

THE SUBJECT OF CRIMINAL OFFENSES ENCROACHING ON PHARMACEUTICAL ACTIVITY IN UKRAINIAN CRIMINAL LAW

O TEMA DAS INFRAÇÕES PENAIS QUE INVADEM A ATIVIDADE FARMACÊUTICA NO DIREITO PENAL UCRANIANO

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Abstract: The purpose of the article is to analyze the provisions of the Criminal Code of Ukraine regarding subjects of criminal offenses encroaching on pharmaceutical activity. Research methods are: monographic analysis, systematic analysis, comparative and legal analysis, generalization, forecasting, etc. The importance of the chosen topic is due to the fact that in connection with Ukraine's intention to join the EU, Ukraine must harmonize criminal legislation with the EU and implement EU legislation into the criminal legislation of Ukraine to ensure criminal legal protection of pharmaceutical activity. Pharmaceutical activity is an obligatory component of health care in the state and an independent object of criminal law protection. The subject of a criminal offenses is an element of criminal offenses that encroach on pharmaceutical activity. We have emphasized that it is important to study not only a general subject, but also a special one, which may be characterized by such characteristics as an official position (such a subject is an official); specialty (profession); family relationship with the victim (such a special subject can be a father or mother); official or other relations with the victim (a special subject can be a person on whom the victim is materially or professionally dependent), etc. It has been proven that the selection of a general and a special subject in the elements of criminal offenses of specific types makes it possible to find out the specifics of the mechanism of harm to pharmaceutical activity, which is expressed in the rupture of social ties in the content of the relevant components of pharmaceutical activity, subjects and "non-subjects" of pharmaceutical activity.

Keywords: Subject of criminal offenses. Pharmaceutical activity. Medicinal products. Health care. General and special subject. Elements of criminal offenses.

Resumo: O objetivo do artigo é analisar as disposições do Código Penal da Ucrânia relativas a infrações penais que invadem a atividade farmacêutica. Os métodos de investigação são: análise monográfica, análise sistemática, análise comparativa e jurídica, generalização, previsão, etc. A importância do tema escolhido deve-se ao facto de que, em conexão com a intenção da Ucrânia de aderir à UE, a Ucrânia deve harmonizar a legislação penal com o UE e implementar a legislação da UE na legislação penal da Ucrânia para garantir a proteção jurídica penal da atividade farmacêutica. A atividade farmacêutica é componente obrigatório da assistência à saúde no estado e objeto independente de proteção penal. O objeto das infrações penais é um elemento das infrações penais que invadem a atividade farmacêutica. Enfatizamos que é importante estudar não apenas um assunto geral, mas também um especial, que pode ser caracterizado por características como cargo oficial (tal assunto é oficial); especialidade (profissão); relação familiar com a vítima (este sujeito especial pode ser pai ou mãe); relações oficiais ou outras com a vítima (um sujeito especial pode ser uma pessoa de quem a vítima depende material ou profissionalmente), etc. tipos permite conhecer as especificidades do mecanismo de dano à atividade farmacêutica, que se expressa na ruptura dos laços sociais no conteúdo dos componentes relevantes da atividade farmacêutica, sujeitos e “não sujeitos” da atividade farmacêutica.

Palavras-chave: Tema de Infrações Penais. Atividade Farmacêutica. Medicamentos. Cuidados de Saúde. Assuntos Gerais e Especiais. Elementos de Infrações Penais.

1. Introduction

The determination of the "parameters" of the criminal protection of pharmaceutical activity under the legislation of Ukraine should include an analysis of the group of norms of the Special Part of the Criminal Code, which are systematized in a certain way and determine the characteristics of specific types of criminal offenses. For this purpose, it is proposed to carry out a meaningful analysis of the specific systemic characteristics of the normative-theoretical legal structure of the relevant elements of criminal offenses. Such an analysis will make it possible to answer the following main questions related to the "normative level": 1) who is the subject of criminal offenses in pharmaceutical activity within the Special Part of the Criminal Code, 2) what is the significance of distinguishing general and special subjects for qualification and separation from related criminal offenses.

The identification of a general and a special subject in the elements of criminal offenses under Ukrainian criminal law is important from the point of view of the fact that pharmaceutical activity is the object of criminal law protection, as well as for the specificity of the mechanism of causing harm to pharmaceutical activity.

Taking into account the allocation of general and special subjects as part of criminal offenses and the content of Art. 131, 132, 134, 137, 138, 139, 140, 141, 142, 145, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 321-1, 321-2, 322, 323, 325 of the Criminal Code of Ukraine, the subjects of criminal offenses in the specified elements should be considered:

1) general subject of a criminal offense (Art. 134, 138, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, part 1 Art. 321, part 1 Art. 321-1, 322, 323 of the Criminal Code of Ukraine);

2) special subject of a criminal offense, in particular:

- a member of medical or pharmaceutical profession or other employee charging his professional duties (Art. 131 of the Criminal Code of Ukraine);

- an official of a medical institution, an auxiliary employee and a medical employee (Art. 132 of the Criminal Code of Ukraine);

- an obstetrician-gynecologist who has a special medical education and has the right to perform artificial termination of pregnancy (part 3 of Art. 134 of the Criminal Code of Ukraine);

- a person entrusted with professional or official duties regard to life safety and health care of minors (Art. 137 of the Criminal Code of Ukraine);

- a member of medical profession who is obliged, in line with the established rules, to provide help to a patient (Art. 139 of the Criminal Code of Ukraine);
- a member of medical or pharmaceutical profession who is entrusted with professional duties (Art. 140 of the Criminal Code of Ukraine);
- a person who is authorized (responsible for) performing clinical trials (Art. 141 of the Criminal Code of Ukraine) or biomedical, psychological or other experiments on a person (Art. 142 of the Criminal Code of Ukraine);
- a person who is acting professional or official duties related to medical secrecy (Art. 145 of the Criminal Code of Ukraine);
- an official who abuses his official position (part 2 of Art. 308, part 2 of Art. 312, part 2 of Art. 313, part 2 of Art. 320, part 2 of Art. 321-1 of the Criminal Code of Ukraine);
- a person who is entrusted with the obligations to comply with the rules of production, making, purchasing, storage, release, accounting, transportation, forwarding of poisonous or potent medicines, other than narcotics, psychotropic substances or their analogues or poisonous or potent medicines (part 2 Art. 321 of the Criminal Code of Ukraine);
- medical or pharmaceutical employee (part 2 of Art. 321-1 of the Criminal Code of Ukraine);
- a person entrusted with the duties of complying with the established order of preclinical study, clinical trials of medicinal products and/or the order of state registration of medicinal products (Art. 321-2 of the Criminal Code of Ukraine);
- a person entrusted with the responsibilities of educating the victim or taking care of him, or a trainer (part 2 of Art. 323 of the Criminal Code of Ukraine);
- a person who is entrusted with the obligations to comply with the rules and norms established for the purpose of preventing epidemic and other infectious diseases, as well as mass non-infectious diseases (poisoning) and combating them (Art. 325 of the Criminal Code of Ukraine).

2. Literature review

The provisions of the Criminal Code of Ukraine (2002) were analyzed in detail to determine the subjects of criminal offenses in pharmaceutical activity. The category "subject of a criminal offense" in Ukrainian criminal law is considered as an element of a criminal offense, which according to scientists Grynenko, I. (2019: 183) and Condratov, D. (2014: 51) is

characterized by three mandatory features: it is a physical person, reprehensible, who has reached a certain age. The absence of at least one of the indicated signs excludes the possibility of qualifying the act as a criminal offense, and the person who committed it - to recognize the subject of a criminal offense (Taran, N., 2019: 66), which is traditionally called general (Voznyuk, A. 2016: 81-82). In cases of committing an act by an unconvicted person or a person who has not reached the age from which criminal responsibility arises (characteristics of the subject), it is not a crime, but a socially dangerous act (Lytvynov, O., 2020: 118).

As Berzin, P. (2023: 482) notes, the subject of a criminal offense, as a person who committed this offense, is a component of the legal structure of the criminal offense. The specified signs characterize all subjects of criminal offenses regardless of the specific types of these criminal offenses, and therefore are signs of the general subject of criminal offenses (Volynets, R., 2020: 174; Berzin, P., 2024: 288-289).

A special entity is required for separate warehouses provided for by the Criminal Code of Ukraine. This is a person who, in addition to these general features, is endowed with special (additional) features that are inherent in this specific composition of the crime and only in the presence of which, criminal responsibility for the commission of this crime can arise (Volynets, R., 2020: 174). The special subject of a criminal offense is a natural convicted person who has committed a criminal offense at the age from which criminal liability may arise, the subject of which can only be a certain person (part 2 Art. 18 of the Criminal Code). In this regard, the position of Navrotskyi, V. and others (2013: 256) is justified, who recognizes a special subject as a type of subject that is separated from the general and at the same time endowed with all the features of a general subject of a criminal offense.

3. Methods

The dialectical and special scientific methods of research were used in the article. The method of monographic analysis made it possible to clarify peculiarities of the division of subjects into general and special, which is relevant in Ukrainian criminal legislation. The purpose of this method is to carry out the qualification of criminal offenses in pharmaceutical activity as accurately as possible.

The method of analysis and synthesis made it possible to generalize information on understanding provisions of the articles of the special part of the Criminal Code of Ukraine regarding the subjects of criminal offenses in pharmaceutical activity. A detailed and extensive

analysis of the provisions of the Special Part of the Criminal Code of Ukraine was conducted for this purpose.

The comparative and legal method made it possible to carry out a comparative and legal analysis of the concept of "the subject of a criminal offense" in the legislation of Ukraine.

The systematic method made it possible to conduct research of the construction of articles in a Special Part of the Criminal Code of Ukraine to determine the range of powers of subjects of criminal offenses.

The forecasting method made it possible to study the improvement of the current legislation in terms of qualification of the actions of subjects who commit criminal offenses in the pharmaceutical industry, so that each guilty person was brought to criminal responsibility.

The generalization method made it possible to draw conclusions based on the conducted research.

4. Results and Discussion

4.1. Analysis of the provisions of the Criminal Code of Ukraine in terms of identifying general subjects of criminal offenses that encroach on pharmaceutical activity

The general subject in the composition of criminal offenses provided for in Art. 134, 138, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, part 1 of Art. 321, part 1 of Art. 321-1, 322, 323 of the Criminal Code of Ukraine, should be considered any culpable person of the age at which criminal responsibility can occur and who has committed the relevant act as a mandatory element of the criminal offense of the corresponding type. Therefore, the following categories of persons should be recognized as general subjects:

1) a person who does not have a special medical education, but: a) performs an artificial termination of pregnancy (abortion) (parts 1, 3 of Art. 134 of the Criminal Code of Ukraine), as well as a person who forces the victim to have an abortion (part 2 of Art. 134 of the Criminal Code of Ukraine) or sterilization (parts 4, 5 of Art. 134 of the Criminal Code of Ukraine);

2) a person who does not have a proper medical education, but is engaged in medical activities without a special permit (Art. 138 of the Criminal Code of Ukraine). The lack of proper medical education should be associated with situations where a person did not receive a medical education at all, or received a medical education that does not have the appropriate qualification requirements for the doctor to carry out the relevant type of his professional activity;

3) a person who carries out illegal production, making, purchasing, storage, transportation or selling purposes, as also illegal sale of narcotics, psychotropic substances or their analogues (Art. 307 of the Criminal Code of Ukraine), as well as illegal production, making, purchasing, storage, transportation or sending of narcotics, psychotropic substances or their analogues not for selling purposes (Art. 309 of the Criminal Code of Ukraine);

4) a person who carries out illegal sowing or illegal cultivation of opium poppy (Art. 310 of the Criminal Code of Ukraine) violates the established rules of sowing or growing opium poppy or cannabis, production, making, purchasing, storage, sale, distribution, trade, transportation, forwarding or the use of narcotics, psychotropic substances, their analogues or precursors intended for the production or making of these narcotics or substances (Art. 320 of the Criminal Code of Ukraine), and also carries out illegal production, making, purchasing, transportation, forwarding, storage for selling purposes or sale of poisonous or potent substances or poisonous or potent medicinal products (part 1 of Art. 321 of the Criminal Code of Ukraine);

5) a person who carries out illegal production, making, purchasing, storage, transportation or forwarding of precursors for the purpose of their use for the production or making of narcotics or psychotropic substances, as well as illegal sale of such precursors (Art. 311 of the Criminal Code of Ukraine);

6) a person who steals, appropriates, extorts narcotics, psychotropic substances or their analogues or acquires them by fraud or extortion (Art. 308 of the Criminal Code of Ukraine), as well as steals, appropriates, extorts precursors or acquires them by fraud for the purpose of their selling, as well as selling thereof for the purpose of further producing or making of narcotics, psychotropic substances or their analogues, robbery for the purpose of stealing precursors, their extortion (Art. 312 of the Criminal Code of Ukraine), stealing, appropriation, extortion of equipment designed for making narcotics, psychotropic substances or their analogues, or acquisition of such equipment by fraud, and also illegal making, purchasing, storage, transfer or sale of such equipment to other persons of such equipment, robbery with the purpose of stealing equipment intended for the production of narcotics, psychotropic substances or their analogues, as well as its extortion (Art. 313 of the Criminal Code of Ukraine);

7) a person who illegally introduces narcotics, psychotropic substances or their analogues into the body of another person (Art. 314 of the Criminal Code of Ukraine), induces a person to use narcotics, psychotropic substances or their analogues (Art. 315 of the Criminal Code of Ukraine), independently publicly illegally uses narcotics (Art. 316 of the Criminal Code of

Ukraine), organizes or maintains places for the illegal use, production or making of narcotics, psychotropic substances or their analogues, as well as accommodating any premises for this purpose (Art. 317 of the Criminal Code of Ukraine), and also a person who illegally organizes or maintains places for the use of intoxicating drugs and other means that are not narcotic or psychotropic or their analogues, as well as providing premises for this purpose (Art. 322 of the Criminal Code of Ukraine);

8) a person who commits illegal making, falsification, use or sale of falsified or illegally obtained documents authorizing the receipt of narcotics or psychotropic substances or precursors designated for the production or making of such narcotics or substances (Art. 318 of the Criminal Code of Ukraine), and also illegally making of a prescription authorizing the purchase of narcotics or psychotropic substances (Art. 319 of the Criminal Code of Ukraine);

9) a person who is making, purchasing, transportation, sending, storage for selling purposes, or the sale of intentionally falsified medicinal products (part 1 of Art. 321-1 of the Criminal Code of Ukraine);

10) a person who inducement of minors to the use doping (Art. 323 of the Criminal Code of Ukraine).

Despite the fact that in the elements of criminal offenses provided for in Art. 134, 138, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, part 1 of Art. 321, part 1 of Art. 321-1, 322, 323 of the Criminal Code of Ukraine, the subject is general, a criminal offense of a certain type can also be committed by subjects of pharmaceutical activity within and outside the borders of the circulation of medicinal products, as well as subjects that ensure state regulation of a specific type of pharmaceutical activity (regardless of whether they use their powers to ensure the implementation of pharmaceutical activity of a certain type, or whether they use powers related to another or other fragments of pharmaceutical activity).

4.2. Special subject of criminal offenses in pharmaceutical activity

The special subject is "represented" in the composition of criminal offenses that encroach on pharmaceutical activity, as follows.

We can refer to here: a) medical, pharmaceutical or other employee who performs his professional duties (Art. 131 of the Criminal Code of Ukraine), b) medical or pharmaceutical employee who is entrusted with professional duties (Art. 140 of the Criminal Code of Ukraine), c) medical or pharmaceutical employee (part 2 of Art. 321-1 of the Criminal Code of Ukraine).

A medical employee is a professionally trained person who carries out professional activities and provides medical services to the population in the relevant health care institution. Certain professional powers related to medical activity and performed by medical employee may be related to pharmaceutical activity. For example, issuing a prescription for a medicine.

A pharmaceutical employee is a professionally trained person who carries out professional activities in a certain health care institution related to pharmaceutical services (providing pharmaceutical services and/or pharmaceutical assistance), namely: a) pharmaceutical employee who should be recognized as officials b) pharmaceutical employee, who are not public servants in terms of the functions they perform. Basically, these are pharmaceutical employees engaged in pharmaceutical activities, who have the appropriate special education and meet the uniform qualification requirements. Also, pharmaceutical employees, as special subjects of the crime, must hold the relevant position of a pharmacist, a specialist with a pharmaceutical education, in accordance with the list established by pharmaceutical legislation (Berzin, P., Demchenko, I., Berzina, A. 2023: 1682).

Another employee who performs his professional duties in the field of pharmaceutical activity, but is not a medical and pharmaceutical employee provided for in Art. 131 of the Criminal Code, may be:

1) a professionally trained person who performs actions related to the circulation of medical products or medical devices in a health care institution or in other institutions (for example, employees of state bodies (including health care bodies), who are obliged to ensure the prevention of HIV transmission (in particular, from mother to child);

2) employees performing laboratory diagnostics of HIV and other incurable infectious diseases conduct laboratory tests for the presence of HIV or viruses of other incurable infectious diseases in blood (its components) received from blood donors (its components) and donors of other biological fluids, cells, human tissues and organs, or carry out scientific research using infected material or are engaged in the production of biological preparations for the diagnosis of AIDS or other incurable infectious diseases;

3) other persons whose professional duties are related to the circulation of medicines products or medical devices, and who are obliged to ensure procedures for the prevention of HIV infection or other incurable infectious diseases (for example, employees of internal affairs bodies and execution of punishments, etc.).

Such varieties of special subjects as "medical official", "auxiliary employee" and "medical employee" are directly provided for in Art. 132 of the Criminal Code of Ukraine. In order to recognize an official of a medical institution as a special subject, it is necessary that the functions

performed by him ensure his access to information about the provision of these services and/or their results. An official is assigned such functions and performs them because he holds a corresponding position in a medical institution.

An auxiliary employee of a medical institution is a person who is not recognized as an official, but is endowed with those functions that allow him to independently obtain information about conducting a medical examination of a person to detect HIV infection or another incurable infectious disease that is dangerous to a person's life, or AIDS disease and its outcomes (for example, medical nurse).

The concept of a person who is entrusted with professional or official duties regarding the protection of the life and health of minors (Art. 137 of the Criminal Code of Ukraine) includes both an official and a non-official person who, in connection with his performance of a certain job or occupation of a certain positions, are entrusted with duties regarding the life and health of minors, including duties to control the performance of such duties by other persons.

A person who is authorized to conduct clinical trials (Art. 141 of the Criminal Code of Ukraine) or to conduct biomedical, psychological or other experiments on a person (Art. 142 of the Criminal Code of Ukraine), as well as a person who is authorized to observe the established procedure of preclinical study, clinical trials of medicinal products (Art. 321-2 of the Criminal Code of Ukraine), is a medical or pharmaceutical employee (regardless of whether such an employee is an official as a special subject of the specified types of criminal offenses, as well as whether he performs his authority in a health care institution or within the scope of individual entrepreneurial activity), which directly carries out, respectively, preclinical and/or clinical trials of medicinal products or experiments on humans.

A person who performs professional or official duties related to medical confidentiality (Art. 145 of the Criminal Code of Ukraine) should be recognized as a medical and pharmaceutical employee (regardless of whether they perform their professional or official duties in health care facilities or within individual business activities), who are an official or non-official person.

A special subject as part of criminal offenses provided for in part 2 of Art. 321 of the Criminal Code of Ukraine, can be an official or non-official person (regardless of whether he is a medical or pharmaceutical employee or not) who, in his professional activity, which relates to the relevant fragment of pharmaceutical activity, is obliged to comply with the rules of production, making, purchasing, storage, release, accounting, transportation, forwarding of poisonous or

potent substances that are not narcotic or psychotropic or their analogues, or poisonous or potent drugs.

One of the special subject as an element of the criminal offense provided for in Art. 321-2 of the Criminal Code of Ukraine, there is a person who is obliged to comply with the established procedure for state registration of medicinal products.

As part of the criminal offense provided for in part 2 of Art. 323 of the Criminal Code of Ukraine, the signs of a special subject are related to the person's performance of the duties assigned to him regarding the education of the victim or taking care of him, or the professional duties of a trainer.

A person who, in his professional activity, is obliged to comply with the rules and regulations established for the purpose of preventing epidemic and other infectious diseases, as well as mass non-infectious diseases (poisoning) and combating them (Art. 325 of the Criminal Code of Ukraine), may be an official (in particular, from among medical or pharmaceutical employee), and non-official.

5. Conclusions

The selection of a general and a special subject in the elements of criminal offenses of specific types makes it possible to find out the specifics of the mechanism of harm to pharmaceutical activity, which is expressed in the rupture of social ties in the content of the relevant components of pharmaceutical activity, subjects and "non-subjects" of pharmaceutical activity.

Subjects of criminal offenses in the elements of those criminal offenses that encroach on pharmaceutical activity are presented as follows: a) as a general subject (in the elements provided for in Art. 134, 138, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, part 1 of Art. 321, part 1 of Art. 321-1, 322, 323 of the Criminal Code of Ukraine); b) as a special subject, which is defined as: a medical, pharmaceutical or other employee who performs his professional duties (Art. 131 of the Criminal Code of Ukraine); an official of a medical institution, an auxiliary employee and a medical employee (Art. 132 of the Criminal Code of Ukraine); an obstetrician-gynecologist who has a special medical education and has the right to perform artificial termination of pregnancy (part 3 of Art. 134 of the Criminal Code of Ukraine); a person who is entrusted with professional or official duties regarding the protection of life and health of minors (Art. 137 of the Criminal Code of Ukraine); a medical employee who is obliged,

in accordance with established rules, to provide assistance to a patient (Art. 139 of the Criminal Code of Ukraine); a medical or pharmaceutical employee who is entrusted with professional duties (Art. 140 of the Criminal Code of Ukraine); a person authorized (responsible for) conducting clinical trials (Art. 141 of the Criminal Code of Ukraine) or biomedical, psychological or other human experiments (Art. 142 of the Criminal Code of Ukraine); a person who performs professional or official duties related to medical secrecy (Art. 145 of the Criminal Code of Ukraine); an official who abuses his official position (part 2 of Art. 308, part 2 of Art. 312, part 2 of Art. 313, part 2 of Art. 320, part 2 of Art. 321-1 of the Criminal Code of Ukraine); a person who is entrusted with the obligations to comply with the rules of production, making, purchasing, storage, release, accounting, transportation, forwarding of poisonous or potent substances that are not narcotic or psychotropic substances or their analogues, or poisonous or potent medicinal products (part 2 of Art. 321 of the Criminal Code of Ukraine); a medical or pharmaceutical employee (part 2 of Art. 321-1 of the Criminal Code of Ukraine); a person who is entrusted with the duties of complying with the established procedure for preclinical study, clinical trials of medicinal products and/or the procedure for state registration of medicinal products (Art. 321-2 of the Criminal Code of Ukraine); a person entrusted with the responsibilities of educating or caring for the victim, or a trainer (part 2 of Art. 323 of the Criminal Code of Ukraine); a person who is entrusted with the obligations to comply with the rules and norms established for the purpose of preventing epidemic and other infectious diseases, as well as mass non-infectious diseases (poisoning) and combating them (Art. 325 of the Criminal Code of Ukraine).

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