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Oleksandr KRAVCHENKO ©
Ph.D. (Law)
(National University of Life and Environmental Sciences of Ukraine), Ukraine

INTERNATIONAL EXPERIENCE OF REGULATORY AND LEGAL PROTECTION OF COMMERCIAL BUSINESS SECRETS

Abstract. Scientific intelligence is devoted to the analysis of existing international legislation in the field of legal protection of trade secrets (TS). Searching for ways to improve legal and institutional mechanisms for the protection of commercial business secrets, as well as a comparison of existing regulatory and legal documents of foreign countries with the aim of implementing the best of them into national practice. On the basis of the conducted scientific research, we can state that in order to improve the legal protection of trade secrets (TS) in Ukraine, it is necessary to adopt the appropriate law on TS.

Today in Ukraine, business entities themselves regulate relations regarding the definition and protection of TS, by adopting the relevant local regulatory documents of the enterprise, institution or organization. Thus, regulatory and legal support in the field of protection of commercial secrets is the drawing up of certain local documents at the enterprise, institution or organization that ensure the protection and protection of TS – this is an order, statute, labour contracts and agreements, rules of internal procedure, which provide for the obligation refrain from disclosing it to third parties, and also establish responsibility for violation of these terms of the contract.

Among the subjects of authority related to the protection of TS in Ukraine, the following can be noted: the Cabinet of Ministers of Ukraine, the Ministry of Culture and Information Policy, the Ministry of Economic Development and Trade of Ukraine, the Ministry of Justice of Ukraine, the Ministry of Education and Science of Ukraine, the Ministry of Economic Development and Trade of Ukraine, bodies of internal affairs, in particular, bodies of the National Police, the State Fiscal Service of Ukraine, the Antimonopoly Committee of Ukraine, the Security Service of Ukraine.

We consider it expedient to adopt a separate law regarding the protection of commercial secrets in Ukraine, namely to regulate all aspects regarding the protection of TS.

Keywords: *commercial secrets, trade secret, confidential information, information, business, protection.*

Introduction. The scientific work is devoted to the analysis of the available international experience and legislation in the field of legal protection of trade secret. The problem in the field of TS protection of enterprises, institutions and organizations is to find reliable protection of commercially valuable information of a certain business, and especially during martial law. Among the subjects of authority related to the protection of TS in Ukraine, the following can be indicated: the Cabinet of Ministers of Ukraine, the Ministry of Culture and Information Policy, the Ministry of Economic Development and Trade of Ukraine, the Ministry of Justice of Ukraine, the Ministry of Education and Science of Ukraine, the Ministry of Economic Development and Trade of

ORCID iD: https://orcid.org/0000-0002-8870-7662
alex_23@i.ua

Ukraine, bodies of internal affairs, in particular, bodies of the National Police, the State Fiscal Service of Ukraine, the Antimonopoly Committee of Ukraine, the Security Service of Ukraine. We consider it expedient in relation to the protection of commercial secrets in Ukraine, based on international experience in the regulatory protection of TS, to adopt a specific law, namely to regulate all aspects of TS protection in our state.

Analysis of recent research and publications. The international experience of regulatory protection of trade secret was the subject of research by such researchers as Y. Kapitsy, G. Androshchuk. The state of regulatory protection of CT in Ukraine was covered by S. Gordienko, B. Gogol et al.

The purpose of the article is to find modern international legal measures for the protection of trade secret, for the possible use of this experience in practice in Ukraine.

Formulation of the main material. We have previously explored that English law uses three principles that apply to any trade secret (TS) infringement:

1) If the information is transferred on the basis of confidentiality, the person who received it does not have the right to use or disclose this information for the purpose of creating competition for the owner of the information;

2) If it is proven that the defendant intentionally or unintentionally disclosed confidential information without the consent of the owner, he is found guilty of violating the rights of the owner of the information;

3) A person who has received confidential information has no right to use it earlier than the owner of the information to occupy the most advantageous positions, even if the content of this information has been published or can be established by third parties through their own research.

It is assumed that the owner of the TS should have a certain advantage over all the rest of the persons and be sure that he will not be late at the start in the conditions of fierce competition. These principles have a generalized nature and can be changed and supplemented depending on specific cases, circumstances, etc. In case of violation of TS, the following measures are applied to the violator:

1) Issuance of a court decision, which may have an "interim" (serves only to prevent further damage until a final decision on the case is made) or "permanent" effect;

2) The defendant undertakes under oath to hand over to the plaintiff or destroy the physical objects in which the know-how or trade secret is embodied (the plaintiff can choose one or another measure at his own discretion);

3) Compensation for losses or lost profits resulting from a breach of confidentiality obligations.

The third remedy is damages caused by the breach of privacy. In English case law, the following categories of damages are known:

– simple or general, which can be easily established with sufficient precision;

– special ones, which can also be established with sufficient accuracy, but the court should pay special attention to them, since they are not so obvious;

– onerous, which can be considered as compensation for the improper methods by which the privacy violation occurred;

– "exemplary", the compensation of which should serve as a clear example and a warning for the defendant against similar violations in the future;

– conditional, when the plaintiff is supposed to be paid a specified amount

for the violation of his rights and interests, even if the plaintiff does not claim any compensation for damages at all.

In relations related to the creation of service inventions, special rules apply. If the secret is an official invention within the meaning of the Law on Official Inventions, then the official inventor is obliged to keep the secret until the invention is freely used. And a person who has acquired knowledge independently of the owner of the secret uses it freely in his own interests, and the person who has legally acquired knowledge from the owner of the secret, involuntarily enters into binding relations with him, which, as a rule, are formalized by a contract. The employee's actions regarding the transfer and use of illegally obtained knowledge are qualified as a violation of non-contractual obligations. We can summarize and note that in England there is quite good judicial practice for the legal protection of the owner of a trade secret from modern threats of various types. In Switzerland, it is a clear and sufficiently effective system of regulatory acts has developed, which forms the basis of the legal regime of fair competition (Kravchenko, 2019, p.160-161).

We have established that Swiss law provides for civil and criminal sanctions for violating the rules of fair competition. At the same time, the existence of a loss for a competitor (clientele) is far from always a condition for the onset of liability: actions that did not lead to loss, but threaten to cause it, may also be considered illegal. As for the fault of the infringer, it is considered by judicial practice as a condition of liability insofar as the initial criterion for its imposition is good trade practice or good will, that is, an objective criterion. Thus, the illegality and culpability of the violator's actions appear as a condition for liability for violation of the rules of fair competition. This means (if we take into account the legal definition of unfair competitive actions) their contradiction to the law and customs of good trade practice. Protection of violated (or threatened) interests of a competitor (clientele) takes place in a legal action. A lawsuit may be filed by a competitor or a client, as well as by other persons, in particular: economic and professional associations, other organizations of the federal or cantonal scale that protect consumer rights (provided that similar actions are within their competence according to the statute). And the person whose interests are violated (or whose interests are threatened with violation), as well as other listed persons, have the right to demand from the court a ban on unfair competitive actions (or, accordingly, their termination), a finding of the illegality of such actions, a refutation or other proof of the decision to the reduction of an indefinite (or limited) circle of persons. In addition, such a person has the right to file a lawsuit against the violator for non-contractual damage and to demand compensation for the material, economic and (or) moral damage caused. In addition to the civil sanctions provided in this way, the law establishes criminal sanctions: imprisonment or a fine of up to 100,000 Swiss francs (Kravchenko, 2019, p.162).

In this regard, part 1 of Article 273 of the Criminal Code of the Netherlands is of interest, which provides for liability for the person who intentionally discloses special information related to a commercial or industrial organization or an organization in the service sector in which the guilty person works or has worked, provided that she was obliged to keep the information secret. There is no doubt that the civil and labour legislation of Ukraine must clearly regulate the relationship between the employer and the dismissed employee regarding the latter's preservation of commercial secrets that became known to him during the

course of his employment (Kravchenko, 2019, p.162).

In Poland, the law "On Combating Unfair Competition" of 1993 provides for the protection of industrial secrets of the enterprise. In accordance with this Law, a production secret is understood as undisclosed technical, technological, commercial or organizational information of an enterprise, in relation to which the entrepreneur has taken measures to protect confidentiality (Kravchenko, 2019, p. 162-163).

It is interesting to note that in March 2019, the German Parliament adopted a law related to the protection of trade secret, which implements Directive (EU) 2016/943 of the European Parliament, including on the protection of trade secrets (Directive (EU) 2016/943). Sweden has a special law – the Act on Legal Protection of Trade Secret.

In 2016, the Defend Trade Secrets Act of 2016 (DTSA) was adopted in the United States of America. The law provides for the possibility of prosecuting employees and contractors for the disclosure of TS of a certain firm. If earlier each state established the rules for the protection of TS separately, now this issue is also regulated at the federal level. The Law applies to TS related to products and services used between states, as well as in foreign trade, etc. (Defend Trade Secrets Act of 2016).

G. Androshchuk notes in his scientific papers that experts especially single out the activities of the special services of the people's Republic of China, Japan, Israel, France, South Korea, and Taiwan on the territory of the United States. Foreign spies also seek to obtain classified information about the production and marketing policies of American corporations, whose activities primarily concern the defence complex, about the contracts concluded by them with US government departments, as well as measures to increase the export of high-tech products (Androshchuk, 2018, p. 43).

We have considered the issues of normative and legal protection of TS in Ukraine and the world in previous scientific investigations (Kravchenko, 2022, p.110-116; Kravchenko, 2022, p.45-52; Kravchenko, 2022, p. 29-31; Kravchenko, 2022, p. 211-220; Kravchenko, 2022, p. 175-181).

Accordingly, we established that commercial, industrial, economic espionage – obtaining information that has commercial value by illegal methods. In previous works, we focused in detail on the research of regulatory protection of commercial secrets in the world, and also touched on the issues of protection of TS from commercial, economic, industrial espionage (Kravchenko, 2015, p. 91-98; Kravchenko, 2016, p. 175-181; Kravchenko, 2017, p. 224-228; Kravchenko, 2017, p. 41-48; Kravchenko, 2017, p. 128-129).

As G. Androshchuk notes, the analysis conducted by American counterintelligence shows that in 58 % of cases, economic and industrial espionage was carried out on behalf of foreign companies, in 22 % – in the interests of foreign governments, and in 20 % – private and state foreign scientific centres and laboratories. At the same time, less developed countries, as a rule, strive to export technologies available on the commercial market, although for this they often have to violate the rules of export control. Developed countries, for their part, aim to obtain secret developments capable of increasing the power of their armed forces. In his opinion, recently there has also been a tendency to increase the number of thefts of individual ultra-modern components and nodes that can be used to modernize outdated weapons, intelligence and information systems (Androshchuk, 2018, p. 43).

Experts especially highlight the activities of the special services of the People's Republic of China, Japan, Israel, France, South Korea, and Taiwan on the territory of the United States. Foreign spies also seek to obtain confidential information about the production and marketing policies of American corporations, whose activities primarily concern the defence complex, about the contracts they have concluded with US government departments, as well as measures to increase the export of high-tech products. The evolution of economic espionage methods involves the development of adequate countermeasures. Therefore, economic counterintelligence is an integral part of the security service system – both at the state and corporate level. Its task includes control over information flows and possible ways of leakage (Androshchuk, 2018, p. 43).

G. Androshchuk reports in his research work that Bernard Benson – the inventor of new types of weapons, a millionaire who became rich by implementing patents for various types of weapons (a remote control system for torpedoes, the principle of flight of missiles with homing warheads, the "Delta" wing for supersonic aircraft, computer systems, etc. – more than 100 patents in total), speaking at a UNESCO conference, said that the accumulation of secrets in memory devices is a danger that can turn into a disaster, and called for immediate prevention. Almost 80 % of data leaks are due to simple carelessness or negligence. It is also about personal correspondence, which is one of the channels of leakage of important industrial secrets due to carelessness. In this regard, the military intelligence and security agencies of the USA started a mini-dossier on more than 25 million Americans who were considered potentially dangerous (Androshchuk, 2018, p. 43).

In Ukraine, there is no law on TS, and therefore the TS owner himself determines all aspects regarding the protection of TS at the firm or enterprise. Moreover, as already mentioned, the business entity is developing a number of documents to regulate labour relations with employees regarding the protection of TS, which was provided to him for the performance of certain work.

The specified means of corporate protection of commercial secrets establish the following:

1) Employees and officials who deal with TS are obliged to keep it confidential; persons who have gained access to it must be warned that such information is TS and are obliged to keep it confidential (not to disclose it to third parties), and also bear responsibility for failure to comply with this obligation. Such responsibility is provided for in the employment contract or a separate contract concluded with the employee;

2) The business entity that legally owns the TS must provide in the contract with its counterparties, who are granted access to it, the obligation to refrain from disclosing it to third parties and provide for responsibility for the violation of this agreement. One of the ways of fixing the obligation to preserve TS is to affix the secrecy stamp "TS" on the relevant documents;

3) The business entity that legally owns the TS must take the necessary measures to prevent unauthorized access by third parties to it, in particular, to prevent its leakage or loss. Failure to comply with these conditions can be an obstacle to reliable protection of TS of the economic entity. It can be said that this condition is mandatory for proof in court when certain disputes arise.

Thus, regulatory and legal support in the field of CI or TS protection is the

drawing up at the enterprise of certain local documents that ensure the protection and protection of TS – these are orders, statutes, labour contracts and agreements, rules of internal procedure, which provide for the obligation to refrain from disclosure to its third parties, and also establish responsibility for violation of these terms of the contract.

In our opinion, the above-mentioned normative and legal forms of protection of TS are very important, as they are the legal basis for holding the employee accountable if he disclosed information that constitutes TS. Business entities themselves regulate relations regarding the definition and protection of TS, by adopting the relevant local regulatory documents of the enterprise, institution or organization.

Therefore, local normative-legal regulation of TS is necessary not only at the level of normative-legal acts that make up the legislation on TS, but also at the local level – in the form of local acts of economic entities, etc.

B. Gogol states that Ukrainian legislation in the field of protection of rights to commercially valuable information is unsystematized and contradictory. Taking into account the above, we consider it expedient to enshrine in the legislation of Ukraine a single classification of all types of information that are subject to legal protection. For this, a comprehensive study of the legal regulation of information relations and relations regarding intellectual property objects is appropriate (Hohol, 2017, p. 116).

H. Gordienko believes that the ratio of information protected by intellectual property legislation and confidential information indicates: confidential information is not necessarily an object of intellectual property, however, information protected by intellectual property legislation can be recognized as confidential (Hordiienko, 2013, p. 234).

In turn, Yu. Kapitsa believes that the judicial practice of protecting the rights to commercial secrets and know-how in Ukraine shows significant shortcomings of the current legislation, which does not allow effective protection of rights within the framework of civil proceedings, in particular, due to the impossibility of providing evidence of rights violations in a civil procedure without the threat of their destruction by the defendant. Complicated or unresolved are compensation for property damage in connection with the violation of the rights to TS by an employee, the legal regime of official TS. The definition of trade secrets in the Central Committee of Ukraine does not comply with the provisions of the TRIPS Agreement and the Directive. The definition of the concepts of "disclosure of commercial secrets", "inclination to disclose commercial secrets", "collection of commercial secrets" by the Law of Ukraine "On protection against unfair competition", etc., is imperfect. An important factor is the lack of experience in protecting the rights to TS in organizations and enterprises. The main approaches to changes in the legislation of Ukraine regarding the protection of rights to TS and know-how are determined by the Concept of updating the civil legislation of Ukraine in 2020 and include the introduction of additions to Chapter 15 of the Civil Code of Ukraine regarding the definition of the concept of TS and its types – know-how and business information; replacement of Chapter 46 "Intellectual property right to commercial secrets" with Chapter "Intellectual property right to know-how"; provision that the specifics of the protection of rights to TS are determined by law. Changes should also be made to the Civil Code of Ukraine and Civil Code of Ukraine, the Law of Ukraine "On Unfair Competition", other

legislative acts that take into account the provisions of Directive (EC) 2016/943. With regard to the adoption of a special law on trade secret, in such a law, in addition to the implementation of the Directive, significant attention should be paid to the provisions that would contribute to the introduction of an effective system of protection of KT rights in organizations and enterprises, the use of, in addition to labour civil-law contracts with employees regarding specifics protection of the rights of TS, including settlement in contracts of issues of compensation for property damage for improper use of KT; determining the conditions for payment of compensation for violation of TS rights, etc. Taking into account the fact that business information is the object of informational legal relations and the regulation of relations regarding know-how is provided for by the legislation on intellectual property, as well as that the Directive does not include TS as objects of intellectual property law, it is possible to define a special law as of the law on the protection of commercial secrets against their unlawful acquisition, use and disclosure. This would follow the approaches of the Law of Ukraine "On Information", the Law of Ukraine "On Protection of Information in Information and Telecommunication Systems" and other legislative acts on various types of information (Kapitsa, 2021, p. 254).

Regulatory and legal measures to ensure TS in Ukraine, as well as the structure of legal relations in the field of TS protection, integration of CI and TS protection standards of Ukraine into EU standards, and other aspects regarding trade secret were the subject of our previous scientific studies (Kravchenko, 2018, pp. 75-79; Kravchenko, 2018, pp. 152-156; Kravchenko, 2019, pp. 91-93; Kravchenko, 2019, pp. 82-89; Kravchenko, 2019, p. 137-145; Kravchenko, 2022, p. 189-185; Kravchenko, 2022, pp. 98-104).

Now let’s consider domestic legislation in the field of TS protection, to identify possible gaps that need to be corrected to meet international TS protection standards, namely EU and US standards. The definition of trade secret is contained in the Civil Code of Ukraine (CCU) (the CCU, 2003) and in the Economic Code of Ukraine (CCU) (the ECU, 2003), but, in our opinion, needs improvement. In Art. 505 of the CCU states that TS is information that is secret in the sense that it is unknown as a whole or in a certain form and combination of its components and is not easily accessible to persons who usually deal with the type of information to which it belongs, in this regard, it has a commercial value and was the subject of measures adequate to the existing circumstances to preserve its secrecy, taken by the person who legally controls this information (the CCU, 2003). In Art. 162 of the Economic Code states that a business entity that is the owner of technical, organizational or other commercial information has the right to protection against the illegal use of this information by third parties, provided that this information has commercial value due to the fact that it unknown to third parties and there is no free access to it by other persons on legal grounds, and the owner of the information takes appropriate measures to protect its confidentiality (the ECU, 2003).

In our opinion, legal terms such as "owner of TS" (ECU) (the ECU, 2003), "person" (CCU) (the CCU, 2003) should be replaced by the term "owner of TS", as we proposed in the draft Law of Ukraine "On Trade Secret» (Kravchenko, 2019, add. A)

In Art. 505 of the CCU uses the term "person", but it is not clear which "person" the legislator means, namely: a legal entity or an individual. In our opinion, it should be clearly stated in Art. 505 of the CCU, what exactly is a legal entity and

formulate it, for example, as follows: TS is information that is secret in the sense that it as a whole or in a certain form and the totality of its components is unknown and is not easily accessible to persons who usually deal with the type of information to which it belongs, in this connection has commercial value and was the subject of measures adequate to the existing circumstances to preserve its secrecy, taken by the legal entity that legally controls this information.

In Art. 162 of the Economic Code states that a business entity that is the holder of technical, organizational or other commercial information has the right to protection against the illegal use of this information by third parties, provided that this information has commercial value due to the fact that it unknown to third parties and there is no free access to it by other persons on legal grounds, and the owner of the information takes appropriate measures to protect its confidentiality (the ECU, 2003). Here, in addition to the not entirely correct (in our opinion) term "holder of TS" (change to "owner of TS"), mentions of confidentiality should be removed, because confidential information is information about a natural person, not a legal entity. And formulate the definition of TS in Art. 162 of the Economic Code, for example: a business entity that is the owner of technical, organizational or other commercial information has the right to protection against the illegal use of this information by third parties, provided that this information has commercial value in connection with the fact that it is unknown to third parties and there is no free access to it by other persons on legal grounds, and the owner of the information takes appropriate measures to protect it.

Now let's analyse the legislative framework of Ukraine regarding the CS in the field of information legislation. In accordance with Art. 21 of the Law of Ukraine "On Information", information with limited access is confidential, secret and official information. Information about a natural person, as well as information to which access is limited to a natural or legal person, except for subjects of authority, is considered confidential. Confidential information can be disseminated at the request (consent) of the relevant person in the order determined by him, in accordance with the conditions stipulated by him, as well as in other cases determined by law (On Information, 1992).

In Art. 7 of the Law of Ukraine "On Access to Public Information" states that confidential information is information, access to which is limited to a natural or legal person, except for subjects of authority, and which can be distributed in the order determined by them at their will in accordance with the provisions provided by them conditions (on Access to public information, 2011).

Managers of information, defined in Part 1 of Art. 13 of this law, those in possession of confidential information may distribute it only with the consent of the persons who restricted access to the information, and in the absence of such consent – only in the interests of national security, economic well-being and human rights (on Access to public information, 2011).

In Art. 8 of the Law of Ukraine "On Access to Public Information" provides a definition of secret information as information, access to which is restricted in accordance with Part 2 of Art. 6 of this law, the disclosure of which may harm a person, society, and the state. Information containing state, professional, banking, intelligence secrets, secrets of pre-trial investigation and other secrets prescribed by law, including commercial secrets recognized as secret (on Access to public information, 2011).

The analysis of information legislation of Ukraine regarding CS shows that

CI – a type of information with limited access, and TS – one of the secrets of classified information, which is a type of information with limited access.

Having analysed the legislation of Ukraine regarding the CS, we can note the following:

1) The owner of information that has a commercial value determines at its own discretion whether the information that has a commercial value will belong to TS or will be CI;

2) The owner of information that has commercial value establishes measures to protect this information and other aspects related to the protection of the specified information (organizational, legal, technical);

3) The owner of information that has commercial value establishes the terms of classification, the circle of persons who can be familiar with the specified information (on a contractual basis), and the terms of termination of CS protection.

Summarizing the consideration of the distinction between CI and TS, we propose to clearly separate them at the legislative level. The analysis shows that currently there is practically no difference, and the owner of commercially valuable information independently determines where CI and where TS. From our point of view, CI is confidential information concerning an individual, TS is confidential information concerning legal entities, enterprises, institutions and organizations, which has a commercial value that positively affects the profit of economic entities.

Conclusions. In our opinion, the legislator should exclude from the definition of CI the mention of a legal entity, and formulate the definition of CI, for example, as follows: confidential information – information, access to which is limited to a natural person and which can be distributed in a certain manner at his will, in accordance with the conditions stipulated by him.

Having conducted an analysis of international legislation in the field of CS, we can state that in order to eliminate gaps in this field, Ukraine needs to adopt an appropriate law.

Summarizing the results of the scientific investigation, we can state that in order to improve the legal protection of CS of business in Ukraine to the international standards of the EU, it is necessary to adopt a corresponding law on TS (like the one that was developed and proposed by us in previous scientific investigations (Kravchenko, 2019).

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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Олександр КРАВЧЕНКО

МІЖНАРОДНИЙ ДОСВІД НОРМАТИВНО-ПРАВОВОЇ ОХОРОНИ КОМЕРЦІЙНИХ СЕКРЕТІВ БІЗНЕСУ

Анотація. Наукова розвідка присвячена аналізу наявного міжнародного законодавства в сфері нормативно-правової охорони комерційних секретів (КС). Пошуку напрямів удосконалення правових та інституційних механізмів охорони комерційних секретів бізнесу, а також порівняння наявних нормативно-правових документів зарубіжних держав з метою імплементації найкращого з них в національну практику. На базі проведеної наукової розвідки можемо стверджувати, що для удосконалення нормативно-правової охорони комерційної таємниці (КТ) бізнесу в Україні, потрібно прийняти відповідний закон про КТ.

На сьогодні в Україні суб'єкти господарювання самі регулюють відносини щодо визначення та охорони КТ, шляхом прийняття відповідних локальних нормативно-правових документів підприємства, установи чи організації. Таким чином, нормативно-правовим забезпеченням у сфері охорони комерційних секретів є оформлення на підприємстві, установі чи організації певних локальних документів, що забезпечують охорону та захист КТ – це наказ, статут, трудові контракти та угоди, правила внутрішнього розпорядку, які передбачають обов'язок утримуватись від розголошення її третім особам, а також встановлюють відповідальність за порушення цих умов договору.

Серед суб'єктів владних повноважень, що стосуються охорони КС в Україні, можна зазначити наступні: Кабінет Міністрів України, Міністерство культури та інформаційної політики, Міністерство економіки України, Міністерство юстиції України, Міністерство освіти і науки України, органи внутрішніх справ, зокрема органи Національної поліції, Державну фіскальну службу України, Антимонопольний комітет України, Службу безпеки України та ін.

Вважаємо за доцільне стосовно охорони КС в Україні прийняти закон, щоб врегулювати всі аспекти щодо охорони КТ бізнесу.

Ключові слова: *комерційні секрети, комерційна таємниця, конфіденційна інформація, інформація, бізнес, охорона.*

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