NORGES HØYESTERETT

EFTA Court
1, rue du Fort Thüngen
1499 Luxembourg
Luxembourg

Doc 63

Case No 24-016726SIV-HRET, civil case, appeal against judgment: Request for an Advisory Opinion

1. INTRODUCTION

(1) Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), read in conjunction with section 51a of the Norwegian Courts of Justice Act (*domstolloven*), the Supreme Court of Norway (*Norges Høyesterett*) hereby requests an Advisory Opinion from the EFTA Court for use in Supreme Court Case No 24-16726SIV-HRET. The appellant in the case is Elmatica AS ("Elmatica"), whilst the respondents are Confidee AS ("Confidee") and Vidar Olsen ("Olsen").

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

(3) Section 22-10 and Section 26-7 of the Dispute Act are connected to the Norwegian Act on the protection of trade secrets (*forretningshemmelighetsloven*), which implements the EU Trade Secrets Directive (Directive 2016/943). The Trade Secrets Directive contains a number of procedural rules, but does not regulate the approach to be taken in ruling on disputes involving access to evidence containing trade secrets. Elmatica has raised questions as to whether EEA law nevertheless places an obligation on national courts when such rulings are to be made and, in that connection, has referred in particular to the judgment of the EU Court of Justice (ECJ) in Case C-927/19, which concerned inter alia Directive 89/665 on remedies in public procurement cases. In that judgment, the ECJ held that a national court which is to rule on questions concerning access to evidence in public procurement cases must have all relevant information, including trade secrets, "at its disposal" before a ruling can be made in "full knowledge of the facts". The Supreme Court now requests the EFTA Court to express an opinion on which requirements, if any, EEA law imposes when national courts are to rule on questions of access to evidence in cases involving trade secrets.

2. OVERVIEW OF THE PARTIES TO THE CASE

(4) The parties involved in the case before the Supreme Court are:

Appellant:	Elmatica AS
Counsel:	Advokat Rajvinder Bains raj.bains@dlapiper.com Advokatfirma DLA Piper Norway DA P.O. Box 1364 Vika 0114 Oslo
Respondent:	Confidee AS
Respondent:	Vidar Olsen
Counsel:	Advokat Hallvard Gilje Aarseth hallvard.aarseth@schjodt.com Advokatfirmaet Schjødt AS P.O. Box 2444 Solli 0201 Oslo

3. FACTS – BACKGROUND TO THE CASE

(5) On 29 March 2023, Elmatica instituted legal proceedings against Confidee and Vidar Olsen. Vidar Olsen is a former employee of Elmatica, and was one of the founders who established 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 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. Olsen and Confidee dispute those assertions.

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

(7) On 25 September 2023, Oslo District Court delivered a ruling on access to evidence dismissing 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.

(8) On 8 January 2024, Borgarting Court of Appeal delivered a ruling dismissing Elmatica's appeal.

(9) 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.

(10) Elmatica lodged an appeal with the Supreme Court on 23 January 2024. The principal point of appeal concerns the application of the law, whilst the point of appeal put forward in the alternative concerns the interpretation of the law. As the case stands before the Supreme Court, it concerns only the SkatteFUNN application being adduced in evidence. The parties' submissions will be addressed in greater detail in section six below.

4. LEGAL BACKGROUND TO THE CASE

4.1. Relevant Norwegian legislation

(11) The general rule in Norwegian law on adducing evidence in court is that the parties may adduce such evidence as they wish: see the first paragraph of Section 21-3 of the Dispute Act. 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: see the first paragraph of Section 21-4 of the Dispute Act. There are, however, statutory exceptions to those general rules. One of these is found in Section 22-10 of the Dispute Act, which provides for an evidentiary exception for trade secrets. That provision reads as follows:

> **"22-10. Exception for evidence of trade or business secrets**
> 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."

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

(13) The provision 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*) stated 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. The legal basis for such presentation of evidence is found in Section 26-7 of the Dispute Act, which is worded as follows:

> **"26-7. Disputes concerning access to evidence**
> (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 known until the dispute regarding access to evidence has been resolved in a binding manner."

(14) In HR-2023-1857-U, the Appeals Selection Committee stated the following in paragraph 13 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."

(15) Paragraphs 15–17 further summarise:

> "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."

(16) 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.

4.2. The EU Trade Secrets Directive

(17) Section 22-10 of the Dispute Act was amended in connection with the enactment of the Act on the protection of trade secrets, which implements the EU Trade Secrets Directive (Directive 2016/943), which entered into force on 1 January 2021. According to the preparatory works for the provision, the implementation of the 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.

4.2.1 Directive 2016/943

(18) The Directive does not regulate the approach to be taken in questions of access to evidence containing trade secrets. There are nevertheless provisions in the Directive which may be of interest, inter alia Article 4(1) of the Directive, which reads as follows:

> "**Article 4**
> *Unlawful acquisition, use and disclosure of trade secrets*
>
> 1. Member States shall ensure that trade secret holders are entitled to apply for the measures, procedures and remedies provided for in this Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret."

(19) Reference is also made to Article 9(1) to (3), reproduced below:

> "**Article 9**
> *Preservation of confidentiality of trade secrets in the course of legal proceedings*
>
> 1. Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.
> (…)
>
> 2. Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.
> (…)

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

4.2.2 Case law of the ECJ

(20) The ECJ's judgment in Case C-927/19, concerning the interpretation of the Procurement Directive (2014/24) and the Remedies Directive (Directive 89/665), is highlighted in the appeal as being of key importance. That judgment arose from a request for a preliminary ruling from the Supreme Court of Lithuania. The case before the national courts involved inter alia questions about the disclosure of documents in the aftermath of a public procurement procedure. The second-ranking tenderer in the procurement procedure, Ecoservice, requested to have the successful tenderer's tender disclosed, along with the correspondence exchanged between the contracting authority and the successful tenderer. The Supreme Court of Lithuania referred a number of questions to the ECJ. The ECJ summarised the relevant questions concerning the production of documents as follows in paragraph 112:

> "By its fourth, eighth and ninth questions, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24 must be interpreted as meaning that both the contracting authority and, as the case may be, the competent national court are required to disclose to an economic operator which has requested it all the information contained in the documents submitted by a competitor, including the confidential information contained therein. That court also wishes to know whether, in the event of a refusal to disclose information on the ground of its confidentiality, the contracting authority must state reasons for its position regarding the confidential nature of that information."

(21) In paragraph 128, the ECJ refers to the principle of national procedural autonomy, under which it is up to the Member States "to adopt detailed procedural rules governing the judicial remedies intended to safeguard the rights conferred by EU law". The ECJ also holds, however, that despite the absence of procedural rules in Directive 89/665 on remedies in public procurement cases, it is "necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined".

(22) As referred to in paragraph 112, Directive 89/665 contains inter alia provisions on effective review in Article 1(1) and (3), which reads as follows:

> "**Article 1**
>
> (1) (…)
>
> Member States shall take the measures necessary to ensure that (…) decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.
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> (…)

> (3) Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review."

(23) In paragraph 129, the ECJ states that a weighing-up of interests must be undertaken of "…the obligation to provide the unsuccessful tenderer with sufficient information to safeguard its right to an effective remedy" against "the right of other economic operators to protection of their confidential information and their trade secrets". Thus, the consideration of remedies under the public procurement rules must be weighed against the consideration of protecting a competitor's trade secrets in the tendering documents. In order to carry out that weighing-up of protected rights, national courts must "carry out a full examination of all the relevant matters of fact and law": see paragraph 130. In order to carry out a complete assessment, the national court 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".

(24) In point 6 of the operative part of its judgment, the ECJ answers the abovementioned questions as follows:

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

(25) The formulations in the statements cited can be interpreted as meaning that, in public procurement cases, national courts have an obligation to obtain or request access to the successful tenderer's tendering documents in a public procurement procedure which are alleged to contain trade secrets, so that a proper weighing-up may be undertaken of the protected interests.

5. BRIEF DESCRIPTION OF THE BACKGROUND TO THE REQUEST

(26) Where – as in this case – one party to a legal dispute outside the field of public procurement law claims that the other party is in possession of evidence that can shed light on the question whether the first party's protection of trade or business secrets has been breached, and the other party opposes production of the evidence in dispute on the ground that it contains that other party's trade or business secrets, the national court must rule on the evidentiary dispute under the rules laid down in Section 22-10 and Section 26-7 of the Dispute Act. It is

appropriate to seek the EFTA Court's view on whether the interpretation of Section 22-10 and Section 26-7 of the Dispute Act, as set out in Norwegian case law, is in accordance with any requirements EEA law may impose on the procedure for decisions on access to evidence in cases covered by the Trade Secrets Directive, particularly in the light of the ECJ's statements in Case C-927/19, to the effect that a court which is to rule on questions concerning access to evidence must have the disputed tendering documents "at its disposal" in public procurement cases.

(27) The relevant provisions referred to by the ECJ in point 6 of the operative part of its judgment, reproduced above, are not mirrored by completely identical provisions in the Trade Secrets Directive. The Trade Secrets Directive does not contain provisions on effective review, as Directive 89/665 does in Article 1(1) and (3). Instead, the Trade Secrets Directive has the provision reproduced above in Article 4 on remedies. Nor does the Trade Secrets Directive contain provisions on duty of confidentiality for, or on order of, public contracting authorities, as does Article 21 of Directive 2014/24. Instead, Article 9 of the Trade Secrets Directive provides for the preservation of confidentiality in the course of legal proceedings. The EU Charter of Fundamental Rights does not apply in Norway. However, the European Convention on Human Rights, which applies as Norwegian law, contains provisions on the right to a fair trial and effective remedies in Articles 6 and 13, which are substantively equivalent to Article 47 of the EU Charter. The consideration of effective remedies is also referred to in recital 26 of the preamble to the Trade Secrets Directive. Lastly, Article 1(5) of Directive 89/665, also referred to by the ECJ, is not relevant to the issues in the present case.

(28) Given that the Trade Secrets Directive contains related – although not completely identical – provisions to Directive 89/665 and Directive 2014/24, the question arises as to whether and, if so, to what extent, the ECJ's statements in Case C-927/19 can be transposed to evidentiary disputes in cases concerning remedies relating to trade secrets, with a view to clarifying the content and scope of a possible obligation for national courts 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.

6. SUBMISSIONS OF THE PARTIES

6.1 Appellant Elmatica AS

(29) The observations submitted by Elmatica AS are set out below:

> "The Court of Appeal's fundamental error in the application of the law lies in the fact that the court failed to request and carry out a review of the SkatteFUNN application before ruling that the evidence could not be adduced. The Court ought to have done so, especially since it was aware that the District Court had not done so. EEA law also imposes requirements on national procedural law and the Court of Appeal failed to supplement the application of the Norwegian rule with relevant parts of EEA law.
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> Only then will the court be able to weigh satisfactorily Elmatica's right to effective protection of and remedies in relation to its trade secrets against Confidee's protection of its trade secrets.
>
> Of course, before the court has such access, which it must request of its own motion, no actual assessment is carried out of what the content of the evidence is – or of which rules

govern the trade secret. Rather, the court refuses to allow Elmatica access, thereby effectively depriving Elmatica of the opportunity to obtain redress in relation to its trade secrets. These are rights guaranteed under the EU Directive (2016/943 - Trade Secrets Directive), in relation to which the States are under an obligation to ensure genuine and effective remedies.

Consequently, in the area of trade secrets, the Norwegian rule must be interpreted and applied in the light of the relevant EEA law rules, thereby ensuring that the EEA law rules are given their full effect and that the holder of a trade secret is given a genuine opportunity to exercise its rights. The courts are the 'guarantors' in this situation. The principle of effectiveness becomes all the more pertinent in a case involving 'bogus competitors', as is the situation in the present case. Confidee has been built up directly from Elmatica's business by former employees with in-depth knowledge of Elmatica's trade secrets. This is not a situation of established competitors or, say, access to information in order to examine in detail the award of a tender.

As regards the latter point, it follows from the ECJ's case-law, inter alia Case C-927/19, paragraph 137 with reference to inter alia Case C-450/06 (in the field of public procurement law) 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)

Points 47 to 51 of Advocate General Eleanor Sharpston's Opinion in Case C-450/06 are illustrative of how such a process should be carried out:

> '47. It is evident that conflicts are likely to arise between the right to confidential treatment of business secrets, the need for transparency in the field of public procurement, the duty of review bodies to ensure effective review and the right of all parties to a fair hearing.
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> 48. To the extent possible, those interests should obviously be reconciled, although it will not always be feasible to reconcile them fully. In particular, it will in some cases be necessary to restrict one party's right – to require confidential treatment of business secrets or to have access to all the evidence in the file – in order to ensure that the very substance or essence of the other party's right, or the court's power and duty of effective review, is not impaired. However, any restriction must not go beyond what is necessary for that purpose,

> and a fair balance must be struck between the conflicting rights. [reference redacted]
>
> 49. Where rights are not absolute, [reference redacted] they must be considered in relation to their function. Restrictions may be imposed, provided that they meet objectives of general interest and do not constitute a disproportionate and intolerable interference impairing the very substance of the rights. [reference redacted]
>
> 50. In award review proceedings of the kind in issue in the present case, the review body could first examine any disputed evidence itself and then place on the file accessible to all the principal parties only such evidence as it judges relevant to deciding the case before it. Evidence which is not placed on the file should not be taken into account. Some evidence might however be placed on the file in a masked, truncated or otherwise edited form in order to protect business secrets, if the court or tribunal concerned considered that full disclosure of the evidence in question would genuinely be detrimental to the legitimate interests of a party which had made an application requesting confidentiality of that information.
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> 51. A reasonable and pragmatic solution could be for the review body to request the party holding the evidence to provide an edited version which could be made available to the other party or parties – subject to the review body's own supervision in order to ensure that only genuinely confidential elements which do not appear decisive to the resolution of the dispute are edited out. In that case, even if the review body has seen evidence concealed from certain parties, it should endeavour not to use that evidence in any way which could infringe those parties' rights to a fair hearing and to equality of arms.'

The ECJ thus imposes, as a minimum requirement, that the national court must obtain access to relevant information, including confidential information and trade secrets, before it takes a decision on which information may be given, to whom and how. Of course, before such access is granted, it is not possible to carry out a reasonable weighing-up of the two opposing considerations.

Advocate General Sharpston summarises how such a process can take place, based on a case in the field of public procurement. There are, however, no reasons to draw a distinction between different areas of law within the EEA law sphere, under which, for certain areas of the law, there will be an obligation to provide the trade secret(s) to the court (e.g., in public procurement law), whilst in other areas of the law it will be up to the national court in its discretion (e.g., in cases involving the Trade Secrets Directive) to determine whether they are to be provided to the court. In both situations there is no doubt that the holder is entitled to protection of its trade secrets under the Trade Secrets Directive. The rationale for the protection is also the same in both cases. Furthermore, access to the trade secret(s) will be necessary in order for the claimant to be able to exercise its rights, be it the right to examine in detail whether a tender was awarded lawfully or in order to establish that the defendant infringed the claimant's trade secrets. There is no reason to distinguish between the two situations. If anything, it would be more logical to impose such an obligation in the area of trade secrets than otherwise, since without such access the protection of trade secrets would rapidly become illusory, paradoxically enough in order to protect another party's trade secret.

In Elmatica's submission, the guidance from the ECJ and the Advocate General must be as compelling in a case such as the present one as it is in the field of public procurement."

6.2 Respondents Confidee and Vidar Olsen

(30) The observations submitted by Confidee and Olsen are set out below:

> "The Court of Appeal did not base itself on an incorrect legislative interpretation in delivering a ruling without obtaining an unredacted version of the SkatteFUNN application: see Section 26-7 of the Dispute Act, read in conjunction with Section 22-10. In HR-2023-1857-U, the Supreme Court clarified that there is no obligation to obtain the document in question prior to an assessment under Section 22-10 of the Dispute Act on trade secrets. Whether the court will request that the documents be presented prior to the assessment under Section 22-10 of the Dispute Act is at the discretion of the court: see paragraph 17 of HR-2023-1857-U.
>
> The ECJ's judgment in Case C-927/19 in the field of public procurement cannot entail that the Court of Appeal's interpretation of Section 26-7 of the Dispute Act, read in conjunction with Section 22-10, is deficient. Case C-927/19 did not concern the same questions as the present case and is not directly transposable or relevant for the interpretation of Section 22-10 of the Dispute Act or the Trade Secrets Directive.
>
> The obligations that can be inferred from Case C-927/19 apply only in public procurement cases and the statements concern obligations under the Procurement Directive (2014/24) and the Remedies Directive (Directive 89/665). The interpretation of those directives is of no relevance to the present case, which does not concern an unsuccessful tenderer's options for complaining about infringements of the public procurement rules, but rather is an action for compensation between two private parties having no connection to public procurement law.
>
> The ECJ's discussion in paragraph 127 et seq. in Case C-927/19 concerns the Member States' obligations to ensure an unsuccessful tenderer in a public procurement procedure the possibility of pursuing effective remedies under the public procurement rules, whilst at the same time protecting the successful tenderer's confidential information. As stated in paragraph 129, '*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*'. It is further stated in paragraph 130 that '*the need to safeguard the public interest in maintaining fair competition in public procurement procedures'* must be weighed against the need to protect genuinely confidential information. The discussions and conclusions are related to the rules which are specific for public procurement and the State's obligation to ensure effective remedies in relation thereto, and also the specific public considerations present in such cases. In so far as Case C-927/19 has implications for the interpretation of Norwegian procedural rules, it is for the interpretation of Section 22-3 of the Dispute Act, which is the provision regulating the production of the successful tenderer's tender containing trade secrets.
>
> The statements in question do not concern the interpretation of or remedies under the Trade Secrets Directive (2016/943), which is the EEA Directive that potentially is relevant for the interpretation of Section 22-10 of the Dispute Act. Thus it is not directly relevant or transposable and its argumentative value must also be deemed to be limited. As illustrated by the statement in paragraph 130, completely different public considerations obtain in a public procurement case than in a case between two private parties in which there is disagreement about the disclosure of trade secrets.
>
> In any event, no absolute obligation to obtain the allegedly confidential information beforehand in the event of assessments of what is to be disclosed can be inferred from Case C-927/19. It follows from paragraph 130 that the court '[….] *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*'. The respondent does not read this as

meaning that other requirements for procedural rules are being imposed than what is already required under Section 26-7 of the Dispute Act, read in conjunction with Section 22-10. Through those rules, the court is '*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*'. The key point is that the court has the *possibility* of carrying out its own assessment if needed, as ensured by Norwegian procedural law."

7. QUESTIONS REFERRED TO THE EFTA COURT

In the light of the legal premises discussed above, the Supreme Court refers 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?

Oslo, 17 June 2024

Are Stenvik
Supreme Court Justice
Electronically signed