

THE OBJECTIVE SIDE OF THE COMPOSITION OF CRIMINAL OFFENSES ENCROACHING ON PHARMACEUTICAL ACTIVITY IN UKRAINE

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Abstract: The article examines the objective side of the composition of criminal offenses encroaching on pharmaceutical activity in Ukraine. Taking into account the peculiarities of activity and passivity in human behavior in the criminal offenses that encroach on pharmaceutical activity, the author proposes to single out the following groups of actions under the Criminal Code of Ukraine, which combine certain types of actions as mandatory signs of the objective side of the specified corpus delicti: 1) action and inaction (activity or passivity) associated with improper performance by a person of his professional duties in the field of pharmaceutical activity (pharmaceutical duties) as a result of negligent or dishonest attitude towards them (in other words, manifestations of the so-called "medical and/or pharmaceutical negligence"); 2) actions consisting in the disclosure of certain information related to pharmaceutical activity; 3) actions consisting in violation of the procedure for carrying out special medical and pharmaceutical "procedures" in the process of pharmaceutical service; 4) actions that violate the order of circulation of medicinal products. The author notes that certain types of criminal offenses that encroach on pharmaceutical activity are constructed as material, i.e., those where consequences (socially dangerous consequences) are a mandatory element. The article considers the consequences in the corpus delicti of the specified criminal offenses. The article focuses attention on the fact that certain criminal offenses that encroach on pharmaceutical activity include optional (alternative) features of the objective side, namely: the method of committing a certain act, the setting (situation) of committing a criminal offense, the place of committing a criminal offense.

Keywords: criminal legal protection of pharmaceutical activity; pharmaceutical activity; criminal responsibility; Criminal Code of Ukraine; criminal offense; health care; objective side; consequences.

1 Introduction

As any act of voluntary human behavior, a criminal offense is a unity of its external (objective) and internal (subjective) properties and signs. The external side of a criminal offense forms its objective side [1, p. 133], or, in other words, the objective side of a criminal offense is an external act of human behavior (a concrete manifestation of social reality), which must be distinguished from the objective side of the composition of a criminal offense - the legislator's judgment about this act of behavior reflected in the Criminal Code [8, p. 180].

The purpose of the article is to investigate the objective side of the composition of criminal offenses that encroach on pharmaceutical activity.

2 Materials and Methods

The research methodology is based on the method of dialectical cognition, which allows analyzing the phenomena under study in a static state and in dynamic interaction. In preparing the study, a complex of general scientific and specific scientific methods was used, in particular, system-functional and system-structural methods made it possible to conduct a comprehensive study of criminal law and criminological patterns. The research methodology includes a systematic analysis of criminal law and medical legislation.

3 Results and Discussion

The content of the objective side of the corpus delicti formed by two groups of signs: 1) signs that are components of the criminal illegal activity itself and directly characterize its external manifestation (these include action or inaction, method, tools and means, consequence and causal connection); 2) signs characterizing the set of conditions under which the act is committed (place, time, setting of the act, as well as their peculiar combination - the situation). Most of these signs are

optional (since they are included not in all criminal offenses of specific types), and the universally mandatory sign of the objective part is only the act [1, p. 133].

Taking into account the peculiarities of activity and passivity in human behavior in the composition of criminal offenses that encroach on pharmaceutical activity, the following groups of actions can be distinguished according to the Criminal Code of Ukraine [5], which combine certain types of actions as mandatory features of the objective side of the specified crimes:

- 1) Action and inaction (activity or passivity) associated with improper performance by a person of his professional duties in the field of pharmaceutical activity (pharmaceutical duties) as a result of negligent or dishonest attitude towards them (in other words, manifestations of the so-called "medical and/or pharmaceutical negligence") (Articles 131, 137, 139, 140 of the Criminal Code);
- 2) Actions consisting in the disclosure of certain information related to pharmaceutical activity (Articles 132, 145 of the Criminal Code);
- 3) Actions consisting in violation of the procedure for carrying out special medical and pharmaceutical "procedures" in the process of pharmaceutical service (Articles 134, 138, 142 of the Criminal Code);
- 4) Actions that violate the order of circulation of medicinal products (Articles 141, 305, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 321-1, 321-2, 322, 323, 325 of the Criminal Code).

Let us move on to the characteristics of the signs of actions highlighted above.

The first group is actions related to the improper performance by a person of his professional duties in the field of pharmaceutical activity (pharmaceutical duties) as a result of negligent or dishonest attitude towards them. Articles 131, 137, 139, 140 of the Criminal Code provide for separate varieties of the so-called "medical and/or pharmaceutical negligence", an independent element of corpus delicti in which is an act expressed (designated): 1) in Part 1 of Art. 131 of the Criminal Code as "improper performance of professional duties by a medical, pharmaceutical, or other employee"; 2) in Part 1 of Art. 137 of the Criminal Code as "failure or improper performance of professional or official duties regarding the protection of life and health of minors"; 3) in Part 1 of Art. 139 of the Criminal Code as "failure to provide assistance to a sick person without valid reasons by a medical worker who is obliged, according to the established rules, to provide such assistance"; 4) in Part 1 of Art. 140 of the Criminal Code as "failure or improper performance of professional duties by a medical or pharmaceutical worker". Therefore, within this group of actions, the feature "improper execution" is "common" to the corpus delicti of criminal offenses provided for in Art. 131, 137, 140 of the Criminal Code, while the sign of "non-performance" is "common" for the corpus delicti provided for in Art. 137, 140 of the Criminal Code (in Article 131 of the Criminal Code, such type (form) of action as "non-performance" is not established).

The concept of "improper performance" refers to the corresponding manifestations of activity and passivity of a person's behavior. Moreover, when characterizing active behavior, it is necessary to take into account the different scope of relevant professional (Articles 131, 137, 140 of the Criminal Code) or official (Article 137 of the Criminal Code) duties assigned to a person and performed by him.

The concept of "non-performance" (Articles 137, 140 of the Criminal Code) denotes only relevant manifestations of a person's passivity and assumes that a person does not perform those specific actions that he is obliged to perform. Such an obligation to perform certain actions must be regulated in the relevant legislative or other legal act, and the implementation of

this obligation must also be assigned to a specific person by the relevant legal act. Therefore, non-performance means inaction, when a person does not perform certain professional or official duties at all, which he is obliged to and could perform on the basis of regulatory or other legal acts [2, p. 85].

The second group includes actions consisting in the disclosure of information related to pharmaceutical activity. Clarifying the signs of the actions of this group requires a general and specific description of the mechanism of disclosure, the types of which are appropriately "represented" in the composition of criminal offenses provided for in Art. 132, 145 of the Criminal Code. Moreover, it is important that only the general characteristics are clearly not enough for a complete description of the disclosure mechanism, since in this case it is not clear which elements of it (the mechanism) characterize the action, and which ones go beyond the content of the action and are the result (consequence), which are formed by disclosure.

At the general level, the concept of disclosure means that specific data (information) is illegally brought to the attention of at least one third party who does not have the authority to get to know them (or a certain group of such third parties) [12, p. 249]. In particular, P. Andrushko reasonably draws a conclusion, commenting on the provisions of Art. 132 of the Criminal Code: "disclosure of information ... is the illegal familiarization of other persons with such information or the creation of conditions that made it possible for outsiders to become familiar with it, committed by a person who is obliged to keep such information confidential" [13, p. 253]. Regarding the content of the disclosure provided in Art. 145 of the Criminal Code, the scientist points out: "this is the illegal familiarization of at least one third party with information that constitutes a medical secret according to the current legislation, by a person to whom this information became known in connection with the performance of professional or official duties and which he did not have the right to disclose" [13, p. 275-276].

The specific level of characteristics of the disclosure mechanism assumes that: 1) there are specific norms that prohibit a person who is obliged to keep the relevant information secret from disclosing it to third parties who do not have the authority to be familiarized with this information (or, in other words, to be aware of such information); 2) disclosure by a person who is obliged to keep the relevant information confidential implies the formation of a specific result (consequence) in the form of awareness of third parties with the specific content of such information (in principle, namely due to the emergence of such awareness of a third party, it can be said that the relevant information is disclosed and brought to its attention, and the disclosure itself is finished, complete). Moreover, several alternative options are possible regarding the consideration of the specified result (consequence) in the content of the structure of the composition of criminal offenses provided for in Art. 132, 145 of the Criminal Code.

The third group implies actions consisting in violation of the procedure for carrying out special medical and pharmaceutical "procedures" in the process of pharmaceutical service (Articles 134, 138, 142 of the Criminal Code). For example, in Art. 134 of the Criminal Code, the act as an element of the objective side is "presented" as: 1) "carrying out an abortion" (Part 1); 2) "forcing an abortion" (Part 2); 3) "illegal abortion" (Part 3); 4) "forcing sterilization" (Part 4).

As part of illegal medical activity, provided for in Art. 138 of the Criminal Code, the act is manifested in a person engaging in medical activities without a special permit and in the absence of proper medical education.

In the composition of the criminal offense provided for by Art. 142 of the Criminal Code, the act is expressed in the illegal conduct of medico-biological, psychological, or other experiments on a person.

The fourth group includes actions that violate the order of circulation of medicinal products (Articles 141, 305, 306, 307,

308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 321-1, 321-2, 322, 323, 325 of the Criminal Code). An obligatory element of the objective side of the corpus delicti of criminal offenses of this group is an act, the signs of which indicate the corresponding fragment of the circulation of medicinal products.

Separate signs of action in the content of the objective side of the composition of criminal offenses relate to the violation of the order of introduction of pharmaceutical activity items (items that provide pharmaceutical activity) into circulation and their stay in circulation. Thus, the signs of the objective side of the corpus delicti of criminal offenses provided for in Art. 307, 309, 311, part 1 of Art. 321 of the Criminal Code is the illegal production, manufacture, acquisition, storage, transportation or forwarding of the composition provided for in Art. 317, Part 1 of Art. 320, Part 1 of Art. 321 of the Criminal Code, - production and manufacture of the corpus delicti provided for in Part 1 of Art. 318, Part 1 of Art. 321-1 of the Criminal Code, - production (illegal production), use and sale, in the corpus delicti provided for in Part 1 of Art. 320 of the Criminal Code, - storage, transportation, forwarding, in corpus delicti provided for by Art. 307, 312, 321 of the Criminal Code, respectively - illegal sale and sale. Article 313 of the Criminal Code defines the objective aspects of a criminal offense as illegal production, acquisition, storage, transfer or sale. In addition, as part of the criminal offense provided for in Part 2 of Art. 321 of the Criminal Code, alternative signs of the objective part are violations of the established rules of acquisition, storage, transportation, forwarding, and as corpus delicti of the criminal offense provided for in Part 1 of Art. 321-1 of the Criminal Code - acquisition, transportation, forwarding, storage, and sale.

Separate components of criminal offenses that encroach on pharmaceutical activity are constructed as material, i.e., those whose mandatory element are consequences (socially dangerous consequences). In particular, in Part 1 of Art. 131 of the Criminal Code, the consequences are presented as the infection of a person with HIV or another incurable infectious disease that is dangerous for human life, and in part 2 of this article of the Criminal Code - as the infection of two or more persons. In Art. 132 of the Criminal Code, the consequences are a mandatory component of the disclosure of information on conducting a medical examination of a person to detect HIV infection or another incurable infectious disease that is dangerous to human life, or AIDS and its results. Similar in their criminal law nature are the consequences inherent in the content of the disclosure provided for in Art. 145 of the Criminal Code, but with the difference that concerns the so-called double consequences: the legislator adds "severe consequences" to the consequences as a mandatory component of disclosure in the article of the Criminal Code. In Part 3 of Art. 134 of the Criminal Code, the consequences are a long-term health disorder, infertility or death of the victim, and in Part 5 of the same article of the Criminal Code - the death of the victim or other serious consequences. In Part 1 of Art. 137 of the Criminal Code, the consequences are defined as significant harm to the health of the victim, and in Part 2 of this article of the Criminal Code - as the death of a minor or other serious consequences. In Art. 138 of the Criminal Code, the consequences are indicated by the concept of "severe consequences for the patient", and in Art. 139 of the Criminal Code - the concept that "it may have serious consequences for the patient" (part 1) and "caused the death of the patient or other serious consequences" (part 2). In Art. 140 of the Criminal Code, the consequences are defined as "severe consequences for the patient" (Part 1) and "serious consequences for the minor" (Part 2), and in Art. 141 of the Criminal Code - as the death of the patient or other serious consequences. In Part 2 of Art. 314 of the Criminal Code, the consequences are moderate or serious bodily injury to the victim, and in Part 3 of this article of the Criminal Code - the death of the victim. In Part 2 of Art. 321-1 of the Criminal Code, the consequences are provided as a long-term disorder of a person's health, and in Part 3 of this article of the Criminal Code - as the death of a person or other serious consequences. Double alternative consequences in the form of the death of the victim or other serious consequences are

provided for in Part 3 of Art. 321-2 of the Criminal Code. In Part 3 of Art. 323 of the Criminal Code, the consequences are defined as harm to the victim's health, and in Part 4 of this article of the Criminal Code - as significant harm to the victim's health or other serious consequences. In Art. 325 of the Criminal Code, the consequences are associated with damage in the form of the spread of diseases or the danger of such spread (Part 1), as well as with the death of people or other serious consequences (Part 2).

Let us consider the specified consequences in the constructions of the corpus delicti of the specified criminal offenses.

In Part 1 of Art. 131 of the Criminal Code, the consequences of "a person's infection with the human immunodeficiency virus or another incurable infectious disease that is dangerous to human life" are doubly mandatory and are associated with the mandatory properties of the result of a person's infection with HIV or another incurable infectious disease that is dangerous to a person human life: the first type of consequences of "infecting a person with HIV or another incurable infectious disease" is associated with the introduction (presence) of HIV or another incurable infectious disease into the human body, while the second type of these consequences is associated with the creation of danger to human life. Therefore, not every infection of a person with a virus of an incurable infectious disease is a mandatory consequence of the composition provided for in Part 1 of Art. 131 of the Criminal Code.

Due to its criminal-legal nature, the consequences in the composition provided for in Art. 132 of the Criminal Code, are single constructive, i.e., they are a mandatory component of the disclosure of information about conducting a medical examination of a person to detect HIV infection or other incurable infectious disease that is dangerous to human life, or AIDS disease and its results. In the corpus delicti provided for by Art. 145 of the Criminal Code, the consequences are doubly mandatory: the first type of consequences in the form of the awareness of third parties in the information related to the medical secret is combined with the second type - "severe consequences".

Part 3 of Art. 134 of the Criminal Code stipulates alternative consequences in the form of a long-term health disorder, infertility or death of the victim. A health disorder lasting more than three weeks (more than 21 days) should be considered long-term.

Infertility is characteristic of a violation [6, p. 62-63] of the physiological condition of women, which is related to the medical processes of ovulation, the functions of the fallopian tubes, the uterus and the peritoneum of the pelvis, etc. [7, p. 3], as a result of which a woman is unable to conceive (regardless of whether it is possible to medically eliminate such infertility of a person who has had an illegal abortion) and "has lost the ability to bear children" [9, p. 37]. Therefore, for the presence of infertility of a person who has had an illegal abortion, as one of the consequences of the criminal offense provided for in Part 3 of Art. 134 of the Criminal Code, it does not matter whether medical workers managed to eliminate infertility through medical intervention or not and, accordingly, restore the ability of such a woman to bear children (such a result of medical intervention is outside the scope of a criminal offense).

Part 5 of Art. 134 of the Criminal Code implies consequences in the form of the death of the victim or other serious consequences. The concept of "other serious consequences" refers to more or less serious types of harm, compared to the death of the victim, affecting the life or health of the person who is forced to undergo sterilization without his voluntary consent, namely: the risk of death, the formation of a long-term health disorder of the victim (an example is an increase in the level of testosterone in the human body, as a result of which blood thickens, hypercoagulation develops, the risk of a heart attack, stroke appears, bone tissues soften [3, p. 197]), infliction of serious bodily injuries on the victim (for example, as a result of the subsequent surgical operation to remove the genital organ),

the death of several victims or the infliction of serious bodily injuries on them, etc.

The concept of "significant harm to the health of the victim" (Part 1 of Article 137, Part 4 of Article 323 of the Criminal Code) is associated with the infliction of light physical injuries on a person (such as those that caused a short-term health disorder or minor loss of working capacity, and without a short-term health disorder or minor loss of working capacity).

The concept of "other severe consequences" in the wording "death of a minor or other severe consequences" (Part 2 of Article 137 of the Criminal Code) includes damage to the victim's life and/or health, which is more or less severe compared to the death of one minor, in particular: moderate or severe bodily harm, death of several minors, etc. Similar one is the approach to specifying the content of the sign "severe consequences for the patient" in Article 138 of the Criminal Code, "death of the patient or other serious consequences" in Part 2 of Art. 139 of the Criminal Code (in contrast to the actual occurrence of the patient's death or other serious consequences (Part 2 of Article 139 of the Criminal Code), in Part 1 of this article of the Criminal Code, the consequences are associated with the danger of serious consequences and are denoted by the concept "may have serious consequences for the patient"), "severe consequences for the patient" (Part 1 of Article 140 of the Criminal Code) and "serious consequences for a minor" (Part 2 of Article 140 of the Criminal Code), "death of the patient or other serious consequences" in Article 141 of the Criminal Code, as well as "death of people or other serious consequences" in Part 2 of Article 325 of the Criminal Code. The content of the above concepts related to the occurrence of serious consequences for the victim must take into account the duration of the victim's health disorder, in the determination of which, in the Rules of Forensic Medical Determination of the Severity of Bodily Injuries, the duration of the disorder is taken into account (as a criterion) for more than three weeks (more than 21 days) [10].

Moderate bodily injury and severe bodily injury are distinguished in Part 2 of Article 314 of the Criminal Code as consequences that are alternative signs in the qualified corpus delicti of illegal introduction of narcotic drugs, psychotropic substances or their analogues into the body. In Part 3 of Article 314 of the Criminal Code, the consequence as an alternative sign of a specially qualified composition is connected with the "death of the victim".

In Part 3 of Article 323 of the Criminal Code, the consequences are provided in the form of harm to the victim's health, and in Part 4 of this Article of the Criminal Code - in the form of significant harm to the victim's health or other serious consequences. Comparison of these provisions of Part 3 and Part 4 of Article 323 of the Criminal Code allows concluding that "damage to the victim's health" in Part 3 of Article 323 of the Criminal Code does not reach the size of the essential. Therefore, the meaning of the concept of "harm to the victim's health" should be associated with consequences less than minor physical injuries without short-term health impairment, namely: infliction of physical pain on the victim, which does not reach the nature of minor bodily injuries without short-term health impairment.

In Article 325 of the Criminal Code, the consequences are "represented" as harm to individual and/or public health in the form of the spread of diseases or the danger of such spread (Part 1), as well in the form of death of people or other serious consequences (Part 2).

Separate corpus delicti of criminal offenses encroaching on pharmaceutical activity include such optional (alternative) features of the objective part as:

1) Method of committing a certain act: Part 2 of Article 142 of the Criminal Code stipulates the signs of "actions ... committed ... by means of coercion or deception" (actions in Part 1 of this Article of the Criminal Code mean "illegal conducting of

medical-biological, psychological, or other experiments on a person”).

In addition, the method of committing the act is provided for in Part 2 of Article 307, Part 2 of Article 317 of the Criminal Code in the form of “involvement of a minor”, and in Part 3 of Art. 307 of the Criminal Code – “involvement of a young minor”. The concept of “involvement” means a specific form of encouraging a minor to commit the actions described in the relevant parts of Article 307 of the Criminal Code.

Part 2 of Article 308, Part 2 of Article 312 of the Criminal Code provides such a method as “the use of violence that is not dangerous to the life or health of the victim, or with the threat of using such violence”.

Part 3 of Article 308, Part 2 of Article 313, Part 2 of Article 320 of the Criminal Code alternatively provide for such a method as “abuse by an official of his official position”, which includes three mandatory elements: a) use of the powers of such an official, which is specified in Article 364 of the Criminal Code or in Article 364-1 of the Criminal Code; b) the purpose of receiving an unlawful benefit, c) receiving it contrary to the interests of the service (Part 1 of Article 364 of the Criminal Code) or the interests of a legal entity of private law (Part 1 of Article 364-1 of the Criminal Code) [4, p. 275-278].

Part 2 of Article 321-1 of the Criminal Code provides such a method as the use of information systems, which is indicated by the wording “... with the help of information systems, including the Internet”.

2) Setting (situation) of committing a criminal offense: Article 132 of the Criminal Code provides for the sign of “fulfillment of professional or official duties” (awareness of a medical worker in “information about conducting a medical examination of a person to detect HIV infection or other incurable infectious disease that is dangerous to human life” is associated with such duties), or information about “AIDS and its results”); Article 145 of the Criminal Code stipulates that with the “fulfillment of professional or official duties” a person becomes aware of a medical secret that he intentionally divulges (the specifics of the specified professional and official duties are taken into account in this case);

3) Place of commission of the criminal offense: Part 2 of Article 307 of the Criminal Code states that the actions provided for in Part 1 are committed “in places designated for educational, sports, and cultural events, and in other places of mass gathering of citizens”. The above-mentioned places should be understood as a certain plane within which a mass of people participating in the respective educational process, sports competitions or educational and training meetings, in the field of culture or provision of cultural services are located.

Conclusion

Thus, separate components of criminal offenses that encroach on pharmaceutical activity include optional (alternative) features of the objective side, namely: the method of committing a certain act, the setting (situation) of committing a criminal offense, the place of committing a criminal offense.

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Primary Paper Section: A

Secondary Paper Section: AG