

Dr. Magdalena Kolasa, LL.M. (IP)

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Using fairness to determine post-employment duties with respect to trade secrets

Abstract

Employees and former employees are named as one of the biggest threats for secrecy. The rising value of information in the economy and reliance on its use by both employers and employees, combined with increasing work mobility, cause tensions. At the same time, trade secrets are used as means to protect innovation and their protection is an important element of public policy.

The scope of post-employment duties may only be fair if it is balanced. The applicable criteria include the right to work and to personal development on the part of the individual and the right to protect investments on the part of the ex-employer. These interests are to be seen in the broader context of public policy relating to incentivising innovation, entrepreneurship and dissemination of knowledge. Achieving fair results requires a legal framework setting out the policy goals and allowing for flexibilities.

The Trade Secrets Directive provides only partial solutions. In particular, more flexibility in issuing remedies would be desirable, such as a possibility to grant damages in lieu of injunction, tying the upper level of damages to the last-received remuneration and including abusive behaviour in the decision to grant a remedy. These measures would allow to better achieve fair results in post-employment disputes.