

Features and Issues of Commercial Secrets Protection at the Conclusion of Commercial Contracts: Organizational and Legal Principles

The article analyzes the current legislation on the protection of company's commercial secrets on the basis of which the peculiarities of precautions are defined for this type of information in contractual relationships of the entity to ensure appropriate conditions for its development. It was proved that using the laws and regulations, governing the various aspects of the creation, use and protection of commercial secrets of the enterprise, the business owners still have the opportunity to develop and implement measures to protect such information at the conclusion of commercial contracts. It was established with the illustrative examples, which scope of rights and opportunities can be applied by the entrepreneur to protect the commercial secrets, and what aspects should be noted at the development of such measures on the basis of real or potential threats to their businesses.

Key words: commercial secrets, contract, protection, legal regulation, business, business security.

Formulation of the scientific problem and its significance. At the present stage of business development a significant competition increase is observed. Under such conditions it becomes more difficult for the business owners to maintain a profitable position. Therefore, the competing entities to improve their market position often use different methods of unfair competition. One of these is receiving information about development peculiarities of other entities within the same scope of business activities. Thus, one of the important aspects of safe and efficient company operation is to protect its commercial secrets.

There are various ways of obtaining information, including: theft of competitor's property, theft or copying of documents, by technical means, sending agents to competitor's structure, recruitment or enticement of employee, etc. However, the most common method is to obtain information through entering into various commercial contracts. So, in order to maintain business security, it is important to take measures to protect commercial secrets in contractual relations, prevent its disclosure or misuse of other business entities.

Thus, the objective of this research is to analyse the current legislation in the field of entrepreneurship, which provides for the legal regulation of using and protecting commercial secrets in contractual relations in Ukraine. The issue of developing the restricted information security system in the company is and has always been relevant for business security. The effectiveness of these measures depends on many factors that need continuous research and improvement. An important task in this regard is a clear understanding by the business entity of the legal rights and opportunities for creation, use and protection of information required for the company operation, including commercial secrets, and correct definition of these measures.

The analysis of the researches on this problem. A large number of lawyers and scholars have studied these issues and laid out their research results in various scientific papers. However, most of works are covering general aspects of the specified research topic. In addition, when considering the issues of commercial secrets protection at the conclusion of commercial contracts the researchers did not focus on highlighting the features of the current legislation of Ukraine in this sphere. These publications include research papers by Yu. I. Krehula, R. O. Bank [1], M. I. Kamlyk [2] and collective paper «The economic security of enterprises, organizations and institutions» [3]. The research papers by M. I. Zubko [4-7] are drawing attention, where the researcher in a quite interesting manner presents the features of business security development, including the issues of the commercial secrets protection in the company. However, the author did not aim at elaborating the features of the mentioned issues in relation to the legislation of Ukraine; therefore, the material is presented in the form of charts, tables, and graphs.

Yu. V. Bondarchuk and A.I. Maruschak's «Business security: organizational and legal framework: scientific and practical guidance» is more detailed as to the specifics of the commercial secrets protection in the contractual relationships of the company [8]. The authors describe in their paper the legal basis for regulating business activity in Ukraine, basis for security system development in Ukraine. The focus is made

on the issues of ensuring organizational and legal support of commercial secrets and other restricted information in the company.

The formulation of the aim and objectives of the study. However, due to this paper's time limitation and introduction of some changes to a number of legislative acts in the studied area, a need arises for a new and more detailed analysis in this regard.

The presentation of the main material and justification of the results of the study. Every entrepreneur in the course of its business activity should be aware that often the restricted information involved in the subject of contractual relationships may suffer damage as further unauthorized use by others for a variety of commercial purposes. This applies not only to the deals for transfer of certain rights of the intellectual property ownership to another person, but also those aimed to ensure the stability of main business activities. For example, maintenance of production facilities, commitment to the client and consumer.

Thus, any contract, performance of which requires disclosure to the counterparty of restricted information requires special security measures of organizational, legal, or technical nature. In addition, using certain information security measures their feasibility should be taken into account. Selected security methods must be economically feasible, and effective enough, with no negative impact on relations with the counterparties.

Thus, defining it necessary to develop security measures for the commercial secrets protection under contractual relationships, the business entities should analyze legal aspects of ensuring the information security within drafting, performance and termination of business contracts [8, p. 180-181].

It should be noted here that the right to protect own rights and freedoms in accordance with the legislation of Ukraine is stipulated by the Article 55 of the Constitution of Ukraine, which states: «Everyone shall have the right in any manner not prohibited by law to protect its rights and freedoms from violations and illegal encroachments» [9]. Such opportunities are provided in other legal acts regulating various aspects of entrepreneurship. For example, the Civil [10] and Commercial [11] Codes of Ukraine are governing the rights of private property, rights, and obligations of the individuals and business entities. In particular, they define not only the reasons and ways of acquiring rights, but also the procedure for protection thereof [10-11].

When proceeding with a development of strategy and tactics for applying information security measures in contractual relations, it is necessary to determine the scope, type, content, and value of the information that may be contained in various economic agreements. For this, it is necessary to establish an appropriate working group. The composition of such groups in different enterprises may vary depending on the capacity of the company and its structure. But it definitely must include experts from legal, contract departments, and security service of the company (if established) and the head of the company. They should jointly develop a system of security measures, and upon its approval by the head of the company properly communicate the same to other persons involved in the business operations.

It is necessary to understand that information security measures with regard to specific commercial transaction should be developed and implemented virtually prior its disclosure to the counterparty. However, in order to implement this, the cooperation will be needed with the other party of business transaction. Therefore, such cooperation should be built given the level of trust between the parties to agreement and their willingness to provide honest and fair contractual behaviour [8, p. 181].

It should be noted that a clear understanding of information specifics that may constitute a commercial secret of the enterprise and peculiarities of its legal regulation are provided through the analysis of the following laws and regulations of the Ukrainian legislative framework.

Therefore, pursuant to Article 505 of the Civil Code of Ukraine the commercial secret is a kind of information which is secret in the meaning that it in whole or in particular form and aggregate of its components is unknown and not easily accessible for persons who normally deal with the kind of information to which it belongs, therefore has commercial value and was a subject to measures under relative circumstances as to preservation of its secrecy, taken by a person legally controlling the information. According to p. 2 of the same article the commercial secret may include technical, institutional, commercial, industrial, or other information, except for information which under the law can not be classified as a commercial secret. [10]

In addition, Article 420 of the Civil Code of Ukraine [10] and Article 155 of the Commercial Code of Ukraine [11] provide that the commercial shall be an intellectual property; and Article 506 of the Civil Code enables business entities to allocate the range of intellectual property rights to commercial secret. These include: the right to use commercial secrets; exclusive right to authorize the use of commercial secrets; exclusive right to prevent unauthorized disclosure, collection, or use of the commercial secrets; other intellectual property rights established by law [10].

However, it should be remembered that validity of intellectual property right to commercial secret is limited to duration of the set of commercial secret attributes established by the first paragraph of Article 505 of the Civil Code of Ukraine (Article 508 of the Civil Code of Ukraine) [10]. Similar conditions are established in the Commercial Code of Ukraine with respect to the rights to use commercial secrets, but with some explanation as to the protection thereof. Thus, in accordance with Art. 162, p. 1 of the Commercial Code of Ukraine, a business entity that is the owner of the technical, organizational or other commercial information shall be entitled to protect this information against illicit use thereof by third parties, provided that such information has a commercial value due to the fact that it is unknown to third parties and it does not provide lawfully for a free access to other persons, and the holder of information shall take appropriate measures to protect its confidentiality. The term of the legal protection of commercial secrets is limited in time [11].

Based on the above, it can be said that the composition and volume of information constituting a commercial secret, procedure for its protection are determined independently by its owner in compliance with the current legislation [12, p. 312-313]. The right of ownership to the information shall be the legal basis for requirement to carry out certain actions or refrain from the same with regard to restricted information [8, p.182-183].

Also, it should be noted that a better understanding of the grounds for the emergence of property right to information and a manner of use thereof is provided in a clarification contained in Article 38 of the Law of Ukraine «On Information».

Thus, the grounds for emergence of the right of ownership to information include: creation of own information at own expense; agreement for information development; agreement providing for the transfer of ownership to the information to another person. According to the same article the information may be the subject of the right of ownership of citizens and organizations (legal entities) and state both in full, and subject of possession, usage or disposition only, as well. Following the last part of the same legal article, the information owner shall have the right to appoint a person to exercise the possession, usage, or disposition of information and define rules for processing and access thereto, as well as set other conditions with regard to information. [13]

Based on the above and in accordance with the content of Article 627 of the Civil Code of Ukraine, which stipulates the principle of freedom of the contract, namely: free choice of counterparty and definition of contractual terms given the requirements of the current legislation, business traditions, reasonableness and fairness requirements, the commercial secret owner when entering into business contracts which provide for review, transfer for use or disposal of such information, may require the counterparty to adhere to the information access mode by defining appropriate provisions in the contract. [10]

Thus, the agreements between business entities can provide for the privacy policy provisions, including with regard to the agreement, as well as the obligation of the parties to adhere to the restricted information mode. Usually, it is done in order to establish a legal barrier for the third parties, especially the law enforcement agencies, to familiarize themselves with the content of agreement. Since the representatives of such agencies, using the official position may perform such actions for deceptive purposes, for example, on the order of competitors. And according to the current legislation of Ukraine, in order to provide the law enforcement agencies with the access to commercial secrets of the enterprise, such enterprise should receive a special request with affixed seal of the corresponding agency and signed by an authorized person [8, p. 184]. In particular, this is stipulated in the Articles 159, 162 of the Criminal Code of Ukraine [14], and Article 37 of the Law of Ukraine «On Information» [13]. Also, to ensure better protection of information classified as commercial secrets, against illegal actions of law enforcement agencies and other regulatory bodies, the business entities should use the provisions of the Decree of President of Ukraine No. 817/98 of 23.07.1998 [15] and Order No. 18 of the State Committee of Ukraine for Enterprise Development of 10.08.1998 [16]. These regulations allow in a certain manner preventing the inspections by supervising authorities and limiting their access to certain types of information, including commercial secrets.

However, when developing measures to protect commercial secrets of the company at the conclusion of commercial agreements, it should be noted that the aforementioned articles do not provide in full for procedure of determining the composition and volume of data that constitute commercial secrets of the business entity. The company's management must take such measures given the provisions of part 4, Article 30 of the Law of Ukraine «On Information» [13] and Order No. 611 of the Cabinet of Ministers of Ukraine «On the list of information that does not constitute a commercial secret» [17].

Thus, according to this part of the Article 30 of the Law of Ukraine «On Information» the confidential information shall not include the following: - data on environment, quality of food and

household items; - data on accidents, disasters, natural hazards and other emergencies that have occurred or may occur and threaten the citizens' safety; - data on health of the population, its standard of living, including food, clothing, housing, medical care and social security, as well as socio-demographic indicators, state of law and order, education and culture of the population; - data on the situation with human and citizens' rights and freedoms, as well as the facts of violations thereof; - data on illegal actions of state authorities, local governments, officials and employees thereof; - other information access to which can not be restricted in accordance with the laws of Ukraine and international treaties ratified by Verkhovna Rada of Ukraine [13].

Also with the specific itemization of commercial secrets in the abovementioned Decree No. 611 it is clearly defined that commercial secrets shall not include: - constituent documents, documents providing for business or economic activity and individual species thereof; - information under all established forms of public reporting; - data which is required to verify the estimation and payment of taxes and other obligatory payments; - information on the number and composition of employees, their wages as a whole and by professions and positions, as well as the availability of jobs; - documents that constitute an evidence of payment of taxes and obligatory payments; - information on environmental pollution, non-compliance with safe working conditions, and sale of products harmful to health, as well as other violations of the law of Ukraine and amount of inflicted losses; - proof of ability to pay; - information about company officials involved in cooperatives, small businesses, unions, associations and other organizations engaged in entrepreneurial activity; - information that under current legislation shall be publicly disclosed.

Enterprises are required to file the information listed herein to state executive, supervisory and law enforcement authorities, other legal entities in accordance with the applicable law, on request thereof [17].

Thus, delving into the content of the aforementioned regulation, which define the characteristics of the information that may be classified as commercial secret, the correctness can be questioned of referring the commercial agreement text to the category of commercial secret. However, upon consent of the parties to agreement the confidentiality of commercial agreement can be recognized indisputably. Since the confidential information may include any information other than those specified in p. 4, Article 30 of the Law of Ukraine «On information» and Order No. 611 of the Cabinet of Ministers of Ukraine «On the list of information that does not constitute a commercial secret» [8, p. 184; 13; 17].

It should be noted that the emphasis in the development and application of security measures aimed at protecting commercial secrets of enterprise in contractual relations should be made in contracts involving the transfer of rights to commercial secrets (possession, usage, or in some cases disposition) from one business entity to another. Also, the business entities collaboration often results in developing of information that can be considered a commercial secret. In such cases, the definition of reciprocal rights and obligations for keeping the commercial secrets confidential is even more relevant issue, especially under implementation of cross-licensing program, which means the exchange of parties' licenses. As an example of such agreement, an agreement can be pointed out for transfer of technology within investment cooperation [8, p. 186]. It can be concluded on the basis of Article 2, part 6 of the Law of Ukraine «On Foreign Investment» and provides for the possibility of foreign investment in the form of the intellectual property rights transfer [18].

Conclusions. Summarizing all the above-mentioned, we can say that the current legislation of Ukraine contains a number of articles in various legal acts regarding the definition of commercial secrets and peculiarities of their use. However, they do not provide for a clear explanation of the procedure for information delimitation in the company and commercial secrets isolation from this. There are only few regulations that contain an exhaustive list of the varieties of information that can not be classified as a commercial secret of the company. The current legislation does not also define the procedure for such information protection, only makes reference to the need to take security measures for its protection.

Thus, the main problem of the legal regulation with regard to security of the information constituting commercial secret of the enterprise at the conclusion of commercial contracts is the inconsistency of existing legal framework and business security requirements. Different legal regulations are scattered across various legal acts of many bodies and institutions, which entrepreneur can use to develop security measures to protect such information in contractual relations.

However, the existing problems do not deprive the business entities of the right to protect commercial secrets as part of the overall business security. Using the legal standards of various legislative and sublegislative regulations governing various aspects of the development, use, and protection of commercial secrets of the enterprise, the business owners still have the opportunity to develop and implement measures to protect such information at the conclusion of commercial contracts.

However, every entrepreneur within current legislation is forced to determine at its own discretion the procedure and features of such measures for information security, including real or potential threat of unauthorized distribution or use of commercial secrets by other party to the contract.

It should be only remembered, that the main purpose of developed measures to protect information of the company at the conclusion of contracts should be primarily aimed not at prediction of indemnification terms caused by the loss of commercial secrets, but at the measures to prevent the same.

Also, in order to improve the business development conditions, particularly in the area of information security, including commercial secrets of the company, a legislator must pay attention to the existing problems in this area with a view to resolving thereof.

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Сухацький Р. Особливості і проблеми захисту комерційної таємниці при укладенні господарських договорів: організаційно-правові засади. в статті проводиться аналіз чинного законодавства в сфері захисту комерційної таємниці підприємства, на основі якого визначаються особливості організації заходів безпеки такого виду інформації у договірних відносинах суб'єкта господарювання з метою забезпечення належних умов його розвитку. На основі проведеного аналізу з'ясовано, що існують проблеми правового регулювання захисту комерційної таємниці від несанкціонованого поширення чи використання такої інформації іншою стороною договору. Обґрунтовано, що використовуючи норми права багатьох законодавчих та підзаконних нормативно-правових актів, які регулюють різні аспекти створення, використання та захисту комерційної таємниці підприємства, власники бізнесу все ж мають можливість розробляти і реалізовувати способи захисту такої інформації при укладанні господарських договорів. Проте кожен підприємець у межах чинного законодавства змушений на власний розсуд визначати порядок та особливості побудови таких заходів інформаційної безпеки. З наведенням наочних прикладів встановлено, який саме обсяг прав та можливостей може використовувати підприємець для захисту комерційної таємниці, та на які саме аспекти варто звертати увагу при розробці таких заходів, виходячи з реальних чи потенційних загроз для власного бізнесу.

Ключові слова: комерційна таємниця, договір, захист, правове регулювання, підприємництво, безпека бізнесу.

Сухацкий Р. Особенности и проблемы защиты коммерческой тайны при заключении хозяйственных договоров: организационно-правовые основы. В статье проводится анализ действующего законодательства в сфере защиты коммерческой тайны предприятия, на основе которого определяются особенности организации мер безопасности такого вида информации в договорных отношениях предприятия с целью обеспечения надлежащих условий его развития. На основе проведенного анализа установлено, что существуют проблемы правового регулирования защиты коммерческой тайны от несанкционированного распространения или использования такой информации другой стороной договора. Обосновано, что используя нормы права, регулирующих различные аспекты создания, использования и защиты коммерческой тайны предприятия, владельцы бизнеса все же имеют возможность разрабатывать и реализовывать способы защиты такой информации при заключении хозяйственных договоров. Однако каждый предприниматель в рамках действующего законодательства вынужден по собственному усмотрению определять порядок и особенности построения таких мер информационной безопасности. С приведением наглядных примеров установлено, какой именно объем прав и возможностей может использовать предприниматель для защиты коммерческой тайны, и на какие именно аспекты стоит обращать внимание при разработке таких мероприятий, исходя из реальных или потенциальных угроз для собственного бизнеса.

Ключевые слова: коммерческая тайна, договор, защита, правовое регулирование, предпринимательство, безопасность бизнеса.