

**USING FAIRNESS TO DETERMINE  
POST-EMPLOYMENT DUTIES  
WITH RESPECT TO TRADE SECRETS**

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# EMPLOYEES AS SOURCE OF MISAPPROPRIATION

- shift from manufacturing of goods to knowledge-based service economy
- decreasing job security and reduced workforce loyalty

# POST-EMPLOYMENT

- conflict of interests
- case-by-case assessment necessary – legal uncertainty
- balancing of rights and consideration of public interest allow to achieve fair results
- legislative framework with flexible tools for determination of duties and framing of remedies allows to increase legal certainty

# FLEXIBLE REMEDIES. EXAMPLES

- flexibilities when granting preliminary injunctions (PI)
  - conditional on applicant filing a security (Art. 11(4) TDS)
  - compensation for respondent if PI revoked at trial (Art. 11(5) TSD)
  - continued use by respondent against guarantee (Art. 10(2) TSD)
- termination of PI on request if proceedings on merits not started or information no longer secret (Art. 11(3) TSD)
  - automatic termination? Considered but not implemented in the UK
- restriction of liability for damages of employees who acted without intent (Art. 14(1) TSD)
  - minimum harmonisation
  - unclear if applies to former employees

# FLEXIBLE REMEDIES. EXAMPLES

- factors to consider when granting remedies (Art. 11(2), 13(1), 14(2) TSD)
  - abusive conduct by claimant,
  - unjustified delay in applying for a preliminary injunction
  - non-economic factors for setting damages (Art. 14(2) TSD)
- damages in lieu of injunction
  - limited to „innocent third parties”

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# Trade Secrets and Employee Mobility

In Search of an Equilibrium

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