

Cocktails on the rocks. The challenges of enforcing trade secrets against former employees

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Abstract

Due to their perishable nature, trade secrets have been compared to an ice cube: the information is valuable as long as it remains secret. Employees have access to confidential information of their employer and create further valuable data. It is mixed and stirred with publicly accessible information and the employees' knowledge and experience. As a result, employees and former employees are one of the greatest threats for secrecy. Enforcement of trade secrets against former employees poses particular challenges, as it may encroach on their right to choose an occupation and exercise professional activity.

The pitfalls in enforcement of trade secrets in a post-employment scenario include determination of the protected information, scope of post-employment duties, and enforceability of any contractual regulation of these duties. A comparative analysis of UK, German and US law shows that the guiding principles in this context are proportionality, fairness and balancing of interests. The Trade Secrets Directive of 2016 reflects these principles as well. While one size does not fit all, some rules of thumb based on these principles may be identified and applied in the context of protection of trade secrets in the post-employment scenario.