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ORGANIZATIONAL AND LEGAL SECURITY OF BUSINESS TRADE SECRETS

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Abstract. *The article is dedicated to the study of legal and illegal acquisition, use and disclosure of trade secrets of business, in the context of the application of security conditions. It is established that a comprehensive analysis of the provisions of the Directive and legislation of Ukraine on the protection of trade secrets indicates the relevance of clarifying certain issues of the protection of trade secrets of businesses in Ukraine, which as a consequence will ensure a high level of security conditions. The conceptual and categorical apparatus of trade secrets and the normative and legal basis for ensuring international cooperation, respectively, was investigated. A practical set of measures to ensure the confidentiality of trade secrets of business was substantiated. As a result of scientific research, the essential and substantive characteristics of the provision of the Directive as the main legal vector of ensuring security conditions have been identified. The provisions that should be taken into account when protecting the trade secret of the business are highlighted, namely: clarification of the procedure for securing the claim and precautionary measures; protection of trade secrets during court proceedings; clarification of legislation regarding the disclosure of trade secrets in the public interest, etc. It is determined that the current procedural legislation also requires improvement in the issue of ensuring in any type of judicial proceedings to limit access to materials that contain information constituting a business secret, in particular, by determining the circle of persons who will have access as such and the opportunity to become familiar with the materials of the case. Based on this, the implementation of the legal aspects of international cooperation in the context of secure measurement of trade secrets is demonstrated. The adoption of the Law provides for the confidentiality of court proceedings. In civil proceedings, authorizing the transfer of jurisdiction to certain specialized courts in cases of breaches of business secrets, the ability to classify litigation as confidential at the request of one party, and the potential limitation of the number of persons entitled to access evidence and / or hearings.*

Key words: *international cooperation, regulatory framework, Directive, trade secret, business security, security contexts, business.*

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1. Statement of the Problem.

In order to approximate the legislation of the EU member states in the field of handling classified information and to establish a comparable level of protection of such information across the EU from illegal acquisition, use or disclosure, the EU developed and approved the Directive 2016/943 in June 2016 on the protection of undisclosed know-how and business information (trade secrets) against illegal acquisition, use and disclosure (hereinafter - the Directive) [1]. The Directive introduces the concept of "trade secrets", defines what constitutes legitimate and illegitimate acquisition, use and disclosure of trade secrets, and establishes procedures and remedies for illegitimate acquisition, use or disclosure of trade secrets in the context of applying security conditions.

2. Analysis of Recent Research and Publications.

The study of modern issues on the regulatory and legal basis of international cooperation to ensure trade secrets in the context of the security conditions are covered by such leading scientists as V. Boniak, I. Blyshchenko, O. Vivchar, E. Demskyi, A. Kazdym, H. Kokhan, Yu. Kuzuvkov, Ye. Lohinov, M. Melnyk, R. Senin, A. Sukharenko, N. Tahantsev, O. Tereshchuk, V. Tsepelev.

3. Task Formulation.

The purpose of the article is to substantiate the essential characteristic of trade secrets of business, as well as the study of the regulatory and legal basis of domestic experience and international cooperation on the basis of a practical mechanism to ensure that the conditions for the operation of the business without any secrecy.

To achieve the goal, the following tasks were identified: to investigate the regulatory framework of domestic experience and international cooperation in the context of the application of security knowledge; analyze foreign experience of organizational and legal regulation of issues related to business secrets; identify the most pressing problems of legislative support, acquisition of legal and illegal obtaining, use and disclosure of trade secrets in order to further address the gaps in the major laws governing these issues;

4. Main Research Results.

On the basis of the conducted research it was found that a comprehensive analysis of the provisions of the Directive and legislation of Ukraine on the protection of trade secrets indicates the relevance of clarifying certain issues of protection of trade secrets of businesses in Ukraine, which as a consequence will ensure a high level of security knowledge conditions.

Thus, based on the research conducted, it is proved that Chapter I defines a trade secret similar to the definition of undisclosed information in the TRIPS Agreement.

According to Article 2 of the Directive, a trade secret is defined as information that simultaneously meets the following requirements: a) it is secret in the sense that it as a whole or in a particular configuration and selection of its components is not generally known or easily accessible to persons in certain circles who normally deal with such information; b) it has commercial value because it is secret; c) reasonable steps have been taken by the person who lawfully possesses it to keep such information secret.

The definition of "trade secret" in the Civil Code of Ukraine was adopted by the legislator from the TRIPS Agreement, therefore, the latter corresponds to the definition in Directive 2016/943. The only point, according to Yu. M Kapitsa, should be corrected an error in the translation of the definition of a trade secret in the Article 505 of the Civil Code of Ukraine on the definition of undisclosed information of the TRIPS Agreement in relation to

not general information of a trade secret (the current wording states that the trade secret is unknown information) [2, c. 253].

Chapter II of the Directive defines cases of unlawful and lawful obtaining of trade secrets.

Thus, according to the Law of Ukraine "On protection from unfair competition" and article 36 of the Civil code of Ukraine unlawful collection, disclosure and use of trade secrets is an offence and a type of unfair competition. In particular, it is: 1) unlawful collection of trade secrets; 2) disclosure of trade secrets; 3) inducement to disclose trade secrets; 4) unlawful use of trade secrets [3; 4].

Having provided for cases of unlawful obtaining of trade secrets, the legislator does not specify that trade secrets can be obtained lawfully by independent discovery or creation, reverse engineering.

Essential and not provided by the norms of national legislation, according to J.M. Kapitsa, is the definition of the Directive unlawful use of trade secrets by a third party, was not directly involved in the unlawful obtaining of trade secrets, but knew or in the appropriate circumstances should have known that the information that was reported to her is a trade secret of the business [2, c. 254].

Analyzing the above-mentioned Law of Ukraine "On protection from unfair competition" and the Civil Code of Ukraine, we can assume that such a provision is provided by the legislator in paragraph 4 "unauthorized use of trade secrets". As O. O. Bakalinska notes, the current legislation does not require the business entity itself to collect or induce disclosure of trade secrets, to finance this process, it is enough that he used this information in the production or management process and understand that the relevant information is a competitor's trade secret, and its use will allow the business entity to obtain competitive advantages or win in the competitive struggle by controlling and using this information [5, c. 358].

A diametrically opposed vision of identifying ways to improve the current legislation is the problem of classifying trade secrets as intellectual property objects. The EU Directive does not define trade secrets as an object of intellectual property rights. According to J. Kapitsa, this approach is used by the European Commission consciously to avoid changing the traditions of member states to protect trade secrets by various institutions of law, as well as the fear that it may lead to excessive protection, harmful to competition [2, c. 254].

In book 4 of the Civil Code of Ukraine, along with other intellectual property, the legislator defines a trade secret. At the same time, not all objects and not all information that can be classified as a trade secret of a business are the result of intellectual (creative) activity. According to Part 2 of the Article 505 of the Civil Code of Ukraine a commercial secret can be technical, organizational, commercial, industrial and other kinds of information, except for those that by law cannot be classified as a trade secret [6]. In our opinion, the concept of trade secrets of business is broader than the concept of the object of intellectual property. Thus, according to the ratio of information protected by intellectual property legislation and confidential information, commercially valuable, it is as follows: trade secret is not necessarily an object of intellectual property, but information protected by intellectual property legislation may be recognized as a trade secret [1].

Relevant is the provision of the Directive on payment of damages by a person who acted in good faith. Thus, a person who acted in good faith, instead of restricting the use of trade secrets or seizure of goods may pay compensation not exceeding the amount of royalties that would have been paid when obtaining a license to use trade secrets.

Other provisions to consider include: clarification of the procedure for securing claims and preventive measures, protection of trade secrets in court proceedings, clarification of the law regarding the disclosure of trade secrets in the public interest, and the like.

Thus, important to emulate is the requirement that the plaintiff provide evidence of the

existence of trade secrets, that the plaintiff is a person entitled to trade secrets, and that the trade secrets were obtained illegally or that the illegal acquisition, use or disclosure of trade secrets is imminent. And also, the ability of the court to sanction the plaintiff when it appears that the claim is meritorious and the plaintiff began the litigation in bad faith.

Improvement is also required by the current procedural legislation on the issue of ensuring, in any type of judicial proceedings, restriction of access to materials that contain information constituting a business secret, in particular, by determining the circle of persons who will have access as such and the opportunity to become familiar with the materials of the case.

Thus, from a practical point of view, Part 2 of the Article 9 of the Directive provides that Member States are to ensure that the competent judicial authorities, at the reasoned request of one of the parties or on their own initiative, can take the specific measures necessary to maintain the confidentiality of any trade secrets, or alleged trade secrets used or mentioned in legal proceedings in connection with the illegal reception, use and disclosure of trade secrets [1].

The above measures provide in the context of providing security conditions:

1) restrict access to documents that contain trade secrets or information that is considered a business trade secret;

2) restrict access to court hearings where trade secrets or information deemed to be trade secrets may be disclosed, and make any recordings of such hearings available to a limited number of persons;

3) provide any other persons who are not restricted with a non-confidential version of any judgment that does not contain fragments of material containing trade secrets of the business [13].

The number of persons under the Directive must not be greater than is necessary to ensure that the rights of litigants to an effective remedy and to a fair trial are respected, and must include at least one natural person from each party and a suitable attorney or other representative of the litigant.

Such provisions of the Directive, in our opinion, are sufficient and justified, as they provide for the possibility of protecting commercially valuable information by restricting access to materials containing commercially valuable information, as well as restrictions on persons having access to information and access to case materials.

Protection of business trade secrets under the norms of national legislation is carried out by applying the general provisions of procedural legislation governing the publicity of the judicial process and is limited only by the possibility of closed court hearings, to which only participants of the case have access, as well as a special regime of proclamation of the judgement.

Thus, according to part 7 of the Article 7 of the CPC of Ukraine, part 8 of the Article 8 of the CPC of Ukraine; part 8 of the Article 10 of CAP of Ukraine, consideration of the case in closed proceedings is carried out in cases where open court proceedings may lead to disclosure of secrets or other information protected by law. During such a hearing, only the participants in the case may be present, and if necessary - witnesses, experts, specialists, and translators. The court warns these persons about the obligation not to disclose information, for the protection of which the consideration of the case or the commission of certain procedural actions takes place in a closed court session [7; 8; 9].

Part 2 of the Article 27 of the CPC of Ukraine provides that the investigating judge, the court may decide to conduct criminal proceedings in a closed court session throughout the proceedings or its separate part, in particular, if the conduct of proceedings in an open court session may lead to the disclosure of secrets protected by law [10].

The current procedural codes do not provide for other norms that would protect commercially valuable information during court proceedings.

Thus, in Ukraine, norms regulating issues related to trade secrets are contained in various normative and legislative acts. Therefore, supporting the positions of many scholars and practitioners, we emphasize the need for a special law of Ukraine on the protection and safeguarding of trade secrets harmonized with international legal standards for the protection of trade secrets, due to the practical need to regulate a group of public relations arising in connection with trade secrets, which are not regulated by law, as well as the lack of laws capable of performing this function in accordance with EU standards [11].

5. Conclusions and Further Research Implications.

Summarizing scientific research, it should be noted that a country such as Belgium, taking into account the Directive, has adopted a law aimed at protecting the undisclosed know-how and commercial information (trade secrets) of businesses from their illegal capture, use and disclosure. This Law has implemented all the above-mentioned recommendations on the protection of trade secrets during court proceedings. It has been investigated that the German parliament passed the Law on Trade Secrets of the Federal Government. This law implements European Parliament Directive (EU) 2016/943 on the protection of undisclosed know-how and trade information (trade secrets) against their illegal acquisition, use and disclosure in German national law in order to establish uniform protection of business trade secrets. The law provides for the confidentiality of court proceedings. In civil proceedings, authorizing the transfer of jurisdiction to certain specialized courts in cases of breaches of business secrets, the ability to classify litigation as confidential at the request of one party, and the potential limitation of the number of persons entitled to access evidence and / or hearings.

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ОРГАНІЗАЦІЙНО-ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ БЕЗПЕКИ КОМЕРЦІЙНОЇ ТАЄМНИЦІ БІЗНЕСУ

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Анотація. *Присвячено дослідженню законного і незаконного отримання, використання і розголошення комерційної таємниці бізнесу, в контексті застосування безпекознавчих умов. Встановлено, що комплексне аналізування положень Директиви та законодавства України щодо охорони комерційної таємниці свідчить про актуальність уточнення окремих питань охорони комерційної таємниці бізнесу в Україні, що як наслідок дасть можливість забезпечити високий рівень безпекознавчих умов. Досліджено понятійно-категоріальний апарат комерційної таємниці та нормативно-правовий базис забезпечення міжнародного співробітництва відповідно. Обґрунтовано практичний комплекс заходів збереження конфіденційності комерційної таємниці бізнесу. Як результат наукових досліджень ідентифіковано сутністно-змістовну характеристику положення Директиви як основного правового вектора забезпечення безпекознавчих умов. Виокремлено положення, які варто врахувати при охороні комерційної таємниці бізнесу, а саме: уточнення порядку забезпечення позову та запобіжних заходів; захист комерційної таємниці під час судового провадження; уточнення законодавства стосовно розкриття комерційної таємниці у публічних інтересах тощо. Визначено, що удосконалення потребує і чинне процесуальне законодавство в питанні забезпечення під час будь-якого виду судового провадження обмеження доступу до матеріалів, які містять відомості, що становлять комерційну таємницю бізнесу, зокрема, шляхом визначення кола осіб, які матимуть доступ як такий та можливість ознайомлюватися з матеріалами справи. На основі чого продемонстровано імплементацію правових аспектів міжнародного співробітництва в контексті безпечного виміру комерційної таємниці. Прийняття Закону передбачає*

положення про конфіденційність судового розгляду. В ході цивільного судочинства, надаючи дозвіл на передачу юрисдикції певним спеціалізованим судам у випадках порушення комерційної таємниці бізнесу, можливість класифікувати судовий процес як конфіденційний за запитом однієї з сторін, і потенційне обмеження числа осіб, які мають право на доступ до доказів і / або слухань.

Ключові слова: *міжнародне співробітництво, нормативно-правовий базис, Директива, комерційна таємниця, безпека бізнесу, безпекознавчі контексти, бізнес*.

Appendix A. Supplementary material

Supplementary data associated with this article can be found, in the online version, at http://sepd.tntu.edu.ua/images/stories/pdf/2021/21voiktb.pdf

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