LEGAL REGIME FOR THE PROTECTION OF COMMERCIAL CONFIDENTIALITY IN THE EU AND UKRAINE

ПРАВОВИЙ РЕЖИМ ЗАХИСТУ КОНФІДЕНЦІЙНОЇ (КОМЕРЦІЙНОЇ) ТАЄМНИЦІ В КРАЇНАХ ЄС ТА УКРАЇНІ

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Abstract. Present research describes the current stage of scientific development of the legal framework of commercial confidentiality protection in the EU and Ukraine. Research and theoretical basis of the study consists of the research papers of Ukrainian scholars in the field of civil, business, civil procedure and commercial procedural law, private international law, constitutional and administrative law and other fields of law. Thus, the features and the notion of commercial confidentiality, analysis of the fundamental provisions of acting legislation on commercial confidentiality and main issues of its legal protection are provided in the works by V. Drobyazka, R. Drobyazka, S. Gavrina, I. Gonchar, I. Dyba, V. Ivashchenko, S. Iliashenko, O. Sergeeva, H. Sliadneva, Y. Nosik. The issues of legal protection of commercial confidentiality are studied in the works by D. Bayura, O. Bezhevets, V. Prystaiko, N. Ivanytska, L. Topalova, G. Shvets. The target of the study is the legal relations that arise from establishing the legal regime of commercial confidentiality in the EU and Ukraine, and legal regulations governing these relations and their practical application. The study focuses on legal relations that arise from establishing a legal regime for the protection of commercial confidentiality in the EU and Ukraine. The study views the concept of "commercial confidentiality" as a legal category, defines common features of commercial confidentiality that are the basis for

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certain legal protection. The authors prove that the European Union countries do not have a uniform act, which would have contained general mandatory European provisions on legal protection of information, sensitive information (commercial confidentiality). At the same time, some international standards for the commercial confidentiality protection are established by the Paris Convention for the Protection of Industrial Property, which captured the provisions on necessary termination of unfair competition. Comparing the legislation of Ukraine and the EU states with regard to the protection of commercial confidentiality the authors state that means of protection and the level of compliance of the Ukrainian legislation in most cases correspond to the European standards. However, the adoption of special law that will regulate the sensitive information relations in Ukraine, and commercial confidentiality in particular poses a problem. A legal framework for the protection of commercial confidentiality is still being applied, mainly through the provision of various laws, including public law.

1. Introduction

In terms of the existing competition between entrepreneurs, commercially val-uable information on the production technology of goods, its components, methods of minimizing the costs and growing revenue and other information, constituting commercial confidentiality provides a certain manufacturer with the advantages on the market which allows him making significant profit.

The informational orientation on the development of society and economy, the intellectualization of social production and entrepreneurship, the spread of unfair competition at national and international levels, in particular, of commercial espionage in its various forms, call the attention to the strengthening of practical interest in commercial confidentiality as one of the most effective measures of information protection, which is given a paramount priotrity by the Concept of the National Program of Informatization.

At the same time, there are some legal obstacles in Ukraine to the extensive use of commercial confidentiality legal mechanisms. There are many other obstacles to the full-scale functioning of a legal category of commercial confidentiality in Ukraine, in particular, the instability of the law on commercial confidentiality which was introduced early in the 1990s and already radically reformed (new Civil and Commercial codes of Ukraine

were adopted). These obstacles are also the inconsistency and even the contradictory nature of provisions of certain regulatory legal acts on relations arising from commercial confidentiality; uncertainty of commercial turnover of trade secrets; the ambiguous nature and content of the right to commercial confidentiality; the lack of efficient law enforcement practice in this area, in particular, the judicial one.

The article proves that the right to commercial confidentiality is a type of intellectual property rights (exclusive rights). At the same time, commercial confidentiality is equal to the information itself and is not seen as a legal framework for the protection of this confidential information. The features of commercial confidentiality inherent in it due to the very essence of the object set special conditions of the legal protection of an object.

At the same time, one should take into account that the national legal mechanisms for the protection of confidential information (trade secrets and know-how) in Europe, in its turn, differ significantly in terms of the sources, judicial practice, standards of civil, criminal, and administrative protection, the extent of legal protection and other.

The notion of violation in terms of commercial confidentiality differs from the one of property rights or intellectual property rights. Trade secrets and know-how, as opposed to them, are granted the presumption of good faith, because any person can identify information as commercial confidentiality and keep it secret, or practically manage it. Such a person may, at its own discretion, grants access, or restricts illegal access to such information for other persons through physical acts.

These and other factors explain the need for a comprehensive scientific and theoretical study of legal nature of the rights to commercial confidentiality and a legal framework for the protection of trade secrets in the EU countries and Ukraine and thus proves the relevance of the issue discussed. In addition, the acting legislation on commercial confidentiality in Ukraine and current establishment of economic and legal security and protection of commercial sensitive information also underline the relevance of the research.

2. Notion and features of commercial confidentiality

Reveling the notion and features of commercial confidentiality is of high methodological importance since understanding the notion of commercial confi-dentiality itself is crucial for the content of the rights to confidential-

ity, their in-troduction into the system of economic rights, establishing the grounds for their emergence, change and termination.

O. Kulinichi views commercial confidentiality only as an element of the in-formation with limited access [1, p. 128].

S. Shkliar, in his turn, states that «… the right of an business entity to commercial confidentiality is a subjective right of a business entity, which gives it the right to act in a certain way, in particular to determine the content of information which constitutes a trade secret, a confidentiality mode, to take measures necessary to maintain the secrecy, use and manage it, etc.; to demand that responsible persons act in accordance with the current legislation, without violating its rights; seek for the protection from authorized state bodies in case of violation of the right to commercial confidentiality, in particular, in case of illegal collection, disclosure and use of trade secrets of a business entity". The latter definition focuses not on a certain object but on the type of activities of an business entity [2, p. 11].

Authors like V. Zadiraka, O. Oleksiuk, M. Nedashkovskii believe that com-mercial confidentiality consists of economic interests coming from commercial considerations and information on various aspects and fields of financial, industrial, managerial, research and technology activities of banking institutions, firms, enterprises, companies, corporations the protection of which is determined by competition and possible threat to economic security. Commercial confidentiality appears when it is of a great interest to commerce [3, p. 184].

D. Hetmantsev describes the following main features of commercial confi-dentiality: the notion of "commercial value"; secrecy; the content and extent of trade secret is determined by the bearer of the information at his own discretion; the bearer of this trade secret has all the rights to manage it; a legal framework of commercial confidentiality is prescribed by the Commercial Code of Ukraine and the Civil Code of Ukraine; legal right of a person to trade secrets has specific legal means of protection [4, p. 14]. According to V.L. Kostiuk a trade secret is the right of a business entity (legal entities and private persons) to non-discretion, to keep the records containing their own activities or joint activities with other companions (production, trade, research and technology data, financial or other activities) secret, if this information can cause financial, material or nonmaterial damage. Administrative responsibility for violation of commercial confidentiality is envisioned by the terms of

contracts (labor agreements) between the employer and employee of a business entity [5, p. 48].

M. Vinogradsky and O. Shkanova study the essence of the commercial confidentiality concept mentioned in the following provisions: this is any business information that has a real or potential value for an enterprise for commercial reasons, the disclosure of which may negatively affect the enterprise. It is not publicly available in legal terms. These records are appropriately marked and the company takes appropriate measures to keep its confidentiality. This information does not belong to highly classified one and is not protected by copyright and patent law. This information has nothing to do with the negative actions of an enterprise, which can harm the society (violations of laws and inefficient performance, administrative errors, environmental pollution, etc.) [6, p. 398].

At the same time, some authors, including D. Baiura, O. Bezhevets, S. Iliashenko, L. Topalov while defining the notion of commercial confidentiality in their publications, emphasize that commercial confidentiality is related to production, technical information, management, finance and other activities of an enterprise and records do not belong to the highly classified information, thus their disclosure (transmission, leakage) of which may damage its interests.

Business and civil law of Ukraine view the concept of "commercial confidentiality" as a legal category of the Civil and Commercial Codes of Ukraine that specifiy how a trade secret of an enterprise should be treated.

Thus, the Civil Code of Ukraine (Article 505) defines commercial confidentiality as secret information, in the sense that it is entirely or in a certain way and as a set of its features is unknown and not easily accessible to persons who usually deal with the type of information to which it belongs. In this regard, such information is of commercial value and is subject to secrecy protection measures consistent with existing conditions and these measures are taken by a person who legally controls this information [7].

Art. 162 of the Commercial Code of Ukraine describes the following features of commercial confidentiality, that if present (all the features must be present), are protected from the use by third parties: business information (technical, organizational, etc.); it has a commercial value as it is secret to third parties and thus does not provide other persons with a legal free access; the owner of the information takes appropriate measures to protect its confidentiality [8].

Based on the above-mentioned definitions of commercial confidentiality, the authors define common features of commercial confidentiality that allow for the appropriate legal protection. The above definitions of commercial confidentiality concept mention a set of features, namely: informational content of trade secrets (in the sense that a trade secret is information itself); confidentiality; commercial value; information security.

All features common to the legal category of commercial confidentiality are essential, inherent and integral. At the same time, the features like informational content and the security of information (which means that a person who legally controls this information takes measures consistent with actual circumstances aimed at the protection of its confidentiality) are the same to all types of sensitive information and, to a large extent, also to secret information. The other features of commercial confidentiality are specific. The features of confidentiality and commercial value of information, which constitute a trade secret, are external and qualitative, and informational content is an internal and essential feature.

Since legal relations arising from commercial confidentiality depend upon the existence of a set of commercial confidentiality features or the absence of at least one of them (legal relations arise if all the commercial confidentiality features are present and terminate when at least one of them is absent). The features of commercial confidentiality can be qualified as juridical facts, that once combined form a set of facts, which in their turn ground the existence of legal relations in arising from commercial confidentiality [9, p. 267].

Putting in a nutshell all the above stated, the authors conclude that legal effect of commercial confidentiality lies in: 1) establishing its legal nature; 2) defining the role of commercial confidentiality in the system of civil rights objects; 3) establishing the juridical facts necessary for the emergence, change and termination of legal relations within commercial confidentiality; 4) determining the period of trade secret legal protection.

Today, the constitutional framework of the subjective rights to information is prescribed by the art. 41 and 54 of the Constitution of Ukraine, according to which every citizen has the right to own, use and manage the results of his intellectual activity and no one is allowed to use or disseminate them without his consent, except for in cases established by law [10].

The Civil Code of Ukraine qualifies commercial confidentiality as an object of intellectual property rights (Article 420). Article 177 of the Civil

Code of Ukraine qualifies objects of civil rights as "the result of intellectual, creative activity and information" [7].

Thus, the domestic law qualifies commercial confidentiality as the Institute of Intellectual Property Rights, that is a set of exclusive rights to intangible objects, which is the result of intellectual activity, including creative one, and other objects similar with them.

Therefore, the right to commercial confidentiality is a type of intellectual property rights (exclusive rights). At the same time, commercial confidentiality is similar to the information itself and is not seen as a legal framework for the protection of such confidential information. Following a sensible suggestion, the term "exclusive rights (intellectual property right) to commercial confidentiality" may be used to define the legal framework itself [11, p. 22].

Ukrainian legislation contains provisions on the protection of trade secrets in its legislative acts on protection against unfair competition, which is common to other countries and certain international acts (Chapter 4 of the Law of Ukraine "On Protection against Unfair Competition", Article 32, 36-37 of the Civil Code of Ukraine). At the same time, unfair competition is "illegal collection, dissemination and use of trade secrets" [12].

However, in terms of the features of a legal framework for commercial confidentiality, the protection against unfair competition should be seen only as a way to protect the rights to trade secrets, which does not change its essence.

A system of peculiar features and qualities of trade secrets can be divided into several groups: 1) those related to the properties of an object; 2) those related to the conditions of legal protection of the object; 3) others [13, p. 77].

Trade secrets have all the features of an immaterial object, which is subject to the simultaneous use by an unlimited number of persons, the absence of physical wear, etc.

The content and the essence of an immaterial object, i.e. the information itself, constitute a trade secret, and not their external shape (as opposed to copyright). This means that trade secrets are the objects of exclusive rights, for which the meaning of the result of intellectual activity is critical.

The features of commercial confidentiality inherent to it due to the very es-sence of the object, provide special conditions of legal protection of an object. These conditions are: the object is not widely known and accessible, same as the requirements for registration of an object; circulability.

Another feature of commercial confidentiality is the unlimited period of its protection. The right to commercial confidentiality is preserved until a person has an actual monopoly to the information that creates it, as well as the existing conditions of its protection prescribed by the law.

3. The legal framework for the protection of trade secrets in the EU countries and Ukraine

In terms of legal relations related to commercial confidentiality, the issue of protection is the most important one. According to E. Izmaylova, in recent years different countries adopted many information regulations [14, p. 27].

The experience of other countries in that field is very valuable for Ukraine. For example, the EU does not provide any uniform act that would have contained general imperative European norms in the field of legal protection of information, confidential information (commercial confidentiality). Although European legislation still regulates certain issues, for example, the Directive 95/46 / EC of the European Parliament and of the European Council of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [15] resolved that personal data access is not to compromise commercial secrets [16, p. 48].

Directive 97/66 / EC of the European Parliament and of the European Council of 15.12.1997 concerning processing of personal data and the protection of privacy in the electronic communications sector [17] provides for the infor-mation (confidential information) "access right", for example, personal data, adherence to the privacy conditions while reporting personal data, the protection of fundamental rights and freedoms and legitimate interests in electronic communications sector, etc. The disclosure of sensitive information (trade secrets) in e-commerce, such as access to commercial messages, terms of sending commercial messages and the confidentiality of a process is regulated by Directive 2000/31 / EC of the European Parliament and of the European Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce ("Directive on e-commerce") [18].

International legislative and regulatory acts are also important while establishing international standards for sensitive information protection (trade secrets, know-how). The Agreement on Trade-Related Aspects of

Intellectual Property Rights (TRIPS Agreement) and North American Free Trade Agreement (NAFTA Agreement) hold a specific place among them. They are quite similar and are one the first multilateral international agreements that are directly aimed at creating a single mechanism for the sensitive information protection (trade secrets and know-how). These two agreements are examples of universal and regional harmonization of law. The NAFTA agreement extends to Canada, the United States and Mexico. The TRIPS Agreement sets standards for the protection of intellectual property rights and coercion measures aimed at observation of these rights among the WTO member states [19, p. 29], including Ukraine. Thus, studying the provisions of this Agreement on sensitive information (trade secrets and know-how) is not only of theoretical but also practical importance. One should mention the Model Regulations for the Protec-tion Against Unfair Competition, designed by the World Intellectual Property Organization (WIPO) in 1996, which provides for the protection of confidential information.

One should bear it in mind, however, that the national legal mechanism for the protection of sensitive information (trade secrets and know-how) in Europe differs considerably in terms of sources, cases, civil, criminal, administrative protection provisions, extent of legal protection etc.

International standards for the protection of trade secrets are set forth in the Paris Convention for the Protection of Industrial Property [20], which enshrines the provisions on binding termination of unfair competition. The Art. 10bis of the Convention stipulates that the countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition (paragraph 1).

Comparing the legislations of Ukraine and the EU regarding the protection of trade secrets, the authors note that the means of protection and level of responsibility, provided by the Ukrainian legislation are basically the same as those provided by European standards. However, the definition of trade secrets and the role of this institution in the legislation are still challenging. Therefore, in our opinion, the legislation on sensitive information (trade secrets and know-how) of Ukraine requires upgrades and further development, as it has a number of drawbacks and contradictions contained in provisions of various laws and regulations. Such development should be inseparable from the processes of harmonization and adaptation to international legal and European standards in the field of protection of sensitive

information (trade secrets and know-how), in particular, by adopting a special omnibus law on trade secrets.

The issue of adopting a special law which would regulate relations arising from sensitive information, in particular commercial confidentiality, were widely discussed by Ukrainian scholars. However, legal regulation of commercial confidentiality is still carried out mainly according to the provisions of various legislations, including public law. Given this, it is advisable to adopt a special Law of Ukraine "On Commercial Confidentiality", which will enshrine provisions on: 1) the concept and terms of the protection of commercial confidentiality; 2) information which cannot be classified as a trade secret; 3) regulation of trade secrets access right; 4) the terms of protection and responsibility for violation of legally protected interests of a person who practically controls this information. We believe that this (special) Law of Ukraine "On Commercial Secrets" should appear in the system of legislation at a lower level, in relation to the higher one, which is the Civil Code of Ukraine (Art. 505-508).

Since the informational type of society was established in Ukraine, the protection of the rights to information resources of different levels of access became more relevant. And it's quite natural that it has heightened practical interest in commercial confidentiality and other related concepts as one of the effective measures of information security [21, p. 9].

Moreover, the Supreme Economic Court of Ukraine qualifies sensitive information in the field of economic (business) activity as recognized as such by the law (Article 862 of the Civil Code of Ukraine), trade secrets (Articles 505-508 of the Civil Code of Ukraine) and "know-how" (Article 1 of the Law of Ukraine No. 1560-XII of September 18, 1991 "On Investment Activity") [22, p. 46].

That is, commercial confidentiality belongs to the sensitive information not owned by the state.

There is no Law on Commercial Confidentiality Protection in Ukraine today. Lawyers point out that the main obstacle to the formation of Law is that trade secret information is not subject to record due to its confidentiality. For this reason there are no protective documents granted to it. Moreover, it is almost impossible to detect the illegal use of such information, and to establish the violation or find a law breaker.

4. The right to use trade secrets

The issue of commercial confidentiality is of practical importance. Some years ago scholars talked only about the research and theoretical aspect of trade secrets of business entities. Today, the issue of protecting internal secrets of enterprises are among the most relevant ones [23, p. 35].

In economic law, "use" is a legal power of an owner to take advantage of useful qualities and properties of an object that belongs to it to meet the needs of the owner [24, p. 269, 294].

"Use" in terms of the intellectual property right is understood as an object itself, which is the result of intellectual, creative activity. The object of use is records containing the information on achievements which is not intended for pure understanding but includes recommendations for practical application, preconditioned by storing this information in tangible form or by their objective formulation [25, p. 121].

Law does not establish this ban as for a trade secret. A person in charge of commercial confidentiality should take appropriate measures to keep it secret, that is to say, to nip its divulgation, to limit the access to such information, which is a kind of activity itself. V. Kossak and I. Yakubivsky define the content of the right to use trade secrets as the right of a subject to gain an advantageous effect from the use of information in its activities which is a trade secret [26, p. 462].

The Commercial Code of Ukraine stipulates that the right to use trade secrets is not construed as exclusive right, as opposed to the right to allow the use of trade secrets and the right to prevent the illegal gathering, divulgation or use of trade secrets. Consequently, the legislator itself does not qualify it as an exclusive right, and this is right, since it may be exercised not only by one person who actually manages such information, but also by other persons (Part 3 of Article 162 of the Civil Code of Ukraine). Thus, the consolidation of a legal monopoly on information which constitutes trade secret is not foreseen by the legislation of Ukraine.

5. Exclusive right to prevent illegal disclosure, collection or use of trade secrets

Based on the analysis of this right, the illegal disclosure, collection, or use of trade secrets is a disservice to a person who actually controls such information.

Interest protected by law involves taking necessary measures by a person in charge of the commercial confidentiality on the prevention of disservice. Moreover, such actions are aimed at protection of legitimate interests. For example, it could be the introduction of organizational, legal, cryptographic mechanisms for the protection of information, which constitutes a trade secret, as well as drawing up certain trade secret non-disclosure (confidentiality) agreements, or the incorporation of these provisions into employment contracts with employees.

At the same time, a person managing trade secrets is obliged to adhere to the general provisions of acting legislation on the limits of exercising the civil rights (Article 13 of the Civil Code of Ukraine), in particular to refrain from actions that violate the rights and interests of others or harm the environment or society.

Under the property law, illegal disclosure, collection or use of trade secrets is an obligation of a person as well, and the failure to perform it may break the mode of commercial secrecy (confidentiality). A person in charge of commercial confidentiality may apply these measures only to a mala fide purchaser or a person who has illegally gained access to trade secrets.

Thus, trade secret access right is based on the principles of confidentiality. That means that the abovementioned types of sensitive information exist as long as their records remain confidential (not publicly accessible). Consequently, we argue that it is not a trade secret which is protected but a legitimate interest of a person who actually controls this information.

6. Features of commercial confidentiality protection in the EU countries and Ukraine

Usually, the rights or legitimate interests require protection if they have already been violated or there exists a real threat of their violation. At the same time, the violation of commercial confidentiality is understood in a different way than real rights or intellectual property rights. For example, as for the works or inventions there is always a presumption of bad faith for their use by third parties, unless other is established by the agreement with a copyrighter or by the law. Therefore, the liability incurs regardless of the fault. Unlike them, trade secrets and know-how come along with a presumption of good faith, since any person can identify information as a commercial confidentiality and keep it secret which means to practically

control it. This person may grant access or limit the illegal access to such information for other persons by taking actions.

Legal protection of interests is carried out through application of the appropriate forms, means and methods. There are non-jurisdictional and jurisdictional forms of protection of intellectual property rights, or better said judicial and administrative ones and self-defence [27, p. 683-684].

One can say that a form of protecting commercial confidentiality is mainly jurisdictional one (in a court). Self-defence is also possible but only if that does not involve the abuse of rights. In this case, self-defence is narrowed down to the unrestricted neutralization and deactivation of technical equipment illegally installed by third parties for the purpose of obtaining information, as well as taking prompt measures to misinform persons who got illegal access to secret records in order to prevent possible losses from their disclosure. Self-defence may entail certain penalties for commercial contracts partners and employees who violate the obligation not to disclose sensitive information.

Legal protection of person's interests in charge of confidential information (trade secret, know-how) may be carried out through: 1) the application of the legislation on unfair competition, or 2) the application of economic and civil law and through the means prescribed by the economic and civil legislation of Ukraine (Article 20 of the Civil Code of Ukraine, Article 16 of the Civil Code of Ukraine and other means directly specified in the law).

The protection of commercial confidentiality (confidential information) under the international standards is an integral part of protection against unfair competition and is carried out in accordance with Art. 10-bis ("Unfair competition") and Art. 10-ter ("Marks, Trade Names, False Indications, Unfair Competition: Remedies, Right to Sue") of the Paris Convention for the Protection of Industrial Property. Moreover, it may seem that measures prescribed by the legislation on unfair competition are designed for protecting the "rights to" commercial confidentiality and the "rights to" commercial confidentiality (confidential information) are elements of legislation on the prevention of unfair competition. However, we should mind the difference between the rights and ways of protecting them, when unfair competition is only one of the means of protecting rights, and not the rights themselves, and the rights protected differ from the rights to sensitive information. At the same time, even if taking into account only the means of protection, the law on unfair competition as such does not perform the

function of protecting "rights" or the legally protected interests to commercial confidentiality exercised by a person, though makes reference to general civil law.

The Law of Ukraine "On Protection Against Unfair Competition" dated June 7, 1996 (hereinafter referred to as the Law) [12] stipulates the efforts related to commercial confidentiality that are qualified as unfair competition and provides for certain level of amenability. One may say that unfair competition being a type of activities and actions of a person in charge of commercial confidentiality aimed at securing its secrecy, is also a type of activity. The law distinguishes four categories of offenses: 1) illegal collection of trade secrets (Article 16); 2) disclosure of trade secrets (Article 17); 3) propensity to disclose trade secrets (Article 18); 4) illegal use of trade secrets (Article 19). The law defines forms of unfair competition and specific consequences of wrongdoing in the field of commercial confidentiality such as fines or compensation for losses (Article 20).

If a person controlling commercial confidentiality was inflicted damage by wrongdoing in the form of unfair competition, it can file a claim with a court for damages in accordance with the procedure established by the Civil Law of Ukraine (Article 24). One can note that it refers to the civil law when a person is inflicted damage. Therefore, a person who actually controls sensitive information (trade secret, know-how) should first be applied to the Antimonopoly Committee of Ukraine and not to a court. And only after that, this person can file a claim with a court for compensation for losses. In this case the subject is a business entity.

Art. 16 of the Civil Code of Ukraine and Art. 20 of the Civil Code of Ukraine provide a comprehensive list of ways to protect rights and interests. However, not all of them can be applied to sensitive information (trade secrets and know-how), because the nature of the violated interest of a person and the nature of the violation itself provides certain options.

For violation of rights of business entities as for commercial confidentiality, a guilty person may bear legal responsibility for various types: civil liability in the form of compensation for damage done to an entity in accordance with the Civil Code; disciplinary and financial responsibility under the Labour Code of Ukraine; administrative liability established by Part 3 of Article 164-3 of the Code of Ukraine on Administrative Offenses (CU-AO); criminal liability in accordance with art.231,232 of the Criminal Code of Ukraine (CCU). In addition, Article 21.22 of the Law of Ukraine

"On Protection against Unfair Competition" establishes administrative and economic fines for unfair competition manifested as illegal collection, disclosure, and propensity to disclose and use trade secrets.

However, despite certain positive aspects, none of these actions fully corre-sponds to a bill on the protection of the rights to commercial confidentiality [28]. This requires: passing and systematizing the legislation on commercial confidentiality, its amendments and annexes; designing a single approach to the protection of trade secrets as an element of an intellectual property legislation; determining legal foundation for qualifying information as a trade secret; establishing responsibility for violation of intellectual property rights to commercial confidentiality, etc.

Taking into account the shortcomings of acting legislation on commercial confidentiality and the latest tendencies in world experience, many experts believe that the main burden of the implementation of the second component of the legal institution of commercial confidentiality (legal mechanism for its protection) should be transmitted to the sphere of local statutory instruments and legal regulation of employer-employee relations.

These instruments may include: statute of the enterprise; foundation agree-ments; Collective agreement; internal work regulations, job instructions, etc., where the provisions on commercial confidentiality are only one of the elements of their content. Other local acts, such as the Commercial Confidentiality Regulations and the rules for observing its confidentiality, the provisions on the performers access system to documents and information that constitute a trade secret of an enterprise, a supplementary agreement to the employment agreement (contract), etc. are specific and only refer to commercial confidentiality issues.

Article 162 of the Commercial Code of Ukraine defines that an business entity that owns technical, organizational or other commercial information has the right to protection against the illegal use of this information by third parties if this information is of commercial value and given that it is secret to third parties and does not provide the free legal access to other persons, and the owner of the information takes appropriate measures to protect its confidentiality. The period of legal protection of trade secrets is limited.

Therefore, it is sure that the content and extent of information constituting trade secret and its protection procedure are established solely by its owner or the executive of an enterprise in accordance with the acting legislation.

An enterprise has the right to manage such information at its own discretion and to carry out any lawful acts directed to it, however, without violating the rights of third parties.

Moreover, an enterprise as the owner of the information (i.e. trade secret) has the right to appoint a person who will own, use and manage such information, to set the rules for processing information and getting access to it, and also to establish other commercial confidentiality conditions.

7. Conclusions

The research allows drawing the following conclusions:

1. Based on the above mentioned definitions of the concept of "commercial confidentiality", the authors define common features of commercial confidentiality which are the basis for certain legal protection. Thus, the content of the notion of commercial confidentiality is characterized by the set of features, such as: informational content of trade secrets (that is to say that trade secrets are information); confidentiality; commercial value; security of information.

2. The authors question the practicability of adopting a special Law of Ukraine "On Commercial Confidentiality", which will enshrine the provisions on: 1) the notion and conditions defining the protectability of commercial confidentiality; 2) information which cannot be classified as trade secret; 3) regulation of trade secrets "access right"; 4) the protection conditions and responsibility for violation of "interests protected by law" of a person who is actually in charge of such information.

3. The authors prove that the main obstacle to the formation of Law is that trade secret information is not subject to record due to its confidentiality. For this reason there are no protective documents granted to it. Moreover, it is almost im-possible to detect the illegal use of such information, and to establish the violation or find a law breaker.

4. Trade secret access right is based on the principle of confidentiality. That is, the abovementioned types of sensitive information exist as long as their records remain confidential (not publicly accessible). Consequently, we can say that it is not a trade secret which is protected but a legitimate interest of a person who actually controls this information.

5. The authors prove that the shortcomings of acting legislation on commercial confidentiality and the latest tendencies in world experience, many experts believe that the main burden of the implementation of the

second component of the legal institution of commercial confidentiality (legal mechanism for its protection) should be transmitted to the sphere of local statutory instruments and legal regulation of employer-employee relations.

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