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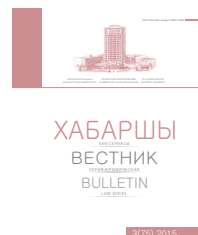
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**Some questions of legal
regulation of institute of a bank
secrecy by the legislation of the
Republic of Kazakhstan**

Тұяқбаева Н.С.,
Бискультанова А.

**Қазақстан Республикасы
заңнамасы бойынша банк
құпиясы институтын құқықтық
реттеудің кейбір мәселелері**

Туякбаева Н.С.,
Бискультанова А.

**Некоторые вопросы
правового регулирования
института банковской тайны
по законодательству
Республики Казахстан**

According to the study of scientific work in the article examines the legal basis of regulation of a bank secrecy. Based on the opinion of the Kazakh and Russian scientists have made findings and made suggestions. Focuses on the shortcomings of disclosure of this concept in the legislation of the Republic of Kazakhstan.

Key words: bank, customer, bank secrecy, information.

Ғылыми жұмыстың мақсатына сәйкес банк құпиясын реттеудің құқықтық негіздері қрастырылды. Қазақстандық және ресейлік ғалымдарының пікірлеріне сүйеніп тұжырымдамалар жасалынды. Зерттеу барысында Қазақстан Республикасы заңнамасында бұл ұғымды жеткіліксіз ашып көрсетуіне назар аударылды.

Түйін сөздер: банк, клиент, банк құпиясы, ақпарат.

В соответствии с исследуемой научной работой в данной статье рассмотрены правовые основы регулирования банковской тайны. Основываясь на мнение казахстанских и российских ученых, были сделаны выводы и предложения. Сделан акцент на недостаточность раскрытия данного понятия в законодательстве Республики Казахстан.

Ключевые слова: банк, клиент, банковская тайна, информация.

**SOME QUESTIONS OF
LEGAL REGULATION
OF INSTITUTE OF A
BANK SECRECY BY
THE LEGISLATION
OF THE REPUBLIC OF
KAZAKHSTAN**

At the request for rendering banking services to one of criteria which attracts most of clients in this or that bank providing not only safety of money, but also safety of the secret connected with the identity of the owner and the made transactions of the account is.

For today leader of a rating of the countries where the bank secrecy remains in the strictest way in any circumstances, there is Liechtenstein. In Liechtenstein only rare representatives of law enforcement agencies in very limited cases can get access to information on the owner of the account. On the second place there are well-known «Zurich gnomes» – bankers of Switzerland. Kazakhstan, unfortunately, can't brag of the same safety of bank secrecy.

The disclosure of information constituting bank secrecy has always been one of the most important in the history of banking relationships. Legislation in most countries clearly defined range of subjects, with access to banking secrecy; its content (information that fall under this regime); procedure for the provision and use of such information; as well as responsibility for its disclosure.

As a whole, this institution is rather complicated and requires a comprehensive analysis and development of a definition of banking secrecy will help determine what information may correspond to this concept, which is certainly a positive impact on banking practices.

The list of information constituting bank secrecy, and the reasons for its issuance determined by the legislative acts regulating banking activities. According to Art. 50 of the Law of the Republic of Kazakhstan «On Banks and Banking Activity in the Republic of Kazakhstan» [1] (hereinafter – the Law on Banks) Banking secrecy includes information on availability, owners, numbers of bank accounts of depositors, clients and correspondents bank balances and cash flow on those accounts and the accounts of the bank, on the operations of the bank (with the exception of the general conditions of banking operations), as well as information on the existence, ownership, the nature and value of the property you are located in safe boxes, boards and premises of the bank. Do not apply to banking secrecy information about the loans granted by banks in the process of liquidation.

Paragraph 4 of Article 50 of the Banking Act [1] states that are not bank secrecy: the obligation to notify the banks of the tax authorities

on the opening of bank accounts of a legal entity or natural person engaged in entrepreneurial activities without a legal entity; provision of information to customs authorities on export and (or) import operations of customers for export and import currency control in accordance with the currency legislation; Reporting on cash balances in the bank accounts of individuals liquidation commission of the bank, forcibly liquidated, the organization performing mandatory deposit insurance, and agent banks to carry out activities related to the return of depositors' money. Of course, there is a conflict between the interests of the bank, the customer's bank, as well as law enforcement agencies.

In our opinion, now Institute of banking secrecy is little studied, resulting in the presence of contradictions and gaps in the legal regulation of bank secrecy.

The literature indicates that bank secrecy – is the information about the bank «money» account of any kind of clients and correspondents, namely settlement, current, cost, currency, deposit (deposits), intra-account (for accounting overdue loans, bills and buying etc.) [2, p. 131]. In this definition contains a very streamlined concept of banking secrecy is not clear its legal nature, as well as the content itself remains unclear banking secrecy. On our opinion, the current Law on Banks [1] list of information constituting bank secrecy, does not account for the entire spectrum of banking operations. For example, the question remains unclear whether the bank secrecy banks issuing bank guarantees, issuing banks, bank guarantees and other obligations for third parties, providing execution in cash transactions with bills, leasing activity, issue of own securities (except for shares) , factoring, forfeiting operations, trust operations. It seems that the information about these operations, the bank is not a bank mystery.

It should be pointed out that the concept of banking secrecy is inextricably linked to a trade secret. In Kazakhstan legislation trade secrets provided in the Law of the Republic of Kazakhstan «On private entrepreneurship» [3]. According to the normative act, the list of information constituting a trade secret, determined by the head of the enterprise; the company has the right not to provide information, commercial secrets.

The Civil Code of the Republic of Kazakhstan [4] uses the term «proprietary and trade secret». CC RK guarantees their protection in the illegal use of third parties under certain conditions. Clear definition of trade secrets in these regulations is

given. From our experience, we propose to consider the totality of trade secrets confidential information with actual or potential material or goods that are not generally available to third parties and declared the entrepreneur (natural person) or the head of the company as such, but within the limits prescribed by law.

Consider the number of concepts institute of banking secrecy.

S.V. Sarbash exploring the banking secrecy came to the following conclusions. According to him, bank secrecy is a complex institution of civil law, which is not highly homogeneous in composition. The author believes that banking secrecy is inherently rather more inclined to inalienable rights. The laws of its turnover is unlikely. Of course, the information constituting bank secrecy may be «commercial» value, for example, competitor's holder of that right or its counterparties. However, it is of interest to them, not because of its unknown to others, which is typical of a trade secret, but for other reasons. For example, the owner of the creditor bank secrecy is interested to get information about the debtor's financial situation, and in this sense for business can be extremely important to get this information. However, if any other person and will have bank secrecy of the debtor, the creditor has not lost interest in it and the value of this information, it does not decrease, which apparently happens with this, for example, a variety of commercial secrets, as a secret process («know-how») [5, p. 148-149].

This position S.V. Sarbash was critically evaluated V.V. Vitryansky, who believes that the concept of «banking secrecy» refers to a multidimensional legal categories. According to V.V. Vitryansky, within the framework of public regulation (in particular, in the field of banking regulation and supervision), the concept of «banking secrecy» (guarantee of bank secrecy, bank secrecy, the prohibition of disclosure of bank secrecy) is regarded as one of the essential requirements for banking activities and participants relevant public legal relations: credit institutions, the Bank of Russia, audit and other organizations that are parties to the relevant relations. Violations of the above requirements entail for public authorities and organizations, as well as officers and employees of the application of rules of administrative law (for example, a review of the license to conduct banking activities) and even criminal liability. The author further notes that civil relations developing between the bank and its customers under contracts of bank deposit and bank account, legal importance

is another aspect of the category «banking secrecy», namely: the secret bank accounts and bank deposit, which is inadmissible disclosure by the bank known to him information about customers, their accounts and deposits held by him and banking operations. A further aspect of the concept of «banking secrecy», released by scientists, is that this concept is often designated themselves information (information) of the Bank's customers, their accounts and deposits, as well as banking. It is this aspect of the legislator has in mind when establishes the rule that the information constituting bank secrecy can only be submitted by customers or their representatives. In this aspect of banking secrecy is presented as a piece of information protected by law, which makes it possible (and makes it necessary) to compare it with the specific object of civil rights as official and commercial secrets. And the fifth aspect is the meaning of the legal regime of information about clients of the bank, their bank accounts and deposits, bank operations on them and presentation [6, p. 290-292].

In our view, the concept of «banking secrecy» should not be confused with the concepts of «legal regime of bank secrecy», «guarantee banking secrecy», «bank secrecy», «and prohibition of disclosure of bank secrecy». First of all, the meaning of any secret (commercial, service) is the confidentiality of information, and in this case the information that appears in the legal relationship to banking services. In our opinion, the content of banking secrecy is the kind of information that occurs in the legal relationship to the implementation of banking operations, ie in the legal relationship between the bank and the customer, the bank in this case acts as a special subject.

For a more complete study of this issue is necessary to define the concept of «trade secret». It should be noted that the legislation of the Republic of Kazakhstan there is no definition of a trade secret, which, of course, is not without difficulties. Paragraph 5 of Article 10 of the Civil Code of the Republic of Kazakhstan [4] states that commercial (entrepreneurial) secret protected by law. Procedure for determining the information constituting a trade secret, its means of protection, as well as a list of information that should not be part of trade secrets, established by the legislation. According to paragraph 1, Article 126 of the Civil Code of the Republic of Kazakhstan [4] civil law protects the information constituting official or commercial secret, in the case when the information has actual or potential commercial value by virtue of its being

unknown to third parties, there is no free access to the legal basis and the information holder shall take measures to protect its confidentiality.

The Law of the Republic of Kazakhstan «On Securities Market» [7] Art. 41 states that trade secrets in the securities market of the following information (except as provided by paragraph 2 of this article):

1) on the balance and movement of ordinary shares and the Company's securities convertible into its common shares on personal accounts in the register of holders of securities and accounting nominee;

2) the existence and ownership of equity securities, other than those specified in paragraph 1 of this paragraph, the personal accounts in the register of holders of securities and accounting nominee, on the balance and movement of equity securities in these accounts. Thus, it becomes obvious that the civil law does not contain a general concept of trade secrets, which, in our opinion, it is a significant gap.

Noteworthy approach to the concept of trade secrets, drawn A.B. Omarova, according to which a trade secret must be understood the law permits the system of preventive measures taken by the owner of undisclosed commercial information, aimed at ensuring the confidentiality of this information (prevention of unauthorized acquisition, use, disclosure), thereby to ensure the integrity of the exclusive right entrepreneur for commercial information [8, p. 13]. Different opinion T. Mahmadvonov. He believes that a trade secret – this information known to a certain group of people associated with a business that has an economic value and is necessary to protect the property interests of its owners [9, p. 6-7]. If we look, for example, to the legislation of the Russian Federation, according to paragraph 1, Article 3 of the Federal Law «On Commercial Secrets» [10] trade secret – it's confidential information, which allows the holder under existing or possible circumstances to increase revenue, to avoid unnecessary costs, maintain its position in the market of goods, works and services or to obtain other commercial benefit. In the Russian civil legislation noted that the information constituting a trade secret, – scientific and technical, technological, industrial, financial, economic, or other information (including component manufacturing secrets (know-how), which has actual or potential commercial value by virtue of its being unknown to third parties to which there is free access to legally and in respect of which the holder of such information, a regime of

trade secrets. So often in the literature, the authors note that the three requirements must be met to trade secrets:

1) The information must have actual or potential commercial value by virtue of its being unknown to third parties;

2) the information constitutes a trade secret, there should be free access to the legal basis;

3) The information to be considered a trade secret requires that the owner of the information takes measures to protect its confidentiality [11, p. 234-235].

In our view, a commercial secret – is primarily confidential commercial information, which is its content.

Lawyers often raises the question: Is subject to protection under the rules of the Institute of banking secrecy confidential information about the borrower violates its loan obligations to the bank because the bank has the right to dispose of at their discretion, unless otherwise provided by the contract with the borrower. So, S. Danilenko of the opinion that this information is subject to both bank secrecy as a

violation of the obligations will certainly be customer information. The author writes that in this case is not important nature of the action (or inaction) that makes the client, the information itself is important.

We agree with S. Danilenko, since the content of banking secrecy is included, in our opinion, any information on all bank transactions, which carries the bank on behalf of a client. In general, it should be noted that the civil legislation of the Republic of Kazakhstan and science in general, it is important to develop the concept of «banking secrecy» because in the form in which it is stipulated in the Law on Banks [1] does not fully meet the problem of resolving these legal .

Therefore, in our view, banking secrecy – is the intangible benefit, the object of civil rights; is information of a confidential nature, arising and resulting in the process of the Bank's business activities in the interests of his client, and is also valuable because of its unknown to third parties. On this basis, we can assume that by the legal nature banking secrecy is nothing else, as a kind of trade secrets.

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