

Characteristics of liability for disclosure of bank secrecy in Europe and the United States

Características de la responsabilidad por revelación del secreto bancario en Europa y Estados Unidos

DOI: <https://doi.org/10.17981/juridcuc.19.1.2023.11>

Fecha de Recepción: 2022/11/17. Fecha de Aceptación: 2023/04/12.

Volodymyr Cherniei 

National Academy of Internal Affairs. Kyiv (Ukraine)
v774910@gmail.com

Serhii Cherniavskiy 

National Academy of Internal Affairs. Kyiv (Ukraine)
0677443745@gmail.com

Viktoria Babanina 

National Academy of Internal Affairs. Kyiv (Ukraine)
v774910@gmail.com

Olena Tykhonova 

National Academy of Internal Affairs. Kyiv (Ukraine)
fin-bezpeka@ukr.net

Hanna Hudkova 

National Academy of Internal Affairs. Kyiv (Ukraine)
anazledenko@gmail.com

For cite this article:

Chernei, V., Cherniavskiy, S., Babanina, V., Tykhonova, O. & Hudkova, H. (2023). Characteristics of liability for disclosure of bank secrecy in Europe and the United States. *Jurídicas CUC*, 19(1), 311–338. DOI: <http://doi.org/10.17981/juridcuc.19.1.2023.11>

Abstract

This paper looks into peculiarities of the legislative approaches to the liability for disclosure of bank secrecy in Europe and United States. The scope of the article is to elaborate general characteristics of liability for disclosure of banking secrecy, revealing types and subjects of legal liability for the disclosure of banking secrecy. To achieve the aim of the article, general and specific research methods were used, in particular, dialectical, formal-logical, dogmatic and comparative-legal. The main research method is comparative-legal. It helped to study the world experience of regulatory ensuring of banking secrecy as well as to reveal specifics of banking legislation, aimed at protection of banking secrecy. The conclusion is made, that in most developed countries, banking secrecy is considered a special kind of trade secret and enshrined in various regulations, which are mostly universal in nature. The legislation of developed countries provides for the prosecution of those responsible for the disclosure of banking secrecy to criminal, civil, administrative, disciplinary and other types of legal responsibility.

Keywords: Banking secrecy; legal liability; disclosure; banking legislation; criminal liability; trade secret

Resumen

Este artículo examina las peculiaridades de los enfoques legislativos de la responsabilidad por revelación del secreto bancario en Europa y Estados Unidos. El objetivo del artículo caracterizar la responsabilidad jurídica por la revelación del secreto bancario, mediante la descripción de los tipos y sujetos de la responsabilidad jurídica. Para alcanzar el objetivo del artículo, se utilizaron métodos de investigación formal-lógico, documental y comparativo; lo cual, ayudó a describir los aspectos relevantes de la regulación comparada internacional que garantiza el secreto bancario, así como a explicar las especificidades de la legislación bancaria, destinada a la protección del secreto bancario. Se llega a la conclusión de que en la mayoría de los países desarrollados, el secreto bancario se considera un tipo especial de secreto comercial y está consagrado en diversas normativas, que en su mayoría son de carácter universal. La legislación de los países desarrollados prevé el enjuiciamiento de los responsables de la divulgación del secreto bancario por la vía penal, civil, administrativa, disciplinaria, además de otros tipos de responsabilidad jurídica.

Palabras clave: Secreto bancario; responsabilidad legal; divulgación; legislación bancaria; responsabilidad penal; Secreto comercial

© The author; licensee Universidad de la Costa - CUC.

JURÍDICAS CUC vol. 19 no. 1, pp. 311–338. January - December, 2023
Barranquilla. ISSN 1692-3030 Impreso, ISSN 2389-7716 Online



INTRODUCTION

A stable banking system is one of the key factors in the economic well-being and growth of the state. It is banking secrecy that guarantees such stability of the state's banking system and is designed to ensure its effective functioning. The level of trust of banking users in banking structures actually depends on this. The institute of banking secrecy is designed to ensure reliable and safe development of business.

In this regard, the legal institution of banking secrecy acts as an integral element of the legal system of the state, the content of which is determined by the peculiarities of the socio-economic and legal system of the country.

Banking secrecy is an extremely important element of relationships in banking practice. The statutory obligation of the bank to maintain secrecy deserves special attention. All credit institutions (banks) without exception are obliged to maintain secrecy. This principle means that they should not allow information about their customers to come out. This is information of any kind, but above all, credit institutions do not have the right to disclose information about the property status of the client and the economic condition of his company.

The importance of the institution of banking secrecy is due to the fact that it is closely linked to the individual's right to privacy.

Since banking secrecy is aimed at ensuring a relationship of trust between the bank and the client, and the obligation to maintain it is borne by all employees of the bank by virtue of their professional functions, it should be noted that banking secrecy is a type of professional secrecy.

The activity of the bank, which is carried out professionally, is a criterion for determining the nature of information that constitutes banking secrecy. In other words, banking secrecy should be considered as an additional obligation arising in connection with the principal obligation, securing and accompanying the principal obligation, however, this obligation must be maintained even after

the termination of the principal obligation (i.e. termination bank deposit agreement).

Thus, banking secrecy as a certain type of information with limited access, is designed to protect information, the free circulation of which may violate the rights and interests of bank customers.

DISCUSSION

General characteristics of liability for disclosure of banking secrecy

One of the most important indicators of the development of modern banks is how much attention they pay to the protection of banking secrecy. Ultimately, the level of trust of each of its clients depends on how reliable the protection of bank secrecy is and the level of non-disclosure of such information. In turn, the disclosure of banking secrecy in the presence of appropriate grounds leads to legal liability with the application of appropriate sanctions.

Banking secrecy is confidential information about the personal data of persons protected by law. Legal protection and safeguarding of banking secrecy is guaranteed by the state and is ensured through the use of statutory means of state coercion.

The application of legal mechanisms of legal liability for the disclosure of banking secrecy is a legal means of ensuring such secrecy.

Legislation is the guarantor of the protection of banking secrecy within the state. Persons guilty of violating the general procedure for the disclosure and use of banking secrecy must be held accountable in accordance with the law.

Legal liability is the most important mechanism for guaranteeing and ensuring the rights and freedoms of the subjects of legal relations ([Smirnov, 2012](#)). It is a system-forming category of jurisprudence.

There is no single approach to determining legal liability in the legal literature. Legal liability has its own legal content and features. The most universal legal responsibility is defined as a measure of state coercion.

Attempts to determine the place of legal responsibility in the mechanism of legal regulation of public relations often encounter two major obstacles. The first appears to the representatives of the science of legal theory in the form of insufficient understanding of the practical aspects of legal responsibility, and the second —to the representatives of the branch sciences, when the features of a particular type of legal responsibility begin to be mechanically transferred to legal responsibility (Kovalenko et al., 2018).

In legal science, legal liability is considered from the standpoint of a number of approaches. There are five main reasons for this (Seredyuk, 2015):

First, there is no legal definition of “legal liability” or even a definition of any of the sectoral types of liability. Second, the concept of responsibility is characterized by polysemantic in terms of etymological or linguistic analysis of the concept.

Philosophical and social science literature also does not contain a single clear understanding of the concepts of “responsibility” and “social responsibility”, which would complement the study of legal responsibility.

Third, any legal phenomenon can be considered within different approaches to the understanding of law, according to each of them, legal responsibility also acquires a different interpretation and definition. Fourth, legal responsibility is inextricably linked to moral, political, religious and other responsibilities, all of which influence each other, significantly enrich and complement each other. Some of these types may intersect with the content and essence of others, in particular on some of the signs it is very difficult to distinguish between political, moral and legal responsibilities. Fifth, in the legal literature, sectoral types of legal liability can differ significantly from each other, which calls into question the possibility of combining their features within one generic concept.

At the same time, scientists substantiate their views taking into account the structure of legal responsibility, as it is considered within social responsibility, as well as within

its manifestations —positive (as responsibility for one's own beliefs) and retrospective (as responsibility for external coercion) ([Seredyuk, 2015](#)).

There is also a two-pronged approach to understanding legal responsibility. Legal responsibility is one of the forms of social responsibility. In society, in addition to legal responsibility, there are other forms of social responsibility, namely: moral, political, organizational, and so on. Organizational and political responsibility is characterized by such forms as a report, resignation, and in accordance with the moral —condemnation of public opinion and so on. These species exist to ensure the orderliness, reliability of social relations in various spheres of society. But legal liability for a particular range of features differs from all others ([Azemsha, 2009](#)).

Legal liability is considered as the application of measures of state coercion to the offender to restore law and order and punish the person who committed the offense. Therefore, legal liability is a special reaction of social and legal nature, which aims to protect the public interest and is manifested in the obligation of the subject of the offense to suffer negative consequences of the offense ([Tereshchuk, 2015](#)). Here the emphasis is on the subjective understanding of this phenomenon, i.e. legal liability is considered from the point of view of the offender.

Some legal scholars question the fidelity and expediency of disclosing legal liability only as certain negative consequences, or sanctions, or in other ways that are possible for a retrospective approach to understanding it. This is due in particular to the fact that the retrospective approach to legal liability is perceived by these scholars as unacceptable, as to the realities that take place in legal practice (including modern), as well as those needs that have arisen, are and will appear in the future for jurisprudence ([Vincent, 2015](#)).

The following definition of legal responsibility seems appropriate: it is the reaction of authorized entities to the actions of individuals or legal entities regulated by legal norms, which may be expressed in

non-compliance with statutory prohibitions, failure to comply with statutory obligations, breach of civil law obligations, causing harm or causing damage and expressed in the application to persons who have committed such acts, means of influence, which entail deprivation of personal, property or organizational nature ([Lukyanets, 2004](#)).

If we consider the subjects of legal liability, we should pay attention to the following. Most constructions of legal responsibility are characterized by the existence of power of one subject of legal responsibility in relation to another, and the existence of such powers may be due either to one of the subjects to state bodies, or official subordination of one subject to another ([Lukyanets, 2004](#)).

The subjects of legal liability for the disclosure of banking secrecy are, respectively, the state in the person of a certain body on the one hand and, accordingly, an employee of the bank or a banking institution in general on the other hand.

Therefore, according to the subjects who violated the principles of banking secrecy, the responsibility can be divided into individual and collective.

The state by its coercive force provides reliable protection and unconditional implementation of legal norms. To this end, regulations establish norms that establish the prosecution of persons whose conduct does not comply with mandatory requirements. Legal liability may arise as a result of violation of the provisions of legal norms and is manifested only in the form of application of coercive measures to a particular offender ([Tereshchuk, 2015](#)).

If the bank discloses information that includes banking secrecy, the client may seek compensation from the bank for property damages and non-pecuniary damage. If such damages are caused to the client during the leak of information about him or her from the bodies that are to exercise banking supervision, these damages are reimbursed by the guilty authorities ([Mikhalchishin, 2011](#)).

Such a sanction seems appropriate, because the beginning of the legal relationship between the client and the bank begins from the moment of concluding the contract.

Therefore, it is quite logical when a client, whose interests are violated by the disclosure of information that contains banking secrecy, can sue the bank as a whole legal entity ([Yemelyanov, 2011](#)).

The combination of subject composition and procedural structure distinguishes a finite number of types of legal liability, which is based on the power relationship between the offender and the prosecuting authority. Such types, in particular, are the well-known constitutional, administrative, criminal and disciplinary responsibilities ([Zinchenko, 2013](#)).

The main types of legal liability for the disclosure of banking secrecy are disciplinary, civil and criminal ([Gelich, 2013](#)). At the same time, the violator may also be held administratively liable for the disclosure of confidential information of the bank.

These types of legal liability are distinguished depending on the industry to which this type of liability belongs. In this case, disciplinary liability is applied for violation of labor discipline, civil—for violations of contractual obligations, criminal—for committing a crime, administrative—for committing an administrative offense.

Without diminishing the role and importance in relation to legal liability, however, the most effective measures are prevention of encroachment on banking secrecy ([Baranovsky, 2014](#)).

Prevention of encroachments on banking secrecy is to clarify the rules of banking law, as well as training for bank employees to improve their legal knowledge and raise awareness of legal liability for illegal disclosure of information constituting banking secrecy. Each bank should organize a service that deals with banking secrecy. Particular attention should be paid to record keeping on documents that have banking secrecy ([Kyrychenko & Melesyk, 2009](#)).

Prevention of encroachment on banking secrecy may be to limit the number of bank employees who will have access to banking secrecy. Prevention of sanctions and prosecution for disclosure of banking secrecy should be specified in the agreements concluded between the banking institution and each client.

It is important to technically limit the access of bank employees who do not use information to work with the client to the relevant databases on the bank's clients, information about their accounts and cash flows, etc.

Thus, legal liability for the disclosure of banking secrecy is a complex legal phenomenon and is aimed at the rule of law by entities that must ensure the protection of such information from its disclosure.

*World experience of regulatory
ensuring of banking secrecy*

Banking secrecy is a component of the legal system of each developed state, the content of which is reflected based on the peculiarities of economic and legal doctrine of the state and the formation of its regulatory framework, which guarantees legal protection of key information with limited access ([Dyachenko, 2009](#)). In most European countries (for instance, Sweden, Germany, Norway, Spain), banking secrecy is considered a special kind of trade secret.

The concept of "banking secrecy" is one of the central concepts of banking law in many countries. This is primarily due to the fact that banks, which are carriers of financial information, are traditionally in the spotlight of government agencies ([Hetmantsev & Shuklina, 2007](#)).

Banking secrecy in many developed countries is enshrined in various regulations, which are mostly universal in nature and in addition to directly related to banking secrecy regulate the general legal aspects of the banking system of such countries.

Banking legislation in developed countries is characterized by the use of a wide range of different legal sources, which is determined in particular by the specifics of various entities, objects, as well as methods of banking regulation. Such sources include ([Kostyuchenko, 2003](#)):

1. National banking legislation which regulate banking relations. It manifests itself primarily in the form of laws. Thus, in the United States there is a developed legal system of regulations, which can be characterized by careful legal regulation of all aspects of such banking. Significant in terms of banking legislation are regulations, instructions, various rules issued by banks, as well as forms used in daily banking practice for banking transactions, local acts in the form of statutes of banks and their associations, customer service rules and certain bank services. Legal customs, as well as business customs, are of key importance for international banking law.
2. International conventions and treaties governing banking relations, ratified by parliaments of different countries, are also referred to as sources of banking law.
3. International customs formed in interbank practice, which become objects of international unification within the International Chamber of Commerce, are acts of informal codification in the field of international customs.
4. In the countries belonging to the Anglo-Saxon legal system (for example, Great Britain, the USA, Canada, etc.), where the law of judicial precedents applies, the main role in the legal regulation of banking is played by judicial and arbitration practice, namely decisions judicial bodies and arbitrations in certain cases involving banks, as well as precedents set by the Court of Justice of the European Union-CJEU ([Saunders, 2009](#)).
5. Regulations of key international organizations extending to the territory of the Member States are also an important element in the legal regulation of banking. For example, with the establishment of the International Monetary Fund-IMF in 1944 as an international monetary and credit organization, which received the status of a specialized agency of the United Nations, the statute of the IMF became a key source of regulation, especially major issuing banks. This Charter plays an important role in the development of trade in the international arena and monetary cooperation by establishing legal norms on the regulation of exchange rates and control over their observance, regulation of the payment system when signing international currency agreements and interbank settlement agreements.

The specifics of the country, current legislation and international agreements, or real legal conflicts, business and banking customs, systems of differentiation of bank accounts, features of a specific banking institution, etc., have their impact on the institution of banking secrecy. For example, what is seen in one jurisdiction as a “disgusting fraud” punishable by criminal punishment, in another can be considered a worthy example of praise and professionalism in business. First of all, an example of such a contrary interpretation is the facts of tax evasion of individuals and legal entities. Given this, the degree of banking secrecy in different parts of the world is significantly different from each other ([Baranovsky, 2014](#)).

The beginning of the encroachment on banking secrecy took place almost simultaneously with the emergence of the banks themselves. Historians mean that banking secrecy as the confidentiality of information about deposits in the bank has almost a history of 300 years. She was born in Switzerland, so to speak.

Switzerland is considered one of the most important banking and financial centers in the world, where banking became popular in the 50-60s of last century. Geographical location in the heart of Europe, high status of permanent neutrality, economic and political stability, sufficient guarantee of a stable exchange rate, liberal national legislation in the monetary and financial sphere, as well as an extensive network of bank branches and outlets and a wide range of banking services contributed to the formation of the state as a key international financial center of the world.

The institution of banking secrecy, which was a key and stable monolith of the unshakable foundation of the entire Swiss banking system and contributed to the country's prosperity and stability in administrative and financial systems, is targeted by the European Union-EU and the United States. The Institute of Banking Secrecy in Switzerland was founded in 1936 ([Baginska, 2012](#)).

It should be noted that the Swiss banking legislation does not have a legal definition of banking secrecy, but this legal institution occupies a central place in the banking legislation of the state.

Thus, the legal regulation of banking secrecy in accordance with of the [Swiss Labor Code \(1911, Art. 398\)](#), as well as of the [Swiss Criminal Code \(1937, Art. 260; 305a; 305b\)](#), the [Federal Act on International Mutual Assistance in Criminal Matters \(1981\)](#), the [Federal Law on Banks and Savings Banks \(1934, Art. 47\)](#), the [Federal Act on Safe and Secure Trade \(1992\)](#), the [Federal Act on the Prevention of Withdrawal of Funds in the Financial Sector \(2018\)](#), the [Federal Act on the Agreement with the United States on Mutual Legal Assistance in Criminal Matters \(2002\)](#).

The legal regime of banking secrecy is also mentioned as the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of November 8, 1990, and the Mutual Legal Assistance Treaty. All the above regulations have provisions that enshrine banking secrecy ([Hetmantsev & Shuklina, 2007](#)).

Traditional banking secrecy has contributed to the success of Swiss banking and the transformation of the state into one of the world's largest banking centers, which has about 1.2 trillion dollars. Assets of international clients corresponding to the latest global transnational assets. The high rating of the Swiss banking system is due to the fact that in the period after the Second World War there were no cases of bankruptcy of banks ([Baginska, 2012](#)).

Talking about the difference between the principle of banking secrecy in Switzerland and the corresponding principle of confidentiality in other European countries, we should mention that Switzerland has long had a legal right to privacy and freedom, which includes the right to protection of personal financial data. The Swiss Federal Court has been guided by this right since 1874. In 1934, the *Federal Law on banks and Savings Banks* was adopted, which defines the degree of criminal liability for disclosure of personal data of customers ([Swiss Confederation, 1934](#)). This law does not make the illegality of disclosing banking secrecy dependent on the damage caused by such disclosure to each client of the bank.

This, in turn, eliminates the problem of determining the possibility of causing damage to a given bank customer as a result of disclosing information that is included in bank secrecy. According to this normative act, any person who, by virtue of his/her powers as a member of the management, employee, deputy, liquidator or commissioner of the bank, observer of the Banking Commission, or member of the management or employee of a certain audit firm, shall disclose the secret entrusted to him/her, or which she learned in the course of his/her activities, as well as any person who persuaded another person to violate professional secrecy, will be punished by up to 6 years in prison or a fine of not more than 50 000 francs. Such a penalty is applied regardless of whether the person continues to work in the banking industry. Of course, such a norm is not perfect, but it is interesting enough for theoretical study ([Hetmantsev & Shuklina, 2007](#)).

At the same time, it cannot be said that the principle of bank secrecy is absolute. Swiss law regulates in detail the conditions under which banking secrecy could be partially disclosed. Namely, when a Swiss citizen was suspected of a criminal offense. Law enforcement agencies must obtain the court's permission to disclose such banking secrecy. As for foreign citizens, there is another principle, which is defined in the bilateral agreement with each individual country. Under any circumstances, law enforcement agencies of another country may first obtain permission from a Swiss court, and this criminal action of the "suspect client" should be subject to criminal liability under Swiss law ([Baginska, 2012](#)).

A clear example of European cooperation in banking regulation is the European Union, represented by the European Commission, which has the power to adopt regulations that are binding on each of the Member States of the European Union. It is the set of these regulations that needs to be singled out as separate European banking legislation. This is especially true of directives that must regulate banking activities throughout the European Union. In addition, such directives include rules on legal relations regarding banking secrecy ([Marushchak, 2013](#)).

It is important that banks established in one of the Member States of the European Union can also operate on the same basis in another country of the European Union in compliance with the laws of that country and having obtained a license in the homeland.

However, the harmonization of banking secrecy law in the EU has been a rather difficult issue. This situation becomes clear if we take into account that each European country had different traditions of regulating banking secrecy.

At the same time, the banking secrecy of the member states of the EU is sufficiently protected, as the protection of such information takes place in the established European tradition ([Lim et al., 2010](#)).

To date, EU law has not defined the content of banking secrecy. Regulations in the field of banking law are limited primarily to issues of professional secrecy of employees of supervisory authorities, as well as a list of some exceptions to the general rule of banking secrecy ([Bolgar, 2013](#)). Therefore, the main role is played by the relevant disclosures on confidential information, which is the basis of banking secrecy.

EU law gives broader powers to governments to obtain information that constitutes banking secrecy.

For example, under the Strasbourg Agreement (Council of Europe-[COE, 1990](#)), the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, states have pledged to ease banking secrecy by laundering “dirty” money, not only in drug trafficking but in all other areas of crime.

Moreover, the obligation to disclose banking secrecy in these situations does not apply if it is a suspicion of illegal acts related to the calculation and payment of taxes, i.e. those investigated by tax and financial agencies ([Radutny, 2008](#)). Banks are also required to provide information on their own initiative to anti-money laundering authorities and to provide such information at the request of those authorities. It is important that the bank does not inform the client about the disclosure of such information.

In German banking law, banking secrecy is seen as the bank's obligation to remain silent about the facts and their assessment of customers from whom the bank receives such information. It is a question of preservation of the information entrusted to the bank, i.e. any information received by the bank from the client is subject to protection ([Dyachenko, 2009](#)). In addition, in certain categories of criminal cases, bank employees may not testify about their customers due to banking secrecy.

In countries where case law applies, legal issues are treated differently in banking secrecy.

UK banking law pays special attention to the problems of banking secrecy. However, the problems of legal regulation of banking secrecy have not received proper legal regulation in English law. From the beginning of the principle, the bank's obligation to maintain the confidentiality of its relations with the client was based on approaches to the contract between the bank and the client as a specific agreement that includes elements of the agency agreement. The agent is constantly bound by the obligation to maintain the confidentiality of his relationship with the principal. In certain cases, this duty corresponds to the privilege of relieving the agent of even the obligation to testify in court, where such testimony could harm the confidentiality of his relationship with the principal. Banking secrecy was considered as meaning the condition of the contract between the client and the bank, respectively ([Hetmantsev & Shuklina, 2007](#)). At the same time, some laws establish the right of public authorities to disclose information about a bank's client.

UK banking law allows the central bank to disclose banking secrecy when necessary to supervise other banks. In addition, the central bank is obliged to disclose banking secrecy to other public authorities entitled to obtain it.

The key role in the disclosure of banking secrecy by the central bank in the UK is played by the public interest of the case, as well as the private interest in each case of the bank's client.

In most countries of the world, the legal basis for the disclosure of information classified as banking secrecy is a request from a judicial authority. The United States passed the [Banking Secrecy Act-BSA in 1970](#), which aims to assist in criminal, tax, and administrative investigations in the form of bookkeeping, and to provide information on certain banking transactions. The same procedures are provided by the laws of countries such as England, Germany, France and most other countries. The United States has built an effective model for cooperation between government agencies (primarily the Treasury, Justice, and law enforcement), which includes bank offices. On the one hand, the relevant divisions were created, including the State Banking Departments with special functions, and on the other hand, the American Banking Association-ABA was created as a large association of US banking institutions. The State Banking Department has set up special analytical and intelligence agencies that are not law enforcement, but are engaged in the study, search and preparation of information relevant to criminal activity. For each fact of an offense, the department works closely with law enforcement to ensure concerted action to detect and stop specific violations of the law ([Kornienko, 2006](#)). Legal regulation of banking secrecy in the form of law has enabled the above-mentioned US authorities to act within the legal framework and to legally request information and documents containing banking secrecy.

Thus, banking secrecy in developed countries is enshrined in various regulations, which are mostly universal in nature and in addition to banking secrecy regulate the general legal aspects of the banking system of such countries. In addition to universal regulations, banking secrecy is reflected in the rules of special banking legislation of some countries.

*Responsibility for the disclosure of banking secrecy
in the laws of Europe and the United States*

The legal institution of liability arising for the disclosure of banking secrecy is sufficiently developed and regulated in the legislation

of developed European countries. The legislation of these countries provides for the prosecution of those responsible for disclosing banking secrecy to criminal, civil, administrative, disciplinary, material and other types of legal liability.

The legislation of some countries does not separate the responsibility for the disclosure of banking secrecy as a separate type of legal liability, but is considered as part of the responsibility for the disclosure of confidential information, including commercial, official, industrial secrets and so on ([Pereira, 2018](#)).

The approaches of legislators in some European countries to the criminalization of acts of commercial or banking secrecy are diverse.

In almost all European countries, the legislator does not distinguish between banking and trade secrets. In the vast majority of cases, this is due to the fact that liability for the disclosure of banking secrecy, obviously, does not fall under criminal law protection, and in some cases is covered by the concept of confidential information or company information.

Criminal rather than administrative liability is the main difference between the principle of banking secrecy in Switzerland and the principle of confidentiality in other European countries ([Baginska, 2012](#)).

An important component of the disclosure of banking secrecy to obtain evidence in criminal proceedings in the financial and legal sphere of Switzerland is the presence in the actions of the suspect of a crime recognized as such in several countries, if such a crime was committed or continued in several countries. If at least one of the countries does not consider the actions of a person to constitute a crime, access to the disclosure of banking secrecy to law enforcement will be closed.

Swiss law enshrines criminal liability for the disclosure of banking secrecy. The [Swiss Criminal Code \(1937\)](#) provides for this crime in the interrelated Art. 162 and Art. 273. In particular, according to [Swiss Criminal Code \(1937, Art. 162\)](#), a person who discloses a trade or business secret which he is required to keep by virtue of

his legal or contractual obligations, whoever uses such disclosure for himself or another person, should be punished by a complaint of imprisonment or a fine. In this case, the legislature pointed to both the obligation of private prosecution and the subject to be held liable. However, [Swiss Criminal Code \(1937, Art. 273\)](#) provides for liability for those who, in accordance with industrial intelligence or trade secrets, in order to make it publicly available to a foreign official body, or a separate foreign organization or private enterprise, or their agents who also make available to a foreign body, or a foreign organization, or a private enterprise, or also their agents of industrial or commercial secrecy. According to this norm, the perpetrator is punishable by imprisonment, and in more severe cases, even by hard labor. Along with imprisonment, a fine can also be applied ([Swiss Criminal Code, 1937; Yakovenko, 2014](#)).

Of interest is [Criminal Code of the Netherlands \(1881, Part 1, Art. 273\)](#), which provides for criminal liability for those who intentionally disclose special information related to a commercial or industrial organization or service organization in which the perpetrator works or has worked, provided that he was obliged to keep information in complete secrecy ([Vorobey & Tikhonova, 2011](#)). Such a rule establishes liability not only for an employee who works in a banking institution, but also for a person who has resigned from it and by virtue of possession of banking secrecy may disclose it.

Therefore, despite the provisions of the employment or civil law provisions on non-disclosure of such information by the employee, the bank received legal protection in the form of future criminal sanctions for disclosing banking secrecy under the [Criminal Code of the Netherlands \(1881\)](#).

According to [Norwegian Penal Code \(2008, Art. 294\)](#), criminal penalty of a fine or imprisonment for up to 6 months is subject to anyone who, without any permission, will independently use a trade or operational secret relating to the activities of the enterprise in which he has worked for the last 2 years, has or has had a share in the last 2 years, also reveals this secret in order to enable another person to use it, or someone who misleads or suggests such things.

Therefore, a person who illegally uses a commercial or business secret of a company, which he or she learned or received as a technical or commercial consultant of the enterprise, or also in connection with the tasks of the enterprise, illegally discloses this secret to the possibility of its use by others, or misleading or suggestion may contribute to this (Syrota, 2013).

It is important that under Norwegian law, as in Swiss law, criminal proceedings are instituted on the complaint of the person concerned. Only in a certain situation without a complaint a criminal case is initiated, when the public interest requires that.

In Norway, statutory activities aimed at obtaining commercial information through fraud are criminalized. According to [Norwegian Penal Code \(2008, Art. 405a\)](#), a person who dishonestly obtains or attempts to obtain information or take control of a trade secret is punishable by a fine or even imprisonment for up to 3 months (Titomer, 2008).

Another approach to the corpus delicti in question is used by the legislator in Spain. According to [Spanish Criminal Code \(1995, Art. 278\)](#), whoever, in order to disclose a trade secret, obtains it in any other way, information, written or electronic documents, information devices or in any other way belonging to a trade secret, shall be punished by imprisonment for a term of two up to four years and a fine totaling twelve to twenty-four monthly salaries. At the same time, under Part 2 of Art. 278 of the [Spanish Criminal Code \(1995\)](#), also imposes imprisonment for a term of three to five years and a fine of twelve to twenty-four monthly salaries, for similar acts, when the disclosed secret will be further disseminated, issued or transferred to third parties.

The responsibility of specially authorized persons is established in the Spanish Criminal Code. According to [Spanish Criminal Code \(1995, Art. 279\)](#), acts of dissemination, extradition or assignment of trade secrets committed by a person who is required by law or contract to protect him, should be punishable by imprisonment from two to four years and a fine of twelve to twenty-four monthly salaries. When such a secret is used by the perpetrator in his own interests,

the punishment is accordingly imposed on him within the lower limit of the sanction. At the same time, according to [Spanish Criminal Code \(1995, Art. 199\)](#), for anyone who reveals other people's secret information, which he learned while in office or in an employment relationship, will be punished by imprisonment for a term of one to three years and a fine of six to twelve months wages. When a person whose professional duty is to protect the secrets of others discloses them, he shall be punishable by imprisonment for a term of one to four years, a fine of twelve to twenty-four monthly salaries, and deprivation of the right to engaging in certain activities for a period of two to six years ([Yakovenko, 2014](#)).

With regard to liability for the disclosure of banking secrecy in the United States, each bank in that country should be responsible for disclosing information to individuals who are not involved in banking activities and related transactions.

However, if a bank in the United States suspects a client of committing a crime, he must report it to the appropriate law enforcement agency.

An employee of the bank who voluntarily provides such information will not bear civil liability for the client or third parties.

[Danish Penal Code \(2005, Art. 263\)](#) stipulates that anyone who illegally uses equipment to secretly listen to or record statements made in person or by telephone, or any other conversation between persons, or, accordingly, negotiate in a closed meeting in which he or she does not take participation or to which he or she has obtained unlawful access, must pay a fine or be taken into custody, or receive imprisonment for any period not exceeding six months. Anyone illegally gaining access to the information of another person or program intended for use in connection with electronic data processing must pay a fine or be detained, or serve a term of imprisonment not exceeding six months. However, if the act is committed with the intention of providing or disclosing to anyone information about the company's trade secrets or in other particularly aggravating circumstances, the sentence may be increased to imprisonment for a term not exceeding four years.

German law also criminalizes the disclosure of confidential information. In Germany, criminal liability for disclosure of trade secrets is provided in [Criminal Code \(1998, Art. 203\)](#), according to which one who unlawfully discloses another's secret, especially a secret related to private life, or industrial or commercial secret, which was entrusted to one or became known to one in another way in due to the performance of professional duties as:

- a doctor, dentist or veterinarian, or also a pharmacist or employee of another medical profession, for the performance of his professional activity in respect of which or the right to be called a specialist in this field requires appropriate education provided by the government;
- a professional psychologist who has a state-recognized certificate of education;
- a lawyer, notary or defense counsel in legal proceedings;
- audited auditor, accountant-auditor, tax consultant, tax collector or body or member of the body of these companies, such as a company of lawyers, auditors, accountants-auditors or tax consultants;
- a consultant on marriage, family, upbringing or youth issues, as well as an appropriate advisor-consultant on unhealthy predispositions;
- a social worker or social educator whose legal status is recognized by the state;
- a representative of the enterprise of private insurance companies for insurance in case of illness, accident insurance and life insurance or the settlement service of private medical practice —may be punished by imprisonment for up to one year or a fine.

Thus, the criminal law of developed countries provides for the presence in the actions of bank employees of a crime to bring them to justice for disclosing banking secrecy.

Employees of banks in accordance with the labor laws of some developed countries, who are found guilty of disclosing banking

secrecy, are also subject to disciplinary or material liability. Liability is to reimburse material losses incurred by the bank's client for disclosing bank account data, conducting banking operations, information about the client's personal data, etc.

Thus, the legislation of developed countries provides for the prosecution of those responsible for the disclosure of banking secrecy to criminal, civil, administrative, disciplinary, material and other types of legal liability. Legislation of those countries does not distinguish liability for disclosure of banking secrecy as a separate type of legal liability, but is considered as part of liability for disclosure of confidential information, including commercial, official, industrial secrets, etc.

CONCLUSIONS

Banking secrecy is an integral element of the legal system of the state, the content of which is determined by the peculiarities of the socio-economic and legal system of the country. It is often seen as a form of secret or confidential information. Therefore, banking secrecy can be attributed to information with limited access, namely to such a variety of it as classified information (trade secret).

The application of mechanisms of legal liability for the disclosure of banking secrecy is a legal means of ensuring such secrecy. Legal provisions on liability for the disclosure of banking secrecy guarantee its protection and serve as an effective mechanism for preventing violations and ensuring reliable legal protection of bank secrets. Violation of the banking secrecy regime requires consistent and coordinated activities of all entities whose activities are aimed at and protection of information on the implementation of the preventive function.

Legal liability has its own legal content and features. Legal liability for the disclosure of banking secrecy is a complex legal phenomenon and is aimed at the rule of law by entities that must ensure the protection of such information from its disclosure.

The peculiarities of legal liability should include coercion on the part of the state, which is manifested in its negative reaction to the offense and, accordingly, the obligation of the latter to suffer negative consequences due to its own illegal behavior.

The subjects of legal liability for the disclosure of banking secrecy are, respectively, the state in the person of a certain body on the one hand and, accordingly, an employee of the bank or a banking institution in general on the other hand. Any bank and, accordingly, its officials who have unlawfully disclosed banking secrecy must be subject to legal liability in accordance with the law. According to the criterion of entities that violated the principles of banking secrecy, liability can be divided into individual and collective.

In most developed countries (Sweden, Germany, Norway, Spain), banking secrecy is considered a special kind of trade secret. Banking secrecy in many developed countries is enshrined in various regulations, which are mostly universal in nature and in addition to directly related to banking secrecy regulate the general legal aspects of the banking system of such countries. In addition to universal regulations, banking secrecy is reflected in the rules of special banking legislation of some countries.

The legislation of developed countries provides for the prosecution of those responsible for the disclosure of banking secrecy to criminal, civil, administrative, disciplinary, material and other types of legal liability.

The laws of some countries do not separate liability for the disclosure of banking secrecy as a separate type of legal liability, but is considered part of the liability for disclosure of confidential information.

The approaches of legislators in some European countries to the criminalization of acts of disclosure of trade or banking secrets are diverse. In almost all European countries, the legislator does not distinguish between banking and trade secrets. In the vast majority of cases, this is due to the fact that liability for the disclosure

of banking secrecy, obviously, does not fall under criminal law protection, and in some cases is covered by the concept of confidential information or company information.

Employees of banks in accordance with the labor laws of some developed countries, who are found guilty of disclosing banking secrecy, are also subject to disciplinary or material liability. Liability is to compensate for material losses incurred by the bank's client for disclosing bank account data, conducting banking operations, information about personal data.

REFERENCES

- Azemsha, I. (2010). Legal responsibility: modern views, discussions and concepts. *Journal of Kyiv University of Law*, (2), 54–57. http://kul.kiev.ua/images/chasop/2010_2/54.pdf
- Baginska, M. (2012). The Swiss banking system 1936-2012: a choice towards new realities or traditions? *Philosophy and political science in the context of modern culture*, 3(4), 107–111. <https://fip.dp.ua/index.php/FIP/article/view/110>
- Baranovsky, O. (2014). Security of the banking sector. *Bulletin of the National Bank of Ukraine*, (6), 42–47. http://nbuv.gov.ua/UJRN/Vnbu_2014_6_9
- Bolgar, T. (2013). Analysis of the feasibility of using external mechanisms for debt collection in the banking system of the state. *Bulletin of the National Bank of Ukraine*, 24, 4–9. http://nbuv.gov.ua/UJRN/Vnbu_2013_11_24
- COE. *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, November 8, 1990. <https://rm.coe.int/168007bd23>
- Dyachenko, V. (2009). Problems of improving the effectiveness of prosecutorial supervision over compliance with legislation on banks and banking. *Current Issues of International Relations*, 87(2), 100–108. <http://apir.iir.edu.ua/index.php/apmv/article/view/1204>

- Federal Republic of Germany. *Criminal Code* of November 13, 1998. https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
- Gelich, A. (2013). Features of economic relations with participation of commercial banks. *Journal of Kyiv University of Law*, (2), 154–158. http://kul.kiev.ua/images/chasop/2013_2/154.pdf
- Hetmantsev, D. & Shuklina, N. (2007). *Banking Law of Ukraine*. Center for Educational Literature. https://shron1.chtyvo.org.ua/Hetmantsev_Danylo/Bankivske_pravo_Ukrainy.pdf?PHPSESSID=ja0nrfols57ak38rnfh8u00l6
- Kornienko, V. (2006). Interaction of law enforcement agencies with banks, controlling and supervisory authorities in the investigation of crimes in the banking fair. *Bulletin of the National University of Internal Affairs*, (35), 184–191. <https://dspace.univd.edu.ua/xmlui/handle/123456789/7660>
- Kostyuchenko, O. (2003). *Banking Law of Ukraine*. ASK Publishing House.
- Kovalenko, V., Bolgar, T. & Sergeeva, O. (2018). Financial security of the banking system of Ukraine - Size and security problems. *Financial and Credit Activity: problems of theory and practice*, 3(26), 38–45. <https://doi.org/10.18371/fcaptp.v3i26.143847>
- Kyrychenko, O. & Melesyk, S. (2009). Economic security of Ukrainian banking system under conditions of global financial crisis. *Current Problems of Economics*, 98, 223–232. <https://eco-science.net/en/>
- Kingdom of Denmark. *The Criminal Code* of September 27, 2005. <https://www.retsinformation.dk/eli/lta/2014/871>
- Kingdom of Norway. *The Penal Code* of 7 March 7, 2008. <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>
- Kingdom of Spain. *Criminal Code* of November 24, 1995. https://boe.es/biblioteca_juridica/codigos/codigo.php?id=38&modo=2¬a=0&tab=2

- Kingdom of the Netherlands. *Criminal Code of the Netherlands* of March 3, 1881. https://sherloc.unodc.org/cld/document/nld/1881/penal_code_of_the_netherlands.html
- Lim, N., Yeow, P. & Yuen, Y. (2010). An online banking security framework and a cross-cultural comparison. *Journal of Global Information Technology Management*, 13(3), 39–62. <https://doi.org/10.1080/1097198X.2010.10856519>
- Lukyanets, D. (2004). Typology of legal responsibility. *Legal Ukraine*, 3, 33–37. https://biem.sumdu.edu.ua/images/stories/docs/K_KPD/Lukianets_22.pdf
- Marushchak, A. (2013). *Protection of banking secrecy*. Yantar.
- Mikhalchishin, N. (2011). The problem of secrecy of information containing banking secrecy. *Bulletin of the Volyn Institute of Economics and Management*, 2, 226–235.
- Pereira, B. (2018). FUNDEB and access to information: analysis of data relating to resources of the fund in the municipality of Belém in 2013. *Revista de Estudos Empíricos em Direito*, 5(2), 109–127. <https://doi.org/10.19092/reed.v5i2.231>
- Radutny, O. (2008). *Criminal liability for illegal collection, use and disclosure of information constituting a trade or banking secret*. Ksilon.
- Saunders, A. (1999). Consolidation and universal banking. *Journal of Banking & Finance*, 23(2-4), 693–695. [https://doi.org/10.1016/S0378-4266\(98\)00103-4](https://doi.org/10.1016/S0378-4266(98)00103-4)
- Seredyuk, B. (2015). Basic approaches to understanding the legal responsibilities in domestic legal science. *Scientific Bulletin of Kherson State University: Juridical Sciences Series*, 1(1), 59–63. http://nbuv.gov.ua/UJRN/Nvkhdu_jur_2015_1%281%29__15
- Smirnov, V. (2012). The procedure for disclosing banking secrecy by banks. *Youth Scientific Journal of the Ukrainian Academy of Banking of the National Bank of Ukraine*, 1(2), 48–52.

- Syrota, A. (2013). Banking secrecy as a legal category. *Financial Law*, (1), 11–14. http://nbuv.gov.ua/UJRN/Fp_2013_1_5
- Swiss Confederation. *Federal Law on International Legal Assistance in Criminal Matters (Mutual Assistance Act, IRSG)* of 21 June, 2002. <https://www.fedlex.admin.ch/eli/oc/2002/498/de>
- Swiss Confederation. *Federal Act on Financial Services* of 15 June, 2018. <https://www.fedlex.admin.ch/eli/cc/2019/758/en>
- Swiss Confederation. *Federal Act on the Protection of Trade Marks and Indications of Source* of 28 August, 1992. https://www.fedlex.admin.ch/eli/cc/1993/274_274_274/en
- Swiss Confederation. *Federal Act on International Mutual Assistance in Criminal Matters* of 20 March, 1981. https://www.fedlex.admin.ch/eli/cc/1982/846_846_846/en
- Swiss Confederation. *Swiss Criminal Code* of 21 December, 1937. https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en
- Swiss Confederation. *Federal Law on Banks and Savings Banks* of 8 November, 1934. https://www.fedlex.admin.ch/eli/cc/51/117_121_129/de
- Swiss Confederation. *Swiss Civil Code* of 30 March, 1911. https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en
- Tereshchuk, M. (2015). Legal responsibility: theoretical and legal analysis. *National Legal Journal: Theory and Practice*, 2/2(12), 18–21. https://ibn.idsi.md/en/vizualizare_articol/37774
- Titomer, E. (2008). Banking secrecy as a subject of criminal law protection. *Current Problems of State and Law*, 44, 311–316. http://nbuv.gov.ua/UJRN/app_2008_44_60
- U.S. *Bank Secrecy Act of 1970*, 91 U.S.C. § 5311 et seq. (1970). <https://www.law.cornell.edu/uscode/text/31/5311>
- Vincent, N. (2015). A Compatibilist theory of legal responsibility. *Criminal law and philosophy*, 9(3), 477–498. <https://doi.org/10.1007/s11572-013-9249-2>

- Vorobey, P. & Tikhonova, O. (2011). The subject of illegal collection for the purpose of using and disclosing commercial or banking secrets. *Law and Society*, 1, 189–193. <http://pravoisuspilstvo.org.ua/eng/>
- Yakovenko, R. (2014). Criminal liability for disclosure of commercial or banking secrets under the laws of Ukraine and European countries: a comparative legal study. *Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs*, 1(70), 376–383. https://dduvs.in.ua/wp-content/uploads/files/visnik/20141203_NV_1_2014.pdf
- Yemelyanov, S. (2011). Problematic aspects of organizational and legal protection of banking secrecy in Ukraine. *Law and security*, 3(40), 194–199. http://nbuv.gov.ua/UJRN/Pib_2011_3_45
- Zinchenko, Y. (2013). Distinguishing between the concepts of «banking secrecy» and «trade secret». *State construction and local self-government*, 26, 261–269. http://nbuv.gov.ua/UJRN/dbms_2013_26_23

Volodymyr Cherniei: Rector of National Academy of Internal Affairs. Doctor of Law. Professor (Kyiv, Ukraine). ORCID: <https://orcid.org/0000-0002-0247-263X>

Serhii Cherniavskiy: Vice-Rector of National Academy of Internal Affairs. Doctor of Law. Professor (Kyiv, Ukraine). ORCID: <https://orcid.org/0000-0002-2711-3828>

Viktorina Babanina: Professor of Criminal Law Department of the National Academy of Internal Affairs. Doctor of Law. Associate Professor (Kyiv, Ukraine). ORCID: <https://orcid.org/0000-0003-4173-488X>

Olena Tykhonova: Professor of Economic Security and Financial Investigations Department of the National Academy of Internal Affairs. Doctor of Law. Professor (Kyiv, Ukraine). ORCID: <https://orcid.org/0000-0002-3848-3023>

Hanna Hudkova: Assistant to the Governor of the National Bank of Ukraine, Office of the Board of the National Bank of Ukraine. Applicant of the Department of Economic Security and Financial Investigations of the National Academy of Internal Affairs (Kyiv, Ukraine). ORCID: <https://orcid.org/0000-0002-8277-096X>