ruled:

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.

- 21 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.
- 22 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 for the provision, the implementation of that directive did not entail any changes to the scope of the exception on the disclosure of evidence; rather, the formulation of the provision was modernised in line with the Act on the Protection of Trade Secrets.
- 23 In the request, the referring court makes reference to the judgment of 7 September 2021 in *Klaipėdos regiono*, C-927/19, EU:C:2021:700, and raises the question of whether the statements in that judgment can be transposed to evidentiary disputes in cases concerning remedies relating to trade secrets. More specifically, the referring court seeks to clarify 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.
- 24 Consequently, by its letter of 17 June 2024, registered at the Court on 2 July 2024, the Supreme Court of Norway, referred the following questions to the 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?*

25 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court

III ANSWER OF THE COURT

26 By its first question, the referring court seeks guidance as to 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 of its alleged trade secrets in evidentiary disputes in cases concerning remedies relating to trade secrets. By its second question the referring court asks, in essence, whether EEA law obliges national courts to obtain and examine disputed evidence which may contain trade secrets to determine whether it should be adduced in the proceedings. The Court considers it appropriate to answer both questions together.

27 It should be recalled from the outset that it follows from the purpose of the Directive, as set out in its Article 1(1), read in conjunction with recital 4, that 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 (see the judgment of 9 August 2024 in *Låssenteret*, E-11/23, paragraph 36 and case law cited).

28 Article 4(1) of the Directive requires EEA States to 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. Article 6, moreover, requires EEA States to provide effective civil redress against the unlawful acquisition, use and disclosure of trade secrets. Nevertheless, the Directive itself does not explicitly regulate the handling of evidentiary disputes that arise in a case where a party claims that their trade secrets have been infringed.

29 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. Such rules must respect the principles of equivalence and effectiveness. This entails that the procedural rules governing the protection of rights under EEA law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be

framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EEA law (principle of effectiveness). It is for the referring court to assess whether the national rules in question respect the principles of equivalence and effectiveness. Accordingly, EEA law requires that national legislation does not undermine the right to effective judicial protection (see the judgment in *Låssenteret*, E-11/23, cited above, paragraph 44 and case law cited). In this respect, it should also be noted that Article 6(2)(c) of the Directive provides that the measures, procedures and remedies referred to in Article 6(1) shall be effective and dissuasive.

- 30 It follows from the request that it is the principle of effectiveness which is primarily at issue in the main proceedings. There being no indication in the request that the circumstances at issue in the main proceedings raise issues concerning the principle of equivalence.
- 31 Furthermore, all EEA law must be interpreted in light of general principles of EEA law, including fundamental rights which form part of these principles. The European Convention on Human Rights and 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 well as the right to the protection of trade secrets, are general principles of EEA law that may require the protection of genuinely confidential information, including trade secrets (see the judgment in *Låssenteret*, E-11/23, cited above, paragraph 46 and case law cited).
- 32 The principle of the protection of confidential information is however not absolute and there are legitimate interests which could justify the disclosure of confidential information. These include 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 (see the judgment in *Låssenteret*, E-11/23, cited above, paragraphs 49 to 51 and case law cited).
- 33 It is for national courts to take appropriate steps in the proceedings to strike a balance between the requirements of effective legal protection and the interest of a due examination of the substance of a claim and the safeguarding of business confidentiality including trade secrets. The Court recalls that the method and extent of disclosure depends on a weighing-up of the protected interests on a case-by-case basis. 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 may 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. 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 (see the judgment in *Låssenteret*, E-11/23, cited above, paragraphs 55 and 56 and case law cited).

- 34 In this respect, it should be noted that Article 7(1) of the Directive stipulates that the measures, procedures and remedies provided for in this Directive shall be applied in a manner that is proportionate, avoids the creation of barriers to legitimate trade in the internal market, and provides for safeguards against their abuse. Furthermore, Article 7(2) provides that EEA 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.
- 35 Accordingly, national courts must necessarily be able to have at their 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 (compare the judgments of 14 February 2008 in *Varec*, C-450/06, EU:C:2008:91, paragraph 53; in *Klaipėdos regiono*, C-927/19, cited above, paragraphs 130; and of 17 November 2022 in *ANTEA POLSKA and Others*, C-54/21, EU:C:2022:888, paragraph 101).
- 36 Nevertheless, this does not place an obligation on the court in all cases to obtain the disputed evidence as part of the balancing exercise. Evidentiary disputes can vary significantly in scope, with the volume and relevance of documents differing considerably from case to case. Imposing an unqualified obligation on courts to obtain and assess all requested evidence in all circumstances could potentially hinder the effective enforcement by private parties of rights relating to the protection of trade secrets and increase the risk of abuse of process. It is sufficient that national courts may, at their discretion, obtain and examine the evidence in question if they deem it necessary to conduct a proper assessment of whether the evidence is to be adduced. Such discretion must be exercised in accordance with general principles of EEA law, in particular the right to an effective remedy and to effective judicial protection.
- 37 In light of the above, the answer to the first question must be that in disputes concerning the unlawful acquisition, use or disclosure of trade secrets, EEA law requires national courts to 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 protection of business confidentiality including trade secrets.
- 38 The answer to the second question must be that there is no obligation under EEA law for national courts in all cases 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. It is 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. Such a discretion must be exercised in accordance with general principles of EEA law.

IV COSTS

- 39 Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Supreme Court of Norway hereby gives the following Advisory Opinion:

- 1. In disputes concerning the unlawful acquisition, use or disclosure of trade secrets, EEA law requires national courts to 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 protection of business confidentiality including trade secrets.**
- 2. EEA law does not place an obligation on national courts in all cases to obtain and examine all disputed evidence which may contain trade secrets in order to determine whether that evidence is to be adduced in the proceedings. It is 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. Such a discretion must be exercised in accordance with general principles of EEA law.**

Páll Hreinsson

Bernd Hammermann

Michael Reiertsen

Delivered in open court in Luxembourg on 26 February 2025.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President