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УДК 343.2

Criminal legal prohibition of iiligal acts with data presenting insider information

Today it is impossible to imagine global universe without such its component as information. In the period of development of informative society, the term «information» occupies one of key places not only in branch, but also directly in a criminal legal conceptual construct. It is the phenomenon whereby various actions are accomplished including criminal ones: from one side, it is an engine of development of the Ukrainian society and state; on the other hand – a factor that assists the increase of a level of criminality, worsens a crime situation in the country. In the current Criminal Code of Ukraine there are quite a bit norms which have in their legal components one or another feature that is information.

Information, in accordance with article 200 of the Civil Code of Ukraine, is the documented or publicly declared data about events and phenomena, which took or take place in the society, state and environment. The arrangements for the use of information and protection of the right on it are established by the law [1]. In particular, the Law of Ukraine «On information» from October 2, 1992 regulates relations concerning creation, collection, receipt, storage, use, distribution, guard, protection of information [2].

Based on the above-mentioned, it should be noted that information is one of components in everyday activity of subjects of insider information (hereinafter II), and in the case of violation of the legal relationship concerned with the use of II, if it damnified considerably the registered rights, liberties and interests of certain citizens and state or public interests, or interests of legal persons, so such actions can be considered to be criminal.

By the law of Ukraine «On securities and fund market» from February 23, 2006 [3], for the first time the concept of «insider information» was introduced and prohibition was provided for, in particular, realization of security trading with the use of II and the changes were made in the Criminal code of Ukraine with the aim to establish criminal responsibility for a disclosure or use of the unpromulgated information about an issuer or his securities.

The aim of this article is a theoretical analysis of separate elements of crimes of the Special part of the Criminal code of Ukraine in which there are quite a bit norms that have in their legal components one or another feature that is information, that induces to search new ways of improvement of the criminal law.

To the problems of socially dangerous act as an essential element of crime provided for by article 232-1 of the Criminal code of Ukraine [4], the researches of such national scientists as O. Dudorov, O. Kashkarov, O. Kondr, V. Sayenko and others are devoted. As a direct object of crime of article 232-1 of the Criminal code of Ukraine is the established order of realization of economic activity in a part of providing of the normal functioning of the securities market, its additional obligatory object are relations of property, and the optional one can be relations of fair economic competition, finding out the concept and content of socially dangerous act in elements of crime, prescribed by this article, is important from the theoretical and practical point of view. This is precisely why the applied scientific research of criminal responsibility for the illegal use of II must be obligatorily based on the deep, system study of the concept, features and particularities of related socially dangerous act that leaves a field for further scientific researches.

As known, article 232-1 was included in the Criminal Code in the order of realization of referential norm – part 4 of article 45 of the Law of Ukraine «On securities and fund market» from February23, 2006, according to that responsibility for the misuse of II is set by the law.

With the passing of the new Criminal Procedural Code of Ukraine [5], in accordance with part 1 of article 477 of this code, criminal execution in the form of a private prosecution is execution, that can be begun by an investigator, prosecutor only on the basis of a statement of a victim in relation to criminal offences, prescribed by articles 231, 232, 232, 232-2 of the Criminal Code of Ukraine. Disposition of article 232-1 of the Criminal Code is defined in such a way that describes at once a target of crime, objective aspect of crime and subject of crime. Thus socially dangerous act in these elements of crime the legislator considers as an illegal disclosure, pass or granting access to II and providing recommendations in relation to purchase or alienation of securities or derivatives.

The target of crime, prescribed by article 232-1, is II. Under II in criminal- legal sense it should be understood information that is not published or not promulgated, so it is unknown to the circle of potential investors. As V. Sayenko asserts, the information considers to be promulgated when it is known to the unlimited circle of persons. However, there is not a necessity, that every investor has this information or, that it is published in mass media. It is enough if it is available through the information systems of the wide use. Therefore there is no need to divulge information through mass media, in fact the divulgation even to the narrow circle of the interested investors will result in the indication of information in the market value of certain security (for example, at general meeting of shareholders) [6, p. 120]. It has emerged that at research of a matter of the illegal use of insider information, as a socially dangerous act, first of all it should be determined if a concept of the illegal use of insider information is normative or it should be specified and verify in other ways [7, c. 351].

In general the definition of the content of the specific elements of crime, is made taking into account the disposition of the corresponding norm of the Special part of the Criminal Code and has a specific in case of blanket method of presentation of disposition of criminal legal prohibition.

Article 232-1 is a criminal legal norm with blanket disposition. The point at issue is that qualifying crime attributes which are fixed in blanket dispositions are important, substantial,

because they determine a list and nature of penal actions, a scope of criminal behaviour [8, c. 60–61]. The existence of criminal legal norms with blanket dispositions leads to quite a bit qualifying crimes attributes (economic, ecological, transport, against industrial safety and others like that) are determined not only by the Criminal Code but also by other normative acts, which are not the law about criminal responsibility and among them there can be both laws and by-laws acts [9, c. 258]. In fact the provisions of regulatory legal acts of other branches of law specificate qualifying crime attributes with mixed wrongfulness. We fall in with views, that the specific of blanket method of presentation of disposition of the norm of the Criminal Code provides in description of elements of crime by means of resumptive attributes and attributes – concepts that are «legislative» (their content does not appear logically from disposition of criminal legal norm), and that is why for the explanation it is required to refer to related to criminal other branches of legislation [10, p. 54–63].

A possibility and necessity to use for subsumption of crimes norms of other branches of law, even when there is not direct reference to them in the article of the criminal law, are based on system nature of the law, interrelation and interdependence between the norms of the different branches of the law [11, c. 81]. The application of criminal-legal norm with blanket disposition is impossible without simultaneous judgment of the committed act according to the norm of other branch of the law. In case of subsumption of crimes with mixed wrongfulness it should be specified the attributes which can be found not only in the criminal law but also in other normative acts, and after the degree of necessity of difinition these attributes are identical [12, p. 385]. Particularly, in the Law of Ukraine «On securities and fund market». Thus, it should be taken into account that this Law does not regulate the order of the use and protection of II, which relates to information that presents a commercial and bank secret. But, part 1 of article 40 of this Law sets prohibition of the use of II by a person that owns II, and in part 3 of article 40 of this Law it is marked that responsibility for the unlawful use of II is fixed by law.

Disposition of article 232-1of the Criminal Code has qualificatory blanket character: from one side, this disposition specifies a target of crime, form of guilt and socially dangerous results, from other side – it necessitates to invoke the Laws of Ukraine and other regulatory legal acts. On the whole, the matter about a presence of socially dangerous act in elements of crime, envisaged by article 232-1, it should be decided just with reference to the indicated article of the special law, or other articles of laws and/or other regulatory legal acts which are used in the criminal legal control of II, commercial or bank secret. So, in the explanations devoted to the use of norms of criminal law with blanket dispositions, Plenum of Supreme Court of Ukraine, in Resolution «About practice of application by courts of the legislation about responsibility for separate crimes in the sphere of economic activity» from April 25, 2003 № 3 [13] and in Resolution «On court practice in cases about crimes and other offences against environment» from December 10, 2004 № 17 [14], repeatedly put an emphasis on the matter about criminal responsibility of a person in such cases should be decided with necessarily taking into account of normative acts to which blanket dispositions of norms of the Criminal Code are referred.

The Law of Ukraine «On protection from unfair competition» from June 7, 1996 provides an opportunity to state that Chapter 4 of the Law envisages responsibility for illegal collection of commercial secret (article 16), divulging a commercial secret (article 17), predisposing to divulge a commercial secret (article 18) and illegal use of commercial secret (article 19). The mentioned offences are acknowledged

by the Law as an unfair competition [15].

With all drawbacks of existence of blanket fact in criminal law it is based on the system character of law and interrelation of its branches and norms, it answers the requirements of stability and compactness of the Criminal Code, and that is why it is not just worthwhile, but inevitable. Because of these reasons the efforts of doctrines shall be intended to decide those topical problems of blanket fact, which in theoretical and practical aspects are the most significant, such as: search of ways to lower the level of blanket fact of dispositions of criminal legal prohibitions; definition of place of references to the normative acts, that are not criminal law, in law-enforcement acts and finding out how to make such a reference in case of ambiguousness of provisions of the regulatory legislation; research of influence of the changes which the normative acts related to blanket dispositions suffer, in the content of attributes of specific elements of crimes and possibility of interpretation of improvement of legal position of an individual as a result of such changes as mediated decriminalization or as changes of situation; definition of the content of intent of the crimes, envisaged by norms of the Criminal Code with blanket dispositions, as well as specific of legal error at committing crime with mixed wrongfulness [9, p. 359–360].

The mentioned function is directly specified in article 1 of the Criminal Code of Ukraine. This is precisely why the consideration of the questions of criminal legal protection of II shall be preceded by the determination of the content of relations of II as an object of commercial secret and criteria of recognition of II as a commercial secret. So under a range of non-public information of economic entities, a commercial secret as an object of intellectual property law should be also subsumed, and it shall be distinguished from II. Mainly, II is distinct from other types of non-public information of economic entities, that it has a specific object, for II the basic direct object of crime is the established order of realization of economic activity of securities.

A commercial secret as an object of intellectual property has certain features; in particular, its universality among other objects of intellectual property, as under the concept of commercial secret a variety of information related to a production, technological information, management, finances and other activity of an economic entity can be brought. Among such features it is worth noticing an unlimitedness of the term of legal protection. So, the right to a commercial secret is force until the actual monopoly of an individual is kept on the information which presents it.

Insider information, unlike a commercial secret, becomes publicly available from the moment of its promulgation according to the law. Hence, the efficiency of criminal legal protection of commercial secret, also with the help of article 232-1 of the Criminal Code of Ukraine, will depend on that, as far as successfully the attributes are represented in its disposition not only of II but also of commercial secret and other neighbouring crimes.

Taking into account the fact that the matter of commercial secret is regulated a good many regulatory legal acts of different branches of legislation; there is an appropriate question, what exactly belongs to the information with limited access, what presents commercial value. Article 505 of the Civil Code of Ukraine determines a commercial secret as secret information, the analysis of the special legislation allows drawing conclusion, that there is not the fundamental difference between concepts of «private information» and «secret information».

On investigating legal nature of unfair competition with the use of information giving rise to achieve competitive edges, O. A. Gorodov remarks that, unlike the non-disclosure, that can be introduced by any proprietor of information which is subject to closing, the

regime of official secret is introduced by public authorities, although the information of official character can be formed and circulate not only in public authorities but also in any other, including commercial organizations [16, p. 83].

According to the definition, envisaged in Part 1 of article 505 of the Civil Code of Ukraine, a commercial secret is a certain type of information. In accordance with article 1 of the Law of Ukraine «About information» [2], under information it is necessary to understand any information and/or data that can be stored on material objects or represented in an electronic format. In article 60 of the Law of Ukraine «On banks and banking» [17] it is recorded, that information about an activity and financial state of a client, that became known to the bank in the process of customer service and mutual relations with him or third persons as a result of the providing bank services, is a bank secret. In accordance with article 36 of the Commercial Code of Ukraine the information, related to production, technology, management, financial and other activity of an economic entity which is not a State secret, its divulging can inflict harm to the interests of an economic entity, and can be recognised as its commercial secret. The content and scope of information that presents a commercial secret, the method of its protection are determined by an economic entity according to the law [18].

The law of Ukraine «On defence of economic competition» determines information, as data in any form and kind and storage in any carriers (including correspondence, books, marks, illustrations (maps, diagrams, organigrams, pictures, charts and others like that), photos, holograms, cine, video, micro films, voice records, databases of computer systems and complete or partial reconstruction of their elements), explanations of individuals and any other publicly declared or documented information [15].

In accordance with part 3 of article 34 of the Constitution of Ukraine, the enforcement of the right for realization of information processes can be statute-restricted in the interests of national safety, territorial integrity or public peace with the aim of prevention of disturbances or crimes, for a health protection of population, for defence of reputation or rights of other people, for prevention of divulging information got confidentially, or for maintenance of authority and impartiality of justice. In particular, article 1 of the Law of Ukraine «On financial services and state control over financial services markets» from July 12, 2013 [19], uses a concept of professional secret, to which refers materials, documents, other information, which are used in the process and in connection with performance of official duties by public servants of public authorities which carry out regulations of financial services markets, and individuals, that are involved in exercising these functions, and which are forbidden to divulge in any form till the moment of taking a decision by the appropriate authorized state body.

The law of Ukraine «On information» divides information after the access mode to it into open information and information with a limited access. In its turn article 21 of this Law divides information with a limited access into confidential, secret and official information. Secret information includes with information, that contains data presenting state or other statutory secret, the disclosure of that does harm to a person, society and state. From the mentioned provisions of the Law of Ukraine «On information» it follows that a commercial secret is a type of private information. After this classification, information that presents a commercial secret can be included with both varieties of «restricted data».

Commercial secret, depending on the content of information that it contains, it is possible to examine as confidential information and as well as other statutory secret, except state one. The indicated normative acts determine insider information as separate kind or

even as a component element of economic activity which is protected by chapter VII of the Special part of the Criminal Code of Ukraine «Crimes in the field of economic activity».

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Яра О. С. Кримінально-правова заборона незаконних дій з відомостями, що становлять інсайдерську інформацію

Досліджується питання кримінально-правової заборони незаконних дій з відомостями, що становлять інсайдерську інформацію. Автором вносяться пропозиції щодо удосконалення кримінального законодавства, що становлять інсайдерську інформацію.

Ключові слова: інформація, інсайдерська інформація, комерційна таємниця, бланкетність, кримінальна відповідальність.

Яра Е. С. Уголовно-правовой запрет незаконных действий со сведениями, составляющих инсайдерскую информацию

Исследуется вопрос уголовно-правового запрета незаконных действий со сведениями, составляющих инсайдерскую информацию. Автором вносятся предложения по совершенствованию уголовного законодательства, составляющих инсайдерскую информацию.

Ключевые слова: информация, инсайдерская информация, коммерческая тайна, бланкетность, уголовная ответственность.

Yara O. Penal prohibition of illegal actions with the information constituting insider information

Examines criminal law prohibition of illegal actions with the information constituting insider information. The author makes suggestions for improvement of the criminal legislation constituting insider information

Key words: information, insider information, commercial secret, blanket fact, criminal responsibility.