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CHARACTERISTICS OF THE QUALIFICATION OF THE CRIME OF ILLEGAL ACQUISITION OR DISCLOSURE OF INFORMATION CONSTITUTING A COMMERCIAL SECRET WITHIN THE SYSTEM OF CRIMES CAUSING UNFAIR COMPETITION

ХАРАКТЕРИСТИКА КВАЛІФІКАЦІЇ ЗЛОЧИНУ НЕЗАКОННОГО ОТРИМАННЯ АБО РОЗГОЛОШЕННЯ ІНФОРМАЦІЇ, ЩО СТАНОВИТЬ КОМЕРЦІЙНУ ТАЄМНИЦЮ, У СИСТЕМІ ЗЛОЧИНІВ, ЯКІ СПРИЧИНЯЮТЬ НЕДОБРОСОВІСНУ КОНКУРЕНЦІЮ

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Abstract: *Although the phenomenon of "crimes causing unfair competition" is not explicitly expressed in the criminal legislation of many countries, this concept, which is included in the legislation of certain countries, including the Republic of Turkey, defines the scope of crimes related to unfair competition. In this context, there has arisen a need to classify the chapter of "crimes causing unfair competition" within the criminal law provisions on crimes in the field of economic activity and to determine the range of crimes that belong to this group.*

In the chapter on crimes in the field of economic activity in the Special Part of the Criminal Code of the Republic of Azerbaijan, the crime of illegal acquisition or disclosure of information constituting a commercial secret is particularly distinguished. Market participants protect information that has economic value related to their commercial activities and possesses confidentiality characteristics by establishing a commercial secret regime for it in one form or another. Actions aimed at acquiring such information by other competing market participants through various means can cause significant harm to the subjects to whom the commercial secret belongs. The qualification and the analysis of the criminal-legal characteristics of the crime of illegal acquisition or disclosure of information constituting a commercial secret, as one of the acts causing unfair competition, is one of the pressing issues of modern criminal law.

This article examines the place of the concept of "unfair competition" as a legal category in competition law and criminal law, the understanding of the concept of "commercial secret" in the legislation of different countries, the historical roots of this concept, the determination of the range of information constituting a commercial secret, the place and criminal-legal characteristics of the crime of illegal acquisition or disclosure of information constituting a commercial secret in the criminal legislation of the Republic of Azerbaijan and other countries, the objective elements of this crime as expressed in the relevant legal norms, as well as the shortcomings in the way this act is formulated in criminal law. The article also provides proposals for amendments to the relevant criminal law provisions.

Keywords: *commercial secret, unfair competition, industrial espionage, document theft*

Анотація: *Хоча явище «злочинів, що спричиняють недобросовісну конкуренцію» явно не відображене в кримінальному законодавстві багатьох країн, ця концепція, яка закріплена в законодавстві окремих країн, зокрема Турецької Республіки, визначає коло злочинів, пов'язаних із недобросовісною конкуренцією. У цьому контексті виникла потреба класифікувати розділ*

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«злочини, що спричиняють недобросовісну конкуренцію» у кримінальному законодавстві щодо злочинів у сфері економічної діяльності та визначити перелік злочинів, що належать до цієї групи.

У розділі про злочини у сфері економічної діяльності Особливої частини Кримінального кодексу Республіки Азербайджан особливо виділяється злочин незаконного отримання або розголошення інформації, що становить комерційну таємницю. Суб'єкти ринку захищають інформацію, що має економічну цінність для їхньої комерційної діяльності та має конфіденційний характер, шляхом встановлення для неї режиму комерційної таємниці в тій чи іншій формі. Дії, спрямовані на отримання такої інформації іншими конкуруючими суб'єктами ринку різними способами, можуть завдати значної шкоди суб'єктам, яким належить комерційна таємниця. Кваліфікація та аналіз кримінально-правових ознак злочину незаконного отримання або розголошення інформації, що становить комерційну таємницю, як одного з діянь, що спричиняють недобросовісну конкуренцію, є одним із актуальних питань сучасного кримінального права.

У статті розглянуто місце поняття «недобросовісна конкуренція» як правової категорії в законодавстві про конкуренцію та кримінальному законодавстві, розуміння поняття «комерційна таємниця» в законодавстві різних країн, історичні витоки цього поняття, визначення кола інформації, що становить комерційну таємницю, місце та кримінально-правові ознаки злочину незаконного отримання або розголошення інформації, що становить комерційну таємницю, у кримінальному законодавстві Республіки Азербайджан та інших країн, об'єктивні ознаки цього злочину, як вони закріплені в відповідних правових нормах, а також недоліки у формулюванні цього діяння в кримінальному законодавстві. У статті також наведено пропозиції щодо внесення змін до відповідних норм кримінального права.

Ключові слова: *комерційна таємниця, недобросовісна конкуренція, промислове шпигунство, крадіжка документів*

Introduction. The qualification of the crime of illegal acquisition or disclosure of information constituting a commercial secret, as set out in the chapter on crimes in the field of economic activity in the Criminal Legislation of the Republic of Azerbaijan, is one of the current issues in criminal law, including in the theory of criminal law.

According to Article 202 of the Criminal Code of the Republic of Azerbaijan, the illegal acquisition or disclosure of information constituting a commercial or banking secret gives rise to criminal liability when committed under the conditions specified in the provisions of that Article *(Azərbaycan Respublikasının Cinayət Məcəlləsi, 2025).*

This crime is one of the innovations in the criminal legislation of the Republic of Azerbaijan. In a market economy, each business entity can suffer significant harm if its technical and production-related information, which is unique to it, is illegally obtained and used by competing business entities. In this regard, the inclusion in criminal legislation of provisions establishing criminal liability for acts of illegal acquisition and disclosure of information constituting a commercial secret is an important step in protecting the interests of market participants *(Azərbaycan Respublikasının Cinayət Məcəlləsinin Kommentariyası, 2023).*

The purpose of this article is to analyze the criminal-law characteristics of the act of unlawfully obtaining and disclosing commercial secrets as one of the crimes causing unfair competition, to introduce and interpret the concept of "crimes causing unfair competition" into the criminal legislation of Azerbaijan on the basis of a comparative analysis of Azerbaijani and Turkish legislation, and to propose relevant amendments to the criminal legislation by identifying and explaining the shortcomings of the criminal act under consideration.

Literature review. Since the mentioned act is one of the innovations of the criminal legislation of the Republic of Azerbaijan and the definition of "crimes causing unfair competition" does not exist in Azerbaijani criminal legislation, no research has been conducted in Azerbaijani criminal law doctrine regarding these acts. Therefore, this topic is a novelty not only for criminal legislation but also for the Azerbaijani criminal law doctrine. From this perspective, the normative and doctrinal

interpretation of the crime of unlawful acquisition and disclosure of commercial secrets, as well as the analysis of existing problems in this field, constitutes an important object of research for Azerbaijani criminal legislation.

In contrast to Azerbaijani criminal doctrine, this issue has been widely studied in Turkish legal doctrine, and a number of scholarly works have been written in this field. As an example, reference can be made to Hüseyin Aydın's scholarly work *"Türk Ticaret Kanunu'nda Haksız Rekabet Suçları"* (2008). In this work, the author separately examined, for each crime, issues such as the subject, legal object, subjective aspect, unlawfulness, special forms of manifestation of the crime, the victim, and prosecution, and also studied the general characteristics of crimes causing unfair competition.

In addition, in Esin Esen's dissertation titled *"TTK'da Düzenlenen Haksız Rekabet Suçları"* (2023), civil law and criminal law were analyzed together. Due to the adoption of provisions on unfair competition from Swiss law, comparative scholarly research in this field was conducted with regard to Turkish and Swiss law, and, taking into account the wide geographical impact of unfair competition, regulations of international law were also addressed.

In the scholarly work titled *"TTK Md. 62/I-b, c, d Kapsamında Haksız Rekabet Suçları"* (2019), Ozan Can Özbalçık analyzed the criminal-law characteristics of crimes of unfair competition contained in the Turkish Commercial Code, including acts aimed at the disclosure or acquisition of trade secrets.

In the article authored by Kayıhan İçel, titled *"Ticari Sır, Bankacılık Sırrı veya Müşteri Sırrı Niteliğindeki Bilgi veya Belgelerin Açıklanması Suçları – Bu Tür Sırlarla İlgili Bilgi İstenmesinin Sınırları"* (2010), the issue of the protection of commercial secrets, banking secrets, and customer secrets by criminal law norms was examined. First, the provisions existing in Turkish legislation were analyzed and some of them were criticized; subsequently, the draft law regulating this issue was interpreted, and the positive and negative aspects of that draft were analyzed.

Main Results of the Research. Before beginning the analysis of the criminal-law characteristics of the act under consideration, it is essential to clarify the concept of "commercial secret" as an economic and legal category. According to the definition of commercial secret in legislation, a commercial secret refers to information related to the production, technological, managerial, financial, or other activities of legal and natural persons, which may harm their lawful interests if disclosed without the owner's consent *("Kommersiya sirri haqqında" Azərbaycan Respublikasının Qanunu, 2001).*

Although Article 55 of the Turkish Commercial Code lists "disclosing or inducing others to obtain commercial secrets" among acts causing unfair competition, the Code does not provide a specific definition of commercial secret. Instead, the concept is addressed in Article 62 of the Code together with production secrets. One notable point regarding the concept of commercial secret is that neither legislation nor doctrine provides a clear definition; the difficulty of defining the concept is noted, and its content is generally determined by listing its elements *(Türk Ticaret Kanunu, 2011).*

As a legal category, the initial foundations of the concept of "commercial secret" were formed in 1868 in the case of *Peabody v. Norfolk* in Massachusetts, USA. Over time, this concept spread to other states and was later regulated by a law intended to be in force in all states in 1979. The court concluded that an employee or any third party's illegal acquisition and use of production secrets belonging to an employer constitutes unfair competition. This case laid the doctrinal foundation for the concept of commercial secret, which later found its place in legislation and judicial practice *(Chan, 2024).*

In American law, this concept has been developed extensively. It has been noted that intellectual property objects such as brands, models, patents, and licenses can be protected as trade secrets, as well as all matters of economic value within an enterprise that may be valuable in the future. The economic nature of a trade secret is characterized by its protection as an object of property rights *(Özbalçık, 2019).*

Different legal regulations provide various definitions of trade secrets. For example, according to Section 4 of the first chapter titled "Definitions" of the Uniform Trade Secrets Act, which is intended to be applied interstate, a trade secret is a formula, pattern, compilation, program, device, method, technique, or process that: is not generally known to others and cannot be readily obtained

by lawful means; has actual or potential independent economic value; and is subject to reasonable efforts to maintain its secrecy, where disclosure or use could result in economic benefit to those who obtain it *(Uniform trade secrets act, 1986).*

Other legal regulations have defined the concept in roughly the same way, showing only minor differences in scope. For example, in the 1995 *Restatement (Third) of Unfair Competition*, a commercial secret is defined as any information that can be used in the operations of a business entity and that has value to the extent that it provides a factual or potential economic advantage over others *(Restatement (Third) of Unfair Competition, 1995).*

As can be seen from the definitions of commercial secret in the cited legal acts, in U.S. law a commercial secret is characterized by information arising from the operations of a business enterprise, the primary purpose of legal protection being the economic value that such information confers. That is, information containing elements of a commercial secret within a business enterprise and whose confidentiality provides an economic advantage is considered within the scope of a commercial secret.

In Turkish law, as noted above, the concept of a commercial secret is mainly defined in the context of acts that cause unfair competition. Currently, Turkish legislation does not contain a legal regulation that defines the concept of a commercial secret. However, for the first time, the *Draft Law on Commercial Secrets, Banking Secrets, and Client Secrets* (which has not yet entered into force) provides a definition of a commercial secret. According to this draft law, a commercial secret is information related to a company's field of activity, known only to a limited number of members and other employees, which could cause harm if obtained by competitors, must not be disclosed to third parties or the public, and is of great importance for the company's success and efficiency in economic activity. This includes internal structure and organization, financial, economic, credit and monetary conditions, research and development activities, operational strategy, sources of raw materials, technical characteristics of production, pricing policies, marketing tactics and costs, market shares, wholesale and retail customer potential and networks, contractual relations subject to authorization or otherwise, and similar information and documents.

Although the cited legal acts do not provide a separate definition of "secret," in the scientific literature (doctrine) the term is generally defined as: "information not known to everyone, the disclosure of which could harm the personal rights and interests of the concerned party," or "information not publicly available, known only to certain persons, whose secrecy must be maintained" *(İçel, 2010).*

As can be seen, the main point emphasized in definitions of commercial secret is that such information must relate to production or technological activities concerning goods (works or services) offered by a business entity to the market and must have economic value. In other words, the dissemination of such information in any form must result in harm to the interests of the market participant.

As the name of the crime under analysis indicates, the object of this crime is the commercial secret. Although normative and doctrinal explanations exist regarding the concept and essence of a commercial secret, determining the precise scope of information that constitutes a commercial secret is critically important for holding a person criminally liable under this offense.

The question of whether information can be considered the object of a crime has been debated in the academic community for many years. N. F. Kuznetsova noted that the object of a crime "consists of different types of material and non-material values, capable of meeting human needs, and whose criminal influence (or illegal use) can cause harm or create a risk of harm" *(Полный курс уголовного права, 2008).* From this, it can be concluded that information can be considered a non-material object of a crime.

However, according to Article 202 of the Criminal Code, the object of this crime consists only of documents containing commercial or banking secrets—i.e., material carriers of information. At the same time, criminal legislation does not provide a legal definition of the term "document," which creates certain difficulties in the correct qualification of the crime. We believe that such an explanation defines the object of the crime too narrowly.

Thus, the theft of documents as a method of collecting information constituting a commercial

or banking secret should be understood broadly, to include both documents and other information carriers.

The Law of the Republic of Azerbaijan "On Commercial Secrets" sets out the criteria for information to be considered a commercial secret. According to these criteria, for information to be classified as a commercial secret, it must meet the following requirements:

- It has commercial value (its secrecy provides an advantage in the field of activity and allows for profit; it may be sold, donated, transferred by contract, or inherited, in whole or in part);
- The owner takes legal, organizational, technical, and other measures to protect its confidentiality;
- Access to this information is legally restricted *("Kommersiya sirri haqqında" Azərbaycan Respublikasının Qanunu, 2001).*

It should also be noted that Article 4 of the same Law, titled "Information Considered as Commercial Secret," actually defines information that is not considered a commercial secret.

As can be seen, although criteria for determining whether information constitutes a commercial secret are set, the legislation does not specify which information is considered a commercial secret.

In general, when explaining the essence of the category of commercial secret, it can be concluded that it is impossible to determine the exact scope of such information. Each market participant has the exclusive right to classify as a commercial secret the information arising from its activities that has economic value and to establish the regime for such information.

In this regard, when holding a person criminally liable for illegally obtaining or disclosing information constituting a commercial secret, it is first necessary to determine whether the information in question falls within the scope of a commercial secret.

Regarding the direct object of the crime, there are various opinions in criminal law theory. For example, T. D. Ustinova argues that the direct object of this crime is the social relations that ensure the protection of intellectual property and information security of participants in economic relations *(Устинова, 2005).*

Furthermore, the crime in question does not only harm fair competition relations but also interferes with the circulation of information constituting a commercial secret. Therefore, these relations should be considered an additional direct object of the crime.

Information constituting a commercial secret (production secret) refers to any information of a production, technical, economic, organizational nature, as well as results of intellectual activity in scientific and technical fields and methods of professional activity. This information is not known to third parties, is not freely accessible on a legal basis, and is protected under a commercial secrecy regime by its owner.

Thus, the main characteristics of a commercial secret are as follows:

1. It has real or potential commercial value because it is unknown to third parties;
2. It is not freely accessible on a legal basis;
3. The owner takes measures to protect its confidentiality;
4. The specific list of information constituting the commercial secret is determined by the head or owner of the enterprise;
5. This information is not included in the list of state secrets or information whose access cannot be restricted.

Objectively, this act is characterized by two constituent elements. Simply obtaining information that constitutes a commercial secret is not sufficient for criminal liability. The information must be collected specifically for the purpose of dissemination or unlawful use. As can be seen, the intent is reflected as a necessary element of the subjective side of the crime in the provision of the Article.

Another necessary element of this offense is the methods of committing the crime. The collection of information constituting a commercial secret through theft of documents, purchase, threatening the person possessing the secret, or other illegal methods gives rise to criminal liability.

A similar norm exists in Turkish criminal law, stating that a person who, due to their position, profession, or trade, provides or discloses commercial secrets, banking secrets, or client secrets to unauthorized persons is subject to criminal liability.

As can be seen, Turkish Penal Code defines a specific subject of the crime for the act of

disclosing information constituting a commercial secret. According to this provision, criminal liability applies to the person who, by virtue of their position, profession, or trade, possesses information and provides it to persons who are not authorized to obtain it *(Türk Ceza Kanunu, 2004)*.

Another distinction of the Turkish law is that the provision imposing liability explicitly mentions not only information constituting a commercial secret but also the "disclosure of documents". In contrast, under the Criminal Code of the Republic of Azerbaijan, liability is provided only for the acquisition and disclosure of information, not documents. However, Article 202 of the Criminal Code considers "theft of documents" as a necessary element of the objective side of the crime.

From the perspective of the objective side, this composition is formal. That is, the crime is considered completed from the moment the acts constituting its objective side are initiated, regardless of their consequences.

Criminal law theory provides various definitions of "collection of information constituting a commercial secret." For example, B.V. Voljenkin notes that: "The concept of collection includes the theft of documents and other carriers of commercial secrets; obtaining the secret (or attempting to do so) from the owner or their relatives through bribery or threats; interception of information via communication channels; unlawful access to documents or making copies of them; use of listening devices and other special technical means; unauthorized access to computer systems; and other illegal methods" *(Волженкин, 2007)*.

As can be seen, B.V. Voljenkin attempted to specify as concretely as possible the methods of collecting information.

Other authors, however, avoid specifying these collection methods and provide broader definitions. For example, A. F. Zhigalov interprets the concept of "collection" as "any method of illegally obtaining such information" *(Жигалов, 2000)*.

The theft of documents constituting a commercial secret should be understood as the illegal and uncompensated taking of information carriers (materials containing commercial secrets) against the will of the owner or a person legally entitled to access them. Theft can be carried out secretly or openly, through the use of force or deception against persons possessing the commercial secret, or by other methods.

In legislation, the term "threat" is neither legally defined nor is the scope of persons against whom the threat is directed specified. This leads to various interpretations of the term. The term "threat" encompasses not only intimidation through psychological coercion but also threats of physical harm, murder, destruction, damage, or theft of property.

Thus, in relation to Article 202(1) of the Criminal Code, "threat" should be understood as any unlawful influence directed at persons possessing commercial or banking secrets (or those legally entitled to access them), as well as their relatives, indicating that negative consequences will occur if they refuse to provide the information. When the crime is committed in this form, the act is considered complete from the moment the threat is communicated to the targeted individuals.

It should also be noted that the execution of the threat is not included within the scope of the analyzed criminal law norm. That is, the use of real physical force or other physical impacts, such as damaging property, to carry out the threat must be additionally qualified under the relevant articles of the Criminal Code.

As a method of committing the crime, the term "other illegal method" should be understood as the collection of confidential information by any means that does not comply with legal forms of access provided by law.

One term used in the scientific literature to describe the illegal acquisition of commercial secrets is commercial espionage. Classic examples of commercial espionage can be found in historical records dating back to the earliest periods of human civilization. One of the most famous examples is found in Chinese chronicles. According to the sources, when a Chinese prince traveled abroad, he wore a magical hat decorated with natural flowers, in which he hid silkworms. He later gave the worms to an Indian, thereby breaking China's monopoly on silk production. This is a classic example of commercial espionage dating back to approximately the 15th century BCE *(Бержье,1972)*.

Throughout history, commercial espionage has been considered one of the most dangerous

forms of unfair competition, and civilized countries' legislation has imposed criminal liability for espionage.

For many enterprises, it is common practice to conduct competitive intelligence, which can be carried out by legal and illegal means, aiming to obtain information of commercial value. Legal competitive intelligence involves lawful methods, such as marketing research, analysis of market dynamics and competitors' development prospects, analysis of competitors' financial and productivity data, modeling, and forecasting.

The goal of illegal competitive intelligence, often referred to as commercial espionage, is to obtain confidential information of commercial value that provides certain advantages in the market relative to competitors. A characteristic feature of this activity is the use of unlawful methods to achieve the objective, which infringes upon the rights and lawful interests of other business entities.

In modern economic practice, the role of commercial espionage has increased significantly. Currently, in most large companies, there are specialists or entire departments engaged in the collection, systematization, and analysis of information about competitors, as well as the theft of industrial and commercial secrets and documents. The social danger of this act lies in the fact that the illegal disclosure of commercial secrets can cause serious economic damage to an organization and weaken its commercial potential. Therefore, combating commercial espionage — one of the most socially dangerous forms of unfair competition — should primarily be carried out through criminal-law measures.

One of the most important characteristics of information constituting a commercial secret is that the owner takes measures to protect its confidentiality. It should also be noted that, in terms of commercial value, there are many protective measures that can be applied, but the owner is not obliged to implement all possible measures. What matters is that the owner clearly demonstrates through their actions that the information should remain confidential from third parties. Otherwise, legal protection of the rights of the owner of information constituting a commercial secret becomes impossible.

This situation can be illustrated by a classic example from foreign court practice concerning commercial espionage. In 1987, a Michigan court rejected a commercial espionage claim filed by the "Cadillac Gage" company — specialized in producing armored vehicles for U.S. Army special units and military police — against a competitor, alleging the theft of valuable schematics. The court justified its decision on the grounds that the plaintiff had not taken sufficient measures to protect its commercial secrets. During the trial, it was revealed that the "Cadillac Gage" production facilities were not considered secure and were frequently left open, while the valuable schematics were always left on desks. A competitor's employee exploited this carelessness, entered the factory during working hours, photographed the schematics, and then left the premises.

Conclusions. Thus, the above example suggests that the commission of the crime of disclosure of information constituting a commercial secret results in interference with market competition relations, creating unfair competition in the market.

In the criminal legislation of the Republic of Azerbaijan, the terms of the provision describing this act should be adjusted in accordance with doctrinal approaches and the requirements of relevant normative acts. In addition, the terms of the provision should be amended to reflect the essence of the information constituting a commercial secret as the object of this crime.

Furthermore, considering the increasing pace of development in economic relations, it is necessary to clarify the phrase "without the consent of the entrepreneur" in Article 202.2 of the Criminal Code, so that it corresponds accurately to the circle of persons who legally possess the information.

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