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Violation of the "right of access" to trade secrets and know-how in the field of aviation and space technologies: problematic aspects

Violation of the "right of access" to trade secrets and know-how in the field of aviation or space technologies are illegal methods of obtaining this information, illegal disclosure of it and other illegal actions.

Illegal methods of obtaining trade secrets or know-how include: industrial espionage, bribing an official (employee) who actually controls such information, illegal entry into the premises of its owner, listening to communications, illegal familiarization with the content of correspondence containing confidential information information, etc.

As you know, the object of an exclusive right can only be the result of intellectual, creative activity, separated from the activity itself, which exists objectively, independently of it, for the use of which it is possible to establish a monopoly (legal or de facto). With regard to commercial secrets and know-how in the field of aviation or space technologies, the person who actually controls such confidential information, in particular, a legal entity, is obliged to take the necessary measures to keep it secret, limit its disclosure (restrict access to it) , which in itself is an activity.

In this connection, the question arises: is it possible to establish a monopoly right to familiarize with commercial secrets and know-how in the field of aviation or space technologies? Can a person have a subjective right to trade secrets and know-how?

The author starts from the position that information as such is a message that contains (in itself) information, and an exclusive right to familiarize with them is not established, and even more so a "property right", therefore, a subjective right cannot arise. Therefore, the term "right to" information, and accordingly to confidential information in the form of trade secrets or know-how (including in the field of aviation or space technologies) is a conditional term. A more precise scientific wording, which to a greater extent will adequately reflect its essence, will be the very term "right of access" to information, as well as confidential information in the form of a commercial secret or know-how (including in the field of aviation or space technologies). Therefore, in the future, the author will use this term - "right of access".

The essence of informational relations is determined by the fact that their immediate purpose is not the traditional use of the result for economic circulation, but in familiarization with information. The content of familiarization with information is a process of learning, and may not even include recommendations for its use. Therefore, the "use" of information is always preceded by familiarization with information that can be both publicly available and confidential. We are most interested in the latter. In particular, the legality of access (provision or restriction)

for viewing information that contains commercial secrets or know-how in the field of aviation or space technology.

Violation of the "right of access" to trade secrets or know-how in the field of aviation or space technologies is illegal methods of obtaining this confidential information, its illegal disclosure and other illegal actions that lead to the violation of the specified right.

Illegal methods of obtaining a trade secret or know-how in the field of aviation or space technologies, in particular, include industrial espionage, bribing an official (employee) who actually controls such a trade secret or know-how, illegal entry into the premises of its owner, wiretapping communication, illegal access to the content of correspondence containing this trade secret or know-how, etc.

Also, trade secrets and know-how (including in the field of aviation or space technologies) are one of the ways to protect against unfair competition and are carried out in accordance with Art. 10-bis ("Unfair competition") and Art. 10-ter ("Trademarks, trade names, false indications, unfair competition; remedies, the right to apply to the courts") of the Paris Convention for the Protection of Industrial Property [1].

National unfair competition legislation, as such, does not function to protect a "right", or rather a legally protected interest, of a person who actually controls a trade secret or know-how (including in the field of aviation or space technology), but provides a reference to general civil legislation.

The main feature of the norms of such legislation is its protective and legal character. In particular, the Law of Ukraine "On Protection from Unfair Competition" (1996) contains the concept of unfair competition (Article 1), and its entire chapter is devoted to illegal actions regarding trade secrets (know-how), which qualify as unfair competition and for which liability arises. The law distinguishes four types of offenses: 1) unlawful collection of commercial secrets (Article 16); 2) disclosure of commercial secrets (Article 17); 3) tendency to disclose commercial secrets (Article 18); 4) improper use of commercial secrets (Article 19).

The content of these articles can be considered not only as a definition of legal terms, but also as an element of the disposition of norms that provide for responsibility for unfair competition in the form of imposition of fines by the Antimonopoly Committee of Ukraine, as well as administrative, civil and criminal liability in cases provided for by law (Article 20).

Damage caused to persons as a result of the actions defined by this Law as unfair competition is subject to compensation in the lawsuits of such persons (Article 24) and, obviously, in the manner determined by the civil legislation of Ukraine.

That is, if persons who actually control a trade secret or know-how (including in the field of aviation or space technology) were harmed by unlawful actions in the form of unfair competition, they can apply to the court for compensation. At the same time, in this case, a person means a subject of entrepreneurial activity.

This provision is fully in line with the Constitution of Ukraine, which established that justice in Ukraine is administered exclusively by the courts and the delegation of the functions of the courts, as well as the appropriation of these

functions by other bodies or officials, are not allowed. The jurisdiction of the courts extends to all legal relations arising in the state (Article 124).

In this regard, amendments were made to the legislation on protection against unfair competition and expressly provided for the possibility of filing a lawsuit directly in court in case of violation of the legally protected interest of a person who actually controls a trade secret or know-how, which will meet the requirements of the Constitution of Ukraine. in particular, Article 124.

Although previously such legislation provided that in the event that a person who actually controls a trade secret or know-how was harmed by unlawful actions in the form of unfair competition, he should first apply not to the court, but to the Antimonopoly Committee of Ukraine. And only after that, such a person could file a lawsuit in court for compensation for the damages. Based on the published court practice, it can be stated that in case of violation of unfair competition, the cases were considered mainly by the Antimonopoly Committee of Ukraine.

It should be noted that the indication of the illegality of actions regarding trade secrets (know-how), which in the Law are qualified as unfair competition, appear only in the case of the collection and use of trade secrets (Articles 16, 19), although it was expedient to b to emphasize the fact of illegality of disclosure of commercial secrets (Article 17) and illegality of inclination to disclosure of commercial secrets (Article 18).

In fact, this is important, since a person who independently and in good faith gained access to information that is a commercial secret (know-how) can further control such information (Article 162 of the Commercial Code of Ukraine), including disclosing it (provide access to her).

In addition, it is illegal actions regarding commercial secrets that are the basis for applying to the court of interested persons for compensation for the damage caused. That is, the person who actually controls the trade secret or know-how can file a claim for damages only against the person who obtained and "uses" the trade secret or know-how in bad faith (according to the theory of de facto monopoly).

The Economic Code of Ukraine also contains articles aimed at protecting trade secrets (know-how), which repeat the norms of the Law of Ukraine "On Protection from Unfair Competition", in particular, regarding the concept of unfair competition (Article 32) and illegal actions qualified as illegal competition (Article 36).

Sources that contain regulations on the protection of commercial secrets and know-how also include laws of other branches of law. Thus, the Code of Ukraine on Administrative Offenses (hereinafter referred to as the Code of Administrative Offenses of Ukraine) enshrines norms that provide administrative and legal protection of the interests of persons who actually control trade secrets (know-how), which is also part of the legislation aimed at combating unfair competition. Accordingly, obtaining, using, and disclosing a trade secret, as well as other confidential information (in particular, know-how) with the purpose of harming the business reputation or property of another entrepreneur, is classified as unfair competition with the means of protection established to protect against unfair competition. The legislation provides for administrative responsibility for the

specified actions in the form of a fine (Article 164-3 of the Criminal Code of Ukraine).

According to the Criminal Code of Ukraine (hereinafter referred to as the Criminal Code of Ukraine), criminal liability may arise for the actions provided for in Articles 231 "Illegal collection for the purpose of using or using information constituting a commercial or banking secret" (i.e. commercial espionage), 232 "Disclosure of commercial, banking secrecy or professional secrecy in the capital markets and organized commodity markets", 361-2 "Unauthorized sale or distribution of information with limited access, which is stored in electronic computing machines (computers), automated systems, computer networks or on such media information". The specified articles deal with criminal liability for violation of the "right of access" to confidential information, including trade secrets and know-how, in particular, in the field of aviation or space technologies.

Regardless of the resolution of the issue of criminal prosecution and punishment of the criminal, the specified sanctions do not compensate the subject of business activity for the losses caused by the crime. Their compensation can be carried out only by using the norms of civil legislation.

Therefore, it can be said that the protection of commercial secrets and know-how (including in the field of aviation or space technologies) is carried out within the framework of the fight against unfair competition, provided for in Article 10bis of the Paris Convention. Also according to Art. 10ter in the process of ensuring effective protection against unfair competition, participating countries undertake to provide citizens of other countries of the Union with the following protection: natural and legal persons who legitimately control confidential information are granted the right to prevent the disclosure, receipt or use of such information without their consent by other persons, if the latter did so in ways contrary to fair commercial practice. The Agreement on Trade Aspects of Intellectual Property Rights (hereinafter - the TRIPS Agreement) [2] includes breach of contract, breach of trust, incitement to breach the concept of a method that is contrary to honest commercial practice; the acquisition of confidential information by third parties who knew or were grossly negligent in not knowing that actions contrary to fair trade practices were committed in the process of such acquisition.

Along with the TRIPS Agreement, issues related to the protection of commercial secrets (know-how) are considered in the specially developed WIPO "Model Provisions on Protection against Unfair Competition" [3].

The work carried out is aimed, in fact, at clarifying the content of Art. 10bis of the Paris Convention, taking into account modern reality. In particular, Art. 6 of the Model Provisions provides for protection against unfair competition with regard to confidential information. The norm of this article coincides with Art. 39 of the TRIPS Agreement. Some differences, however, are observed in the list of types of actions that are considered to be contrary to honest commercial activity. In addition to those listed in Art. 39 TRIPS agreements are industrial or commercial espionage. In Art. 6 of the standard provisions provides another type of dishonest business activity - incitement to the implementation of any act, which is provided in this article (industrial espionage, breach of contract, breach of trust). Among the actions in which unfair competition is manifested, the Model Provisions (similar to the

TRIPS Agreement) also include the illegal nature of the method of obtaining confidential information - this is the intentional obtaining of it by a third party (that is, when such a person knew about the confidentiality of the information), or received it with the manifestation of gross carelessness (when such a person should have known about the similar nature of information).

In general, the specified documents agree in terms of the characteristics of commercial secrets (secret information, undisclosed information), as well as essentially in the types of actions that are considered as manifestations of unfair competition. However, all these documents have different orientations: if the TRIPS Agreement is directed, first of all, to the characterization of the interest of the person who actually controls the undisclosed information, within the framework of the joint design of the document, then in the Model Provisions the emphasis is on the characterization of actions in which unfair competition is manifested, which also determines the common orientation of the document - clarification of the provisions of Article 10bis of the Paris Convention, taking into account modern reality.

It can be stated that the TRIPS Agreement defined for the first time at the international level the signs and concepts of protection of undisclosed information (trade secrets and know-how) as a means of protecting information, the use of which is legally controlled by a legal entity.

In general, in the past, many countries treated the protection of trade secrets or know-how no differently than the protection of production secrets or industrial property. In order to comply with the features of the TRIPS Agreement, WTO member countries will have to cover with legal protection all secrets that have commercial value.

That is, we are talking about the legal protection of commercial secrets and know-how in general and in the field of aviation or space technologies, in particular.

References

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