

Karnaukh B. P.

*Ph. D. in Law, Assistant Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: karnaukh.bogdan@gmail.com; ODCID ID: 0000-0003-1968-3051*

Tsuvina T. A.

*Ph. D. in Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: tsuvinat@gmail.com; ODCID ID: 0000-0002-5351-1475*

Sakara N. Yu.

*Ph. D. in Law, Associate Professor,
Yaroslav Mudryi National Law University, Ukraine;
e-mail: Sakaranatasha@gmail.com; ODCID ID: 0000-0001-8501-3756*

LEGAL PROTECTION OF BANK SECRECY: BALANCING PRIVATE AND PUBLIC INTERESTS

Abstract. Bank secrecy encompasses information that becomes known to the bank in the course of dealing with a client. In order to ensure an appropriate level of trust in client-bank relations, the client must be sure that the information about him will not be disclosed to the outsiders. Thus, ensuring the confidentiality of information about the client is one of the important prerequisites for the functioning of the banking system. In addition, the information contained in the bank documents of a person enjoys legal protection as an element of natural human right to respect for private life and the secret of personal correspondence. At the same time, the regime of secrecy can be used to conceal the illicit movement of capital associated with corruption, money laundering, tax evasion, etc. Therefore, ensuring absolute secrecy of client's can promote the development of criminal activities.

Thus, in order to outline the limits of banking secrecy protection one has to weigh private and public interests: on the one scale there is a right of the bank's client for privacy, on the other — the public interest, connected, in particular, but not exclusively, with the prevention and investigation of criminal activities. However it should be born in mind that pursuing a socially significant purpose does not justify the disclosure of bank secrecy automatically and in any case; instead, other circumstances have to be taken into consideration. First, the possibility of disclosure of bank secrecy should be provided by the law. Secondly, this law must meet the requirements of legal certainty: it must be clear, understandable, unambiguous, so that the consequences of its application could be predicted. Thirdly, the person in respect of which the issue of disclosure of banking secrecy is raised must be provided with the necessary procedural guarantees that would enable this person to prevent or eliminate the arbitrariness in applying the measure at hand.

Keywords: bank secrecy, confidential information, personal data,; the secret of financial monitoring, privacy.

JEL Classification G21

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 16.

Карнаух Б. П.

*кандидат юридичних наук, асистент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: karnaukh.bogdan@gmail.com; ODCID ID: 0000-0003-1968-3051*

Цувіна Т. А.

*кандидат юридичних наук, доцент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: tsuvinat@gmail.com; ODCID ID: 0000-0002-5351-1475*

Сакара Н. Ю.

*кандидат юридичних наук, доцент,
Національний юридичний університет імені Ярослава Мудрого, Україна;
e-mail: Sakaranatasha@gmail.com; ODCID ID: 0000-0001-8501-3756*

ПРАВОВА ОХОРОНА БАНКІВСЬКОЇ ТАЄМНИЦІ: БАЛАНСУВАННЯ ПРИВАТНОГО І ПУБЛІЧНОГО ІНТЕРЕСІВ

Анотація. Банківська таємниця — це інформація, яка стає відомою банкові у зв'язку з обслуговуванням клієнта. Для забезпечення належного ступеня довіри у відносинах «клієнт — банк» клієнт повинен бути впевнений, що інформація про нього не буде розголошена стороннім особам. Таким чином, забезпечення конфіденційності інформації щодо клієнта становить одну із важливих передумов функціонування банківської системи. Окрім того, інформація, що міститься в банківських документах особи, перебуває під правовою охороною як елемент природного права людини на повагу до приватного життя й таємницю особистої кореспонденції. Водночас режим таємності може бути використаний з метою приховання незаконного руху капіталів, пов'язаного із корупцією, відмиванням доходів, ухиленням від сплати податків тощо. Відтак забезпечення абсолютної секретності інформації щодо клієнта може стимулювати розвиток злочинної активності. Таким чином, визначення меж правової охорони банківської таємниці потребує ретельного зважування приватного і публічного інтересів: на одній шальці терезів — право клієнта банку на приватність, на другій — загальносуспільні інтереси, пов'язані, зокрема, але не виключно, із попередженням і розслідуванням злочинної діяльності. При цьому варто розуміти, що переслідування суспільно значимої мети не виправдовує розголошення банківської таємниці автоматично і в кожному разі; натомість до врахування підлягають й інші обставини. По-перше, можливість розкриття банківської таємниці повинна бути передбачена законом. По-друге, цей закон має відповідати вимогам правової визначеності: він має бути чітким, зрозумілим, недвозначним, так, щоб наслідки його застосування були передбачуваними. По-третє, особа, щодо якої порушується питання про розкриття банківської таємниці, повинна бути забезпечена необхідними процедурними гарантіями, які б давали їй змогу попередити або усунути свавілля у застосуванні до неї відповідного заходу.

Ключові слова: банківська таємниця, конфіденційна інформація, персональні дані, таємниця фінансового моніторингу, приватність.

Формул.: 0; рис.: 0; табл.: 0; бібл.: 16.

Карнаух Б. П.

кандидат юридических наук, асистент,

Национальный юридический университет имени Ярослава Мудрого, Украина;

e-mail: karnaugh.bogdan@gmail.com; ODCID ID: 0000-0003-1968-3051

Цуєвина Т. А.

кандидат юридических наук, доцент,

Национальный юридический университет имени Ярослава Мудрого, Украина;

e-mail: tsuvinat@gmail.com; ODCID ID: 0000-0002-5351-1475

Сакара Н. Ю.

кандидат юридических наук, доцент,

Национальный юридический университет имени Ярослава Мудрого, Украина;

e-mail: Sakaranatasha@gmail.com; ODCID ID: 0000-0001-8501-3756

ПРАВОВАЯ ОХРАНА БАНКОВСКОЙ ТАЙНЫ: БАЛАНСИРОВАНИЕ ЧАСТНОГО И ПУБЛИЧНОГО ИНТЕРЕСОВ

Аннотация. Определение границ правовой охраны банковской тайны требует тщательного взвешивания частного и публичного интересов: на одной чаше весов — право клиента банка на приватность, на другой — общественные интересы, связанные, в частности, но не исключительно, с предупреждением и расследованием преступной деятельности. Впрочем преследование общественно значимой цели не оправдывает разглашение банковской тайны автоматически и в каждом случае; к учету подлежат и другие обстоятельства. Во-первых, возможность раскрытия банковской тайны должна быть предусмотрена законом. Во-вторых, этот закон должен соответствовать требованиям

правовой определенности. В-третьих, лицо должно быть обеспечено необходимыми процедурными гарантиями, которые давали бы возможность предупредить или устранить произвол в применении соответствующей меры.

Ключевые слова: банковская тайна, конфиденциальная информация, персональные данные, тайна финансового мониторинга, приватность.

Формул: 0; рис.: 0; табл.: 0; библи.: 16.

Introduction. In the modern world it is difficult to overestimate the importance of information and information relations. Because of the rapid development of information and communication technology (ICT) the mankind has faced a new problem: how to find a balance between a smooth exchange of information on the one hand, and the right for privacy on the other. Being explicated in the area of banking, this global challenge becomes a problem of bank secrecy. On the one hand, a customer entrusts the bank with confidential information about themselves and expects it not to be disclosed to outsiders. The absence of the guarantees for privacy would be a serious threat to the banking system, since confidentiality is one of the important factors that influences customer decisions about whether to have relationship with the bank in general, and if so, which one. On the other hand, the regime of secrecy can be used to conceal a criminal activity. As it is stated in the specialist literature, «financial secrecy, among other things, enables illegal financial flows related to corruption, money laundering, tax evasion and terrorism funding... For this reason, the individuals, involved in illicit capital flows or who benefit from it, try to turn the regime of secrecy into their favor in many different ways» [1, p. 6].

Thus, the main task in the context of determining the legal regime of bank secrecy is to find the balance between the private interest of the customer in maintaining the confidentiality of their data and the public interest in preventing and counteracting any criminal activity.

Research analysis and problem identification. A lot of publications, among which it is necessary to mention the works of O. Briginets [2], D. O. Hetmantsev [3], O. O. Kalashnikova [4], N. V. Korobtsova [5], V. P. Paliyuk [6], V. Timashova [7], O. V. Chernetchuk [8] and others, were devoted to the issues of legal protection of bank secrecy. Nevertheless, the problem does not lose its urgency taking into consideration the ongoing updating of the regulatory environment of banking and the necessity to adapt national law to the appropriate area of European standards.

The purpose of the article is to establish, on the basis of the analysis of domestic and international practice, the main principles, which should determine the limits of the legal protection of bank secrecy.

Research results. Bank secrecy, in accordance with Art. 60 of the Law on Banks and Banking, «is the information about the activities and financial position of a customer that becomes known to the bank in the course of dealing with the customer or through relations with them or third parties while providing bank services. The legal regulation of bank secrecy is provided by the Civil Code of Ukraine, the Civil Procedural Code of Ukraine, the Law on Information, the Law on Protection of Personal Data, the Law on Banks and Banking, and the Law on the Prevention and Counteraction of the Legalization (Laundering) of the Incomes Received by Crime, Funding Terrorism and Proliferation of Weapons of Mass Destruction», Rules for the Storage, Protection, Use and Disclosure of Bank Secrets (as amended by the Resolution of the Board of the NBU dated July 20, 2018, No. 8 2).

In addition, according to the National Program of Adaptation of the Ukrainian Legislation to the Law of the European Union, banking law and financial services are classified as top-priority areas which should be adapted as soon as possible. Consequently, the modern studies of the appropriate spheres can not avoid the analysis of the sources of European law.

In this way, it should be noted that the problem of defining the limits of the legal protection of bank secrecy by the fair balance of private and public interests has been repeatedly raised before the European Court of Human Rights (hereinafter referred to as the ECHR, the Court) in the context of the application of Article 8 of the European Convention on Human Rights and Fundamental Rights Freedom (hereinafter referred to as the ECHR, the Convention).

So, according to Article. 8 ECHR (Right for Respect Private and Family Life) «everyone has the right for respect their private and family life, their home and correspondence. Public authorities can not interfere with the exercising of this right except the cases where the interference takes place in accordance with the law and is necessary in a democratic society in the interests of national and public safety or economic well-being of the country, in order to prevent unrests or crimes, to protect health or morals or to protect the rights and freedoms of other individuals».

At the same time, the ECHR clearly determines that the information the customer entrusts to the bank relates to their private life, and, therefore, such information comes with the provisions of Article 8 of the ECHR. «The court takes into consideration that the information received from the bank documents is undoubtedly a personal information, and it does not matter whether the information is delicate or not. Moreover, such information may also relate to their professional practice, and there is no reason to exclude a professional or entrepreneurial activity from the notion of «privacy» [9, § 51].

A well known case, in which the ECtHR clearly articulated the principles according to which the balance in the matters of bank secrecy has to be determined, was G.S.B. against Switzerland [10].

In 2008, the tax authorities of the USA found out that thousands of American taxpayers had undeclared accounts with the UBS SA in Geneva (hereinafter referred to as «the Bank»). The US tax service brought in a civil lawsuit against the Bank requesting the disclosure of information about 52,000 US customers. The case found an interstate resonance.

The Federal Government of Switzerland and the United States of America made the «Agreement on the Demand of the US Tax Service towards the Swiss company UBS SA». Under this Agreement, Switzerland pledged to assist the United States in obtaining all the necessary information.

Referring to the Agreement, the US Tax Service sent in 2009 the request to the Tax Service of Switzerland to provide them information about American taxpayers who, during the period from January 01, 2001 to December 31, 2008, had ‘the right of signature or access» to bank accounts which were opened, serviced or provided by the UBS SA or its branches or subsidiaries in Switzerland.» Eventually, this demand from the US tax authorities was met.

One of the bank’s customers, a US citizen, appealed to the European Court of Human Rights, arguing that, having reported the USA the information which was considered to be bank secrecy, Switzerland thereby violated his right for respect the private life guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the established practice of the ECHR, the disclosure or transfer of bank secrecy is seen as interference with the individuals’ private life and correspondence. In this case, «such interference is regarded as the violation of Article 8, except the cases when it complies with the requirements provided for in part two of this article» [10, § 52].

So, taking into consideration the provisions of Part 2 of Art. 8 The ECHR, in such cases the Court must determine (a) whether the interference was «in accordance with the law», (b) whether it pursued one or more of the legitimate aims provided for in Part 2 of Art. 8 ECHR, and, finally, (c) whether it was «necessary in a democratic society» to achieve its goals [10, § 52].

As for the first requirement — «compliance with the law» — the ECHR emphasizes that the expression «in accordance with the law» does not only require the disputed measure to base itself on national law, but it also relates to the quality of the law and requires the law to be accessible to a person and predictable in its consequences «[9, § 72].

Taking into account this fact, the appellant in the case argued that Switzerland had not fulfilled the requirement of predictability of the law, since the Agreement was applied retrospectively: information was provided to the US tax authorities about the events that had taken place eight years before the Agreement came into force. [10, §54]

However, the Court rejected this argument, noting that the provisions of the Agreement are essentially the rules of the procedural law, and the rules of the procedural law must immediately be brought into judicial proceedings that are ongoing at the time of bringing into force such rules,

regardless of the fact that the circumstances of life related to the proceedings could have taken place long before the adoption of the corresponding procedural rules [10, § 77].

As for the second condition- the existence of a legitimate aim- the Court stated: «Given that banking is an extremely important sector of the economy of Switzerland, the Court notes that the disputed measures were the part of the comprehensive efforts of the Swiss Government to resolve the conflict between the UBS Bank and the tax authorities of the USA. The measures taken should be regarded as contributing to the protection of the country's economic prosperity. The court accepts the Government's argument that the claims made by the US tax authorities against Swiss banks could threaten the further existence of the UBS SA bank, which is a key player of Swiss economy and the employer for a significant number of citizens, which explains the interest of Switzerland in searching for an effective legal solution through cooperation with the United States» [10, § 83].

Finally, with regard to the third condition, the Court concluded that, «taking into account all the circumstances of the case, and in particular in the light of the non-personal nature of the information disclosed, it was not unreasonable for Switzerland to give preference to the general interest in an effective and mutually beneficial agreement with the United States of America and not the private interests of the appellant» [10, § 97].

The opposite example, when the ECtHR came to the conclusion that the state did not find a balance between private and public interests in bank secrecy, was the case Sommer against Germany [11].

The appellant, a lawyer in criminal cases, defended a client accused of committing a crime in 2009. When the case was completed, the client's bride transferred to the lawyer's account one and a half thousand euros, indicating in the payment order that it was the payment for the lawyers' services.

In 2011, new criminal proceedings were initiated against the said client: this time he was charged with financial fraud. The investigation found out that the fiancée of the suspect had received from him funds that were derived from his criminal activity. Upon finding that she had transferred some of those funds to the appellant (as payment for his advocacy services in the previous case), the prosecutor's office requested the appellant's bank to submit a list of all transactions on the appellant's account for more than two years. At the same time, the prosecutor's office forbade to inform the appellant about this measure.

The bank fulfilled the requirement of the prosecutor's office. The information was analyzed and eventually the list of 53 transactions was added to the criminal proceedings. Accordingly, anyone who had access to the case file could read the data about the appellant's bank transactions.

Since the appellant represented his client and on other charges, he, while investigating the materials of the case, discovered unexpectedly that they contained his bank information. After numerous attempts to extract this data from the case file, the appellant turned to the ECtHR.

The Court confirmed that «collection, storage and dissemination of data on the appellant's professional transactions is the interference with the right for respect professional secrecy and privacy» [11, § 48]. Such interference, however, may be compatible with the Convention if the conditions provided for in paragraph 2 of art. 8 ECHR are observed.

When analyzing whether that interference was «necessary in a democratic society», the Court emphasized, firstly, that «necessity means that the interference corresponds to an urgent public need and is proportional to the legitimate aim pursued» [11, § 55]; secondly, «on assessing the necessity in certain interference, the Court must be convinced that sufficient and adequate safeguards against arbitrariness have been provided, including the possibility of effective control over the measure disputed» [11, § 56].

In this context, the Court drew attention to the considerable amount of information requested by the prosecutor, namely, the data about the appellant's transactions for more than two-year period. Such an array of data, in the Court's opinion, provided a «complete picture of the professional activity» of the appellant during that period, including the list of his clients. Moreover,

this data became available not only to the prosecutor's office, but also to other persons who had access to the case, including other lawyers.

The Court further noted that the applicant had not been provided with the necessary guarantees against arbitrariness in the application of the measure, since the applicant had not been notified of it and could not challenge it [11, § 62].

Together with the fact that the suspicions towards the appellant were rather vague and uncertain, all the facts above mentioned provided the Court with the grounds to conclude that the interference with the appellant's rights was disproportionate and, consequently, violated the provisions of Article 8 of the ECHR.

In Ukrainian law, the procedure for disclosure of bank secrecy is stipulated in Article 62 of the Law on Banks and Banking. In the context of this article, it is necessary to distinguish three cases in which bank secrecy is subject to disclosure:

- (a) upon a written request or with the written permission of a legal entity or an individual to whom the information which contains bank secrecy relates;
- (b) by a court decision; or
- (c) upon a written request of the authorised state bodies.

In the latter case, no appeal to court is required, since the appropriate state bodies are directly empowered by law to require that all the necessary information should be provided immediately to them. However, it is necessary to make several important remarks. Firstly, the list of state bodies empowered to require the disclosure of bank secrecy is clearly envisaged by law. Secondly, the law sets up clear limits within which the full power can be exercised. This, in particular, means that both the necessity in the disclosure of bank secrecy and the specific amount of information to be disclosed must be justified in terms of the competence and the tasks assigned to the corresponding public body. In its decision No. 10 of 30.09. The Plenary Session of the Highest Specialized Court stated: «The circle of the entities who are entitled to request directly from a bank the disclosure of the information which contains bank secrecy is determined by law (Article 62 of Law No. 2121-III) and can be only changed on the basis of the law. Moreover, these entities are only entitled to receive limited information, taking into account their functions and the issues specified in the corresponding law in relation to the identified entities» [12, paragraph 2].

Thus, in the case of 6-553sv10, during the inspection of a bank the State Tax Administration (hereinafter — STA) revealed that a person was made a loan in the bank of 28 thousand USD, whereas, according to the data of the central database of the State Register of Natural Persons of the STA of Ukraine, there was no information on the income of this person for the relevant period.

Taking into consideration the above mentioned, the STA turned to court with the requirement that bank should disclose the information that contains bank secrecy about the person, namely to provide them with the certified copy of the loan agreement and the copies of the documents on the basis of which this contract was concluded and the customer's income statements.

The courts of all three instances refused to allow the claim of the State Tax Administration, noting that «the powers of the tax authorities do not include the disclosure of bank secrecy as for checking a customer's and his warrantor's creditworthiness, and, in particular, for the recovery of the copies of their credit agreements, income statements» [13].

If the public body, which is empowered to demand that a bank should disclose its customer's information, for one or another big cause requires to disclose information required in a broader scope than it is determined by law for that body, it should turn to the court. As the Plenary meeting of the High Specialized Court noted, «in case of necessity of obtaining the information that goes beyond the functions of the entities that have the right to demand directly from the bank the disclosure of any information which contains bank secrecy, they are entitled to turn to the court in accordance with the procedure provided for by the Civil Procedural Code of Ukraine» [12, paragraph 2].

Thirdly, the judicial practice developed the position according to which the disclosure of bank secrecy should be regarded as an extreme measure: the state authority may only resort to this

measure if it has exhausted all other legal mechanisms that are at its disposal to achieve the relevant goals. The Plenary meeting of the High Specialized Court explained: «In case the grounds for turning to the court, in particular by the state tax authority, with the petition on the disclosure of bank secrecy, are the actions of the violator of tax legislation, and there is the way for responding to such actions that is provided by corresponding laws in relation to such actions for these bodies, then the court has no grounds to grant the appeal. The exception is the substantiated references of the appellant to the inability to perform actions in accordance with the response methods provided for by the corresponding laws. In particular, they may be justified references together with the submission of the relevant evidence that the person, in respect of which the disclosure of bank secrecy is required, is not at the place of their registration; or it can be a confirmed impossibility of handing a notification with the copy of the order on conducting documentary verification, etc.» [12, p. 12]. As for the tax authorities, the resolution of the Plenary meeting specifically notes that «the failure itself to submit tax returns or their calculations in due time, the necessity to verify their authenticity, the completeness of the charges and the payment of all taxes and fees stipulated by the CPU, as well as compliance with currency and other legislation, etc., are the basis for the bodies of the State Tax Service of inspections, to initiate checks in accordance with the procedure specified in Chapter 8 of the Tax Code. In this case the disclosure of bank secrecy is possible if the state tax authority proves the circumstances because of which checks are impossible or there is another objective necessity to disclose bank secrecy» [12, paragraph 13].

Thus, in the case of 6-26926sv08, the State Tax Inspectorate applied to court with a petition on disclosure by the bank the information which contains bank secrecy, referring to the fact that it is impossible to carry out an unscheduled on-site audit of a private entrepreneur's documentation because primary accounting, bank and cash documents for verification had not been provided. Therefore, in order to identify the actual income and expenses of the private entrepreneur, to verify the authenticity of the information entered in the tax returns and to identify the commodity-money flow schemes of the said taxpayer, it is necessary to obtain information on the cash flow on his bank account. The circumstances the tax inspectorate referred to were taken into account by the courts and the petition was granted [14].

Another unobvious conclusion that comes from the systematic analysis of the provisions of Article 62 of the Law «On Banks and Banking» concerns the disclosure of information about counterparties. Various transactions on the account of the person, the information about which is required to be disclosed, involve the participation of other persons (who transfer funds to the appropriate account, or on whose account the funds are transferred by the said person). Such persons (counterparties) may fall into the field of vision of public authorities «among others», despite the fact that the request for the disclosure of information did not initially concern them.

In this respect, Article 62 of the Law «On Banks and Banking» contains the indication that «the bank is forbidden to provide information about the customers of another bank, even if their names are indicated in documents, transactions and operations of the customer». On the grounds of the previously mentioned delimitation of three different reasons for the disclosure of bank secrecy, the position was formulated in the judicial practise according to which the prohibition for the disclosure of the information about counterparties is only applied when it comes to the disclosure of information at the request of a public authority; at the same time, if the information is disclosed by the court decision, such a prohibition does not operate.

Thus, in the case No. 6-22159sv08, the State Tax Inspectorate in the Artemivsk district of Luhansk region (hereinafter referred to as DPI) applied to court with a petition on the disclosure by the bank of the information which contained bank secrecy about the LLC «Luhtehsnab» (hereinafter referred to as «Luhtehsnab» ltd.). The DPI noted that «Luhtehsnab» ltd. was registered with the State Tax Inspectorate in the Artemivsk district of Luhansk region. Referring to the fact that «Luhtehsnab» ltd. had not filed its income tax return, the State Tax Inspectorate asked the court to oblige the joint-stock company Index-Bank to disclose the bank secrecy regarding «Luhtehsnab» ltd. about the amount and turnover of funds on the account of with the decoding of its counterparties, on the account LLC «Luhtehsnab».

The court of the first instance and the Court of Appeal satisfied the claim partly but refused the part concerning the disclosure of information about its counterparties.

However, the Supreme Court of Ukraine did not agree with such conclusions, noting that «the decision of the court on the disclosure of bank secrecy and the written request of the body of the State Tax Service of Ukraine are separate and independent grounds for the disclosure by the bank of bank secrecy... However, the clause 3.5 of the Rules of storage, protection, use and disclosure of bank secrecy, approved by the Resolution of the Board of the National Bank of Ukraine of July 14, 2006 N 267, envisages that it is prohibited for a bank to provide information about the customers of another bank, even if they are indicated in the documents, contracts and operations of the customer, unless otherwise is specified in the authorization of the customer of another bank or in the requirement, decision (ruling) of the court «[15] (italics is ours — B.K., T. Ts., N. C.) Taking into consideration the above, the Supreme Court of Ukraine came to the conclusion that the prohibition to disclose information about counteragents does not involve the cases where such disclosure takes place according to the decision of the court and so it canceled the decisions of the previous instances. The same conclusion was reached by the Supreme Court of Ukraine in the case of 6-26926sv08, stating clearly that «information about the customers of another bank can be provided if it is indicated in a court decision» [15].

It should be noted together with it that the protection of the interests of counterparties and other persons who, through one or several transactions links, may be related to the person whose bank secrecy is being disclosed, was also the subject of study in the practice of the ECtHR. In this aspect the case MN and others v. San Marino [9] deserves attention.

In Italy, in 2009, criminal proceedings were initiated against a number of individuals (the appellants did not belong to them). They were charged, among other things, with money laundering, abusing the state of the financial market, embezzlement, tax evasion and fraud. As it was stated, using the company S.M.I., located in San Marino, the suspects carried out investment and trust operations that allowed many Italian customers to launder the gains received from their illegal activities.

Within these proceedings, the Italian prosecutor's office sent a judicial order to the San Marino judicial authorities requesting their assistance in obtaining documents and making searches in a number of banks, fiduciary institutions and trusts in accordance with the bilateral Convention on Friendship and Good Neighborliness between Italy and San Marino.

The court of San Marino accepted this request and instituted an inquiry in all banks, fiduciary institutions and trusts in San Marino. The purpose of the inquiry was «to obtain information and bank documents (in particular, the copies of the extracts on transactions and cash flows, cheques, trust orders and e-mails) concerning a number of certain current accounts in certain institutions, as well as any other current accounts that may be connected with SMI and which are open in all the banks and fiduciary institutions of San Marino and directly or indirectly interacted with the companies or natural persons mentioned in the decision» [9, §9].

Given such extensive formulation, almost 1,500 Italian citizens entered the orbit of this inquiry and the bank secrecy about them was disclosed by the investigation authorities. The appellants appeared to be among them.

Conceiving that their rights were violated, the appellants turned to the Appeal Criminal Court of San Marino. They emphasized that they were not accused or suspected of a criminal offense, and therefore the disclosure of information about them was unlawful. However, the Appeal Criminal Court found their complaints inadmissible, referring to the fact that only «interested parties», namely the accused or suspected and the banking institutions that require the disclosure of this information could dispute such measures. The court of third instance agreed with that reasoning.

The appellants, therefore, turned to the ECtHR alleging the violation of two articles of the Convention, namely, Art. 6 (the right for a fair trial) and Art. 8 (the right for respect private life).

The appellants complained in the context of Art. 6 § 1 of the ECHR that they had not had an effective access to the court to appeal the decision on the disclosure of their bank secrecy. In the

context of Article 8, they noted that this measure was an interference with their private life and their correspondence, and it was neither lawful nor proportionate, and did not provide for the necessary procedural guarantees [9, § 24]. The appellants emphasized, in particular, that the decision of the court of San Marino «provided the investigating authorities with an almost unlimited right to decide what exact documents are to be sought» [9, § 58].

While examining whether the measure taken was necessary in a democratic society and whether it provided for the necessary procedural guarantees, the ECtHR draw attention to, first of all, the wide range of actions of the decisions of the court of San Marino, which also affected, one of the appellants — the person who was not under investigation and against whom no clear suspicion was put forward [9, § 77]. The ECHR emphasized that court of the San Marino had not properly studied the necessity in such a wide investigation and its influence on numerous third parties.

Secondly, the ECtHR drew attention to the fact that, under the circumstances of this case, the appellant, who had not been charged with a criminal offense, was, in fact, in a considerably worse condition in comparison with the accused, taking into consideration the fact that, unlike the latter, the appellant was not able to protect his interests. The appellant did not have an «effective control» which should be available to citizens in accordance with the rule of law, and the presence of which could make the interference on disputing such that meets the criterion of «necessity in a democratic society» [9, § 83].

Taking into account the facts mentioned, the ECtHR stated that there had been violation of Article 8 of the ECHR [9, § 85].

Thus, as it can be seen from the decisions of the ECHR, it is important whether the person could control the applying to him such measure as the disclosure of bank secrecy. In this context, it is worth paying attention to the peculiarities of the procedure for hearing the cases on the disclosure by a bank the information which contains bank secrecy (Chapter 12 of the Civil Procedural Code of Ukraine, hereinafter referred to as the Civil Code of Ukraine). Thus, part one of Article. 349 of the GIC of Ukraine provides that such cases can be heard without notifying the person, in respect of which the disclosure of bank secrecy is required, if it is dictated by the need to protect state interests. At the same time, the Plenary meeting of the High Specialized Court emphasized that this can only take place in exceptional cases [12, para. 9], whereas, according to the general rule, the person involved should be informed of the proceedings concerning him or her. However, even a case is heard without notifying the person in respect of which the disclosure of bank secrecy is required, the court nevertheless is obliged to send a copy of the decision approved by it to the person (Part 3 of Article 350 of the Civil Code of Ukraine). Thus, even if a person is not involved in the case, he or she is still not deprived of the opportunity to control the measure taken against them by disputing the court decision in the Court of Appeal in accordance with Part 3 of Art. 350 of the Civil Code of Ukraine.

Finally, it should be noted that in 2011, some amendments were made to Art. 61 of the Law on Banks and Banking. These changes made it possible for banks to conclude contracts with debt recovery companies that provide debt collectors with the information about debtors. In this case, respectively, the obligation to keep the customer's secret is placed upon the debt recovery company. The case # 712\6137\15-ts can illustrate the application of the redrafted Article 61 of the Law «On Banks and Banking».

The plaintiff received a loan from PJSC «Ukrsotsbank». Since the credit funds were not returned in time, the bank turned to the court. The court made a decision to recover the debt, but this decision was not carried out by the debtor for a long time.

Further, the bank concluded an agreement with a debt recovery company, under the terms of which the latter undertook the commitment, for certain remuneration, to carry out on behalf of the principal legal and actual actions to recover both term and overdue debts from the debtor of the principal. For this purpose, the debt recovery company was provided with a list of debtors, amounts of debts and other necessary information.

In order to fulfill the agreement, the debt recovery company repeatedly claimed the plaintiff to repay his debts.

The plaintiff, on the other hand, believed that the bank, having provided information to debt collectors, violated bank secrecy. For this reason, the plaintiff turned to court requiring that the debt recovery company should be prohibited from taking actions to recover the debt under his loan agreement.

On hearing the case, the Supreme Court drew attention to the provisions of part three of Art. 61 of the Law «On Banks and Banking», according to which «the Bank has the right to provide information that contains bank secrecy to individuals and organizations to guarantee the performance of their functions or providing services to the bank in accordance with the agreements concluded between such persons (organizations) and the bank, including the assignment of a claim to a client, provided that the functions and / or services stipulated by the contracts relate to the activities of the bank which it carries out in accordance with Article 47 of this Law».

Referring to this article, the Supreme Court stated: «The appellant's arguments in his cassation petition that the defendant of PJSC» Ukrspotsbank «disclosed the personal data of the plaintiff, in particular the information about his accounts and other confidential information, which concerns exclusively the relationship between the bank and the customer, are not worth noticing, as the legislation of Ukraine provides for the right of the bank to authorize third parties to represent its interests (to transfer their rights and obligations under a loan agreement) when providing services to the bank. There is no necessity in a written permission of the owner of confidential information in this case, since the said organizations are warned about the prohibition to disclose confidential information about the customer and about the responsibility for its leakage» [15].

Conclusions Determining the limits of legal protection of bank secrecy requires the careful weighting of private and public interests: on one scale there is the right of the bank's customer for privacy, on the other there are public interests, connected, in particular, but not exclusively, with the prevention and investigation of criminal activity. It should be understood, however, that pursuing a socially significant purpose does not justify the disclosure of bank secrecy automatically and in any other case; other circumstances as well are to be taken into consideration. Firstly, the necessity in the disclosure of bank secrecy should be provided by law. Secondly, this law must correspond to the requirements of legal certainty: it must be clear, understandable, unambiguous, so that the consequences of its application can be predictable. Thirdly, the person in respect of which the legal proceeding of the disclosure of bank secrecy is initiated must be provided with the necessary procedural guarantees that would enable them to prevent or eliminate the arbitrariness in applying to them an adequate measure.

Література

1. Janský P. Financial Secrecy affecting the European Union: Patterns across member states, and what to do about it [Electronic resource] / P. Janský, A. Knobel, M. Meinzer, M. Palanský // Tax Justice Network. — 2018. — 24 September. — Available at : <https://www.taxjustice.net/wp-content/uploads/2018/09/Financial-Secrecy-affecting-the-European-Union-Policy-Paper-Tax-Justice-Network.pdf>.
2. Бригінець О. О. Сутність комерційної або банківської таємниці як об'єкта злочинних посягань / О. О. Бригінець // Економіка та право. — 2017. — № 3. — С. 69—73.
3. Гетманцев Д. О. Банківська таємниця: особливості її нормативно-правового регулювання в Україні та в законодавстві зарубіжних країн : автореф. дис. ... канд. юрид. наук : 12.00.07 «Теорія управління, адміністративне право і процес, фінансове право» / Д. О. Гетманцев. — Київ, 2003. — 20 с.
4. Калашнікова О. О. Збереження банківської таємниці як умова договору банківського рахунку / О. О. Калашнікова // Альманах права / Ін-т держави і права ім. В. М. Корецького НАН України ; редкол. : Ю. С. Шемшученко (голов. ред.) [та ін.]. — Київ : Ін-т держави і права ім. В. М. Корецького НАН України, 2015. — Вип. 6 : Ціннісно-правові засади сучасних інтеграційних процесів в Україні. — С. 438—442.
5. Коробцова Н. В. Цивільно-правова охорона таємниць особистого життя людини : монографія / Н. В. Коробцова. — Харків : ІНЖЕК, 2005. — 152 с.
6. Паліюк В. П. Розгляд судами справ про розкриття банківської таємниці / В. П. Паліюк. — Миколаїв : Ліон, 2008. — 388 с.
7. Тімашов В. Правове регулювання банківської таємниці / В. Тімашов, О. Севастьяненко // Підприємництво, господарство і право. — 2018. — № 11. — С. 130—134.
8. Чернадчук О. В. Конфіденційність інформації клієнта банку: актуальні питання / О. В. Чернадчук // Інформація і право. — 2016. — № 1. — С. 37—43.
9. In the Case of M. N. and others v. SAN MARINO [Electronic resource] / The European Court of Human Rights // HUDOC. — Strasbourg, 2015. — July 7. — Available at : <http://hudoc.echr.coe.int/eng?i=001-155819>.

10. In the case of G.S.B. v. Switzerland [Electronic resource] / The European Court of Human Rights // HUDOC. — Strasbourg, 2015. — December 22. — Available at : <http://hudoc.echr.coe.int/eng?i=001-159732>.
11. In the case of Sommer v. Germany [Electronic resource] / The European Court of Human Rights // HUDOC. — Strasbourg, 2017. — April 27. — Available at : <http://hudoc.echr.coe.int/eng?i=001-173091>.
12. Постанова пленуму Вищого спеціалізованого суду з розгляду цивільних і кримінальних справ від 30.09.2011 № 10 [Електронний ресурс] // Законодавство України. — Режим доступу : <https://zakon.rada.gov.ua/laws/show/v0010740-11>.
13. Ухвала Верховного Суду України від 08.09.2010 у справі № 6-553св10 [Електронний ресурс] // Єдиний державний реєстр судових рішень. — 2010. — 8 вересня. — Режим доступу : <http://reyestr.court.gov.ua/Review/11176885>.
14. Ухвала Верховного Суду України від 02.06.2010 у справі № 6-26926св08 [Електронний ресурс] // Єдиний державний реєстр судових рішень. — 2010. — 2 червня. — Режим доступу : <http://reyestr.court.gov.ua/Review/10121180>.
15. Ухвала Верховного Суду України від 01.04.2009 у справі № 6-22159св08 [Електронний ресурс] // Єдиний державний реєстр судових рішень. — 2009. — 1 квітня. — Режим доступу : <http://reyestr.court.gov.ua/Review/3369773>.
16. Постанова Касаційного цивільного суду від 10.05.2018 у справі № 712/6137/15ц [Електронний ресурс] // Єдиний державний реєстр судових рішень. — 2018. — 10 травня. — Режим доступу : <http://reyestr.court.gov.ua/Review/74264394>.

Стаття рекомендована до друку 24.05.2019

© Карнаух Б. П., Цувіна Т. А.,
Сакара Н. Ю.

References

1. Janský, P., Knobel, A., Meinzer, M., & Palanský, M. (2018). Financial Secrecy affecting the European Union: Patterns across member states, and what to do about it. Retrieved from <https://www.taxjustice.net/wp-content/uploads/2018/09/Financial-Secrecy-affecting-the-European-Union-Policy-Paper-Tax-Justice-Network.pdf>.
2. Bryhinets, O. O. (2017). Sutnist komertsiiinoi abo bankivskoi taiemnytsi yak objekta zlochynnykh posiahan [The essence of commercial or banking secrecy as the object of criminal encroachment]. *Ekonomika ta pravo — Economics and Law*, 3, 69—73 [in Ukrainian].
3. Hetmantsev, D. O. (2003). Bankivska taiemnytsia: osoblyvosti yii normatyvno-pravovoho rehulivannia v Ukraini ta v zakonodavstvi zarubizhnykh krain [Bank secrecy: peculiarities of its legal regulation in Ukraine and in the legislation of foreign countries]. *Extended abstract of candidate's thesis*. Kyiv [in Ukrainian].
4. Kalashnikova, O. O. (2015). Zberezhennia bankivskoi taiemnytsi yak umova dohovoru bankivskoho rakhunku [Retaining of bank secrecy as a term of a bank account agreement]. Yu. S. Shemchushenko (et al.) (Eds.). *Almanakh prava — Almanac of right*, 6, 438—442 [in Ukrainian].
5. Korobtsova, N. V. (2005). *Tsyvilno-pravova okhorona taiemnytsi osobystoho zhyttia liudyny* [Civil law protection of secrets of personal life]. Kharkiv: Vyd. Dim «INZhEK» [in Ukrainian].
6. Paliuk, V. P. (2008). *Rozghliad sudamy sprav pro rozkryttia bankivskoi taiemnytsi* [Consideration by the courts of cases on disclosure of bank secrecy]. Mykolaiv: Ilion [in Ukrainian].
7. Timashov, V., & Sevastianenko, O. (2018). Pravove rehulivannia bankivskoi taiemnytsi [Legal regulation of bank secrecy]. *Pidpriemnytstvo, gospodarstvo i pravo — Entrepreneurship, economy and law*, 11, 130—134 [in Ukrainian].
8. Chernadchuk, O. V. (2016). Konfidentsiinst informatsii kliienta banku: aktualni pytannia [Confidentiality of bank client's information: topical issues]. *Informatsiia i pravo — Information and right*, 1, 37—43 [in Ukrainian].
9. The European Court of Human Rights. (2015, July 7). In the Case of M. N. and others v. San Marino. HUDOC. Strasbourg. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-155819>.
10. The European Court of Human Rights. (2015, December 22). In the case of G.S.B. v. Switzerland. HUDOC. Strasbourg. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-159732>.
11. The European Court of Human Rights (2017, April 27). In the case of Sommer v. Germany. HUDOC. Strasbourg. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-173091>.
12. Postanova Plenumu Vyshchoho spetsializovanoho sudu Ukrainy z rozghliadu tsyvilnykh i kryminalnykh sprav vid 30.09.2011 r. № 11 [Ruling of the Plenum of the High Specialized Court of Ukraine for Civil and Criminal Cases 30.09.2011 № 11]. (2011). *Zakonodavstvo Ukrainy — Legislation of Ukraine*. Retrieved from <https://zakon.rada.gov.ua/laws/show/v0010740-11> [in Ukrainian].
13. Ukhvala Verkhovnoho Sudu Ukrainy vid 08.09.2010 u spravi № 6-553sv10 [Decision of Supreme Court of Ukraine 08.09.2010, case № 6-553sv10]. (2010, September 8). *Yedyni derzhavnyi reiestr sudovykh rishen — The only state register of court decisions*. Retrieved from <http://reyestr.court.gov.ua/Review/11176885> [in Ukrainian].
14. Ukhvala Verkhovnoho Sudu Ukrainy vid 02.06.2010 u spravi № 6-26926sv08 [Decision of Supreme Court of Ukraine 02.06.2010, case № 26926sv08]. (2010, June 2). *Yedyni derzhavnyi reiestr sudovykh rishen — The only state register of court decisions*. Retrieved from <http://reyestr.court.gov.ua/Review/10121180> [in Ukrainian].
15. Ukhvala Verkhovnoho Sudu Ukrainy vid 01.04.2009 u spravi № 6-6-22159sv08 [Decision of Supreme Court of Ukraine 01.04.2009, case № 6-22159sv08]. (2009, April 1). *Yedyni derzhavnyi reiestr sudovykh rishen — The only state register of court decisions*. Retrieved from <http://reyestr.court.gov.ua/Review/3369773> [in Ukrainian].
16. Postanova Kasatsiinoho tsyvilnoho sudu vid 10.05.2018 u spravi № 712/6137/15ts [Judgement of Civil Court of Cassation 10.05.2018 case № 712/6137/15ts]. (2018, May 10). *Yedyni derzhavnyi reiestr sudovykh rishen — The only state register of court decisions*. Retrieved from <http://reyestr.court.gov.ua/Review/74264394> [in Ukrainian].

The article is recommended for printing 24.05.2019

© Karnaukh B. P., Tsuvina T. A.,
Sakara N. Yu.