

CORRUPTION BETWEEN DOCTORS AND PHARMACISTS: CRIMINAL LAW PROBLEMS OF COUNTERACTION

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ABSTRACT

The aim: To draw the attention of the scientific community to the problem of corruption between doctors and pharmacists and to find out the available possibilities to counteract it via criminal law measures.

Materials and methods: The sources of this research include international legal acts and Ukrainian legislation; official reports of law enforcement agencies of Ukraine and other countries; NGO "Transparency International" studies; media materials; the results of a survey conducted using the Google Forms service; reports of the Accounting Chamber of Ukraine; judicial statistics data and materials of judicial practice in Ukraine, as well as special anti-corruption studies of Ukrainian and foreign scholars.

The main methods used in the study are the legal-dogmatic method, the method of extrapolation, some methods of formal logic and open-source analysis of law-enforcement practice, as well as the survey method.

Results: The problem of corrupt relationships between doctors and pharmacists is urgent both in Ukraine and abroad, and accordingly, requires an adequate legal assessment. Ukraine has the necessary criminal law tools to combat this negative phenomenon but uses them ineffectively.

Conclusions: A corrupt relationship between a doctor and a pharmacist may occur at three levels. Corrupt forms of unlawful interaction between medical and pharmaceutical workers at all these levels are covered by the existing norms of the Criminal Code of Ukraine; there is no need to single out a special norm that would reflect the corrupt relationship between a doctor and a pharmacist.

KEY WORDS: Corrupt relationship, healthcare sector, unlawful interaction between a doctor and a pharmacist, criminal law assessment

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INTRODUCTION

The corruption in the healthcare sector in Ukraine is a matter of serious concern not only within our country but also abroad. The current situation in the world, mainly related to the spread of the Covid-19 pandemic, exposes the problem of misuse of their special status by public officials of the healthcare sector, private medical workers to gain personal benefits and advantages.

In general, corrupt forms of unlawful behavior in the field of health care are described in special anti-corruption studies. Thus, in the doctoral dissertation of Olena Busol "Counteraction to corruption crime in Ukraine in the context of modern anti-corruption strategy" (2015) a whole section is devoted to the characteristics of the current state of corruption in the field of health care in Ukraine [1, pp. 258-273]. This author points out that similar corruption relationships are also typical for European countries. As an example, the researcher lists the most common corruption schemes in the healthcare sector in Poland [1, p. 272].

Among the "corruption schemes" in the healthcare sector, special attention should be paid to such forms of using the opportunities of special status by medical workers as "mutually beneficial cooperation" with pharmaceutical workers. The threat of corruption in the relationship be-

tween healthcare professionals (HCPs) and the pharmaceutical industry was highlighted in Transparency International study "Corruption in the Pharmaceutical Sector. Diagnosing the Challenges" (2016): "Due to the industry's need to recoup R&D (Research and Development) costs and maximise profits, without strong regulatory systems and oversight mechanisms unethical marketing practices can take place. The close relationship between the pharmaceutical industry and HCPs can make it hard to detect corrupt marketing practices, since the line between violations and normal collaboration is often blurred" [2, p. 17].

This area's particular vulnerability to corruption is also emphasized by foreign researchers. This is one more confirmation that the issues under investigation are relevant not only in Ukraine but also abroad. For instance, Assistant Professor at the University of Toronto Jillian Clare Cohen notes: "The interface between the pharmaceutical industry and physicians is an area that is particularly susceptible to corruption, as service delivery can be influenced by the marketing practices of the pharmaceutical industry" [3, p. 82].

The urgency of the problem is also confirmed by high-profile scandals in this area. According to the official website of the National Police of Ukraine, in 2019 the police exposed a group of pharmaceutical companies in bribing doctors

for UAH 140 million: “For the received reward doctors of several medical institutions prescribed the medicines in the realization of which representatives of the pharmaceutical companies were interested” [4].

Similar news can be found in foreign sources. For example, the title of one of DownToEarth’s publications (May 2019) reads: “There’s an unhealthy alliance between doctors and pharma firms”. The publication also indicates a lack of attention of the Indian government to this problem: “The government has shown little interest to penalise pharma companies that offer sops to doctors to push their drugs” [5]. The website of Special Investigation Service of the Republic of Lithuania notes that criminal case on large-scale corruption in the field of pharmacy has been referred to the court. In particular, it reads that “12 employees of the pharmaceutical company were operating in an organised group. Some of the members of this group – the company’s managers – have allegedly agreed with the doctors of the medical institutions of Lithuanian cities and districts they serve to recommend patients to purchase for an illegal fee, and later to inject the products distributed by their company” [6].

According to the report of the United States Department of Justice (September 2009), “American pharmaceutical giant Pfizer Inc. and its subsidiary Pharmacia & Upjohn Company Inc. have agreed to pay \$2.3 billion, the largest health care fraud settlement in the history of the Department of Justice, to resolve criminal and civil liability arising from the illegal promotion of certain pharmaceutical products” [7]. One more report of the United States Department of Justice (July 2012) notes: “Global health care giant GlaxoSmithKline LLC (GSK) agreed to plead guilty and to pay \$3 billion to resolve its criminal and civil liability arising from the company’s unlawful promotion of certain prescription drugs” [8].

The pharmaceutical company Johnson and Johnson (J&J) was also charged with corruption (2011): U.S. Securities and Exchange Commission (SEC) charged J&J with violating the Foreign Corrupt Practices Act by bribing public doctors in several European countries and paying kickbacks to Iraq to illegally obtain business. According to the SEC’s complaint filed in federal court in the District of Columbia, public doctors and administrators in Greece, Poland, and Romania who ordered or prescribed J&J products were rewarded in a variety of ways, including with cash and inappropriate travel [9].

Thus, the phenomenon of corrupt relationships between doctors and pharmacists takes place in reality, is quite common, and requires an adequate legal assessment.

THE AIM

The article aims to draw the attention of the scientific community to the problem of corruption between doctors and pharmacists and to find out the available possibilities to counteract it with the help of criminal law measures.

MATERIALS AND METHODS

The sources of this research include international legal acts and Ukrainian legislation; official reports of the National

Police of Ukraine, Special Investigation Service of the Republic of Lithuania, The United States Department of Justice, U.S. Securities and Exchange Commission; NGO “Transparency International” studies; media materials; the results of a survey of 249 respondents of different ages and from different parts of Ukraine conducted using the Google Forms service on 25-31 July 2021; reports of the Accounting Chamber of Ukraine; judicial statistics data and materials of judicial practice in Ukraine, as well as special anti-corruption studies of Ukrainian and foreign scholars.

The main methods used in the study are the legal-dogmatic method, the method of extrapolation, some methods of formal logic and open-source analysis of law-enforcement practice, as well as the survey method.

RESULTS AND DISCUSSION

Achieving the aim of this research involves answering several key questions.

What forms of interaction between a doctor and a pharmacist are illegal?

This question arises because, in principle, the interaction between a doctor and a pharmacist is quite natural and legitimate. In the most general form, a doctor and a pharmacist are called to perform a common task of ensuring the health of both the individual and the population in general. Therefore, communication, mutual consultations, etc. between the representatives of these professions are not illegal or dangerous.

In this regard, Jillian Clare Cohen notes: “Some physician-industry interaction is necessary to educate doctors about the therapeutic qualities of new drugs. However, there is compelling evidence that suggests that the motivation is often not health education, but profit maximisation” [3, p. 82].

This was also emphasized by Ukrainian researchers. Nataliya Gutorova, Oleksii Soloviov, Dimitri Olejnik in the article “Improper Healthcare Marketing: German And Ukrainian Experience In Prevention” (2019) underline: “Studies show that there are cases of pharmaceutical companies using improper drug marketing, putting their financial interests above the interests of patients. With such marketing, direct and indirect bribing of doctors is used to maximize the promotion of drugs on the market” [10, p. 2404].

Thus, the exception to the generally useful and necessary interaction of doctors and pharmacists is only those forms of relationships that are designed to achieve an illegal result contrary to the main vocation of these professions.

The legislation of Ukraine sets restrictions for medical, pharmaceutical workers, and rehabilitation specialists in the course of their professional activities, most of which relate to the field of interaction “doctor-pharmacist” [11]. It should be noted that any prohibition will be effective only if its observance is ensured by the establishment of legal responsibility, the most severe form of which is criminal liability. The analysis of the current Criminal Code of Ukraine makes it possible to single out the criminal law

norms aimed at ensuring the observance of one of the established restrictions – the prohibition to receive illegal benefits from business entities or their representatives engaged in the production and/or sale of medicines, medical devices, technical and other means of rehabilitation.

Counteraction to non-compliance with other restrictions for medical and pharmaceutical workers is provided by the provisions of Article 44² of the Code of Ukraine on Administrative Offenses “Violation of restrictions imposed on medical and pharmaceutical workers in the course of their professional activities”. The low efficiency of this norm is evidenced by the data of official statistics of cases on this administrative offense: a total of 6 relevant cases were considered from 2013 to 2019 [12]. In 2020, 5 proceedings were initiated under Article 44² of the Code of Ukraine on Administrative Offenses, 3 of which were returned by the courts as improperly filed [13].

However, such statistics show rather the latency of the relevant violations. As part of the research, we conducted a survey¹ to determine whether health professionals adhere to certain restrictions, including the restriction on prescribing drugs on forms that contain advertising information. Respondents were asked the following question: “Has your doctor prescribed you any medicines on a form advertising a drug / pharmaceutical company?” 249 respondents took part in the survey. 80.3% of them, i.e. the absolute majority of respondents, answered “yes”. Two more provided their answer version, which also indicates that the medical workers did not comply with the analyzed prohibition.

However, can such results give grounds for an unambiguous conclusion that there is a corruption component between the doctor and the pharmacist / pharmaceutical company in these cases? Obviously not. But such results undoubtedly indicate the insufficient effectiveness of the analyzed administrative-law prohibition.

As for the criminal-legal counteraction to illegal relationships between a doctor and a pharmacist, it should be noted that concerning doctors and pharmaceutical workers there is no separate criminal-legal prohibition (special norm) providing for the criminal liability of these categories of workers for corruption, however, all general prohibitions established in the current Criminal Code of Ukraine are applicable to them if their behavior contains corpus delicti of a criminal offense. There is the approach expressed in special literature about the need to eliminate the relevant gap. In this regard, the position of the working group on the draft Criminal Code of Ukraine is mentioned about the formulation of two new criminal offenses in the next Criminal Code of Ukraine: Article 4.3.8 “Illegal promotion of medical products” and Article 4.3.9 “Receiving illegal benefits for the promotion of medical products” [14]. It seems to us that the answer to the question on the need to criminalize illegal behavior, as done in Article 4.3.8 of the draft Criminal Code of Ukraine, or to differentiate criminal liability – Article 4.3.9 of the draft Criminal Code of

Ukraine – can be given only by answering the following question.

So the next question to be clarified is: **do the analyzed forms of interaction belong to acts of corruption within the meaning of the Criminal Code of Ukraine and, accordingly, is it possible to apply criminal law tools of counteraction to persons committing such acts?**

The analysis of international legal acts and Ukrainian legislation makes it possible to state that on formal grounds the illegal relationships of a doctor and a pharmacist (both in the case one of them is an official, and in the case none of them is an official) may belong to acts of corruption within the meaning of the Criminal Code of Ukraine if: 1) one of these two subjects (either a doctor or a pharmacist) misuses his/her special status and commits an illegal act prohibited by the Criminal Code of Ukraine; 2) offers, promises / accepts an offer, a promise or provides / receives in this regard an illegal benefit or intends to receive it in the future.

The analysis of media publications, available judicial practice, analytical reports of the regulatory authorities and the results of our survey makes it possible to identify the following forms of corruption between a doctor and a pharmacist, which can appear at different levels:

1) the level of government relations in terms of the use of budget funds (public authority – pharmaceutical corporations): for example, abuse of office by a public official in the procurement of medicines for the implementation of state targeted programs in the field of health care.

For instance, according to the calculations of the Accounting Chamber of Ukraine, the reference prices of full and partial reimbursement of 18 out of 30 items of insulin drugs released to patients with diabetes in the period from 17.03.2020 to 30.08.2020 were overstated. This resulted in unnecessary reimbursement of the total amount of UAH 862.7 thousand from local budgets. According to the officials of the State Expert Center of the Ministry of Health of Ukraine, such an overstatement of wholesale prices for drugs occurred due to technical inaccuracies [15, p. 27].

It should be noted that the problem of corrupt relationships between a doctor and a pharmacist at the government level is typical not only for Ukraine. For example, there is a well-known case of the activities of Pfizer Company in 2012, which agreed to pay \$60 million to settle the US federal investigation into a case of bribery abroad. Pfizer had been accused of bribing not only doctors but also hospital administrators and drug regulators in European and Asian countries. According to court documents, the company had been making monthly payments for what it called “consulting services” to a doctor in Croatia who helped decide which medicines the government would register for sale and reimbursement [16, p. 96];

2) the level of economic relations between legal entities (hospital – pharmacy): for example, procurement of overpriced medicines to obtain illegal benefits through the so-called “rollback”;

¹ Footnote. The survey was conducted using the Google Forms service. More details on its results can be found at the link: <http://surl.li/ayxqz>

3) the level of direct provision of medical services (doctor – patient – pharmacist): for example, the direct sale by a doctor of medicines received from a pharmacist “for sale” (including the counterfeit ones); recommendation of a specific pharmacy to a patient for the corresponding reward so that the patient bought drugs right there; prescribing of drugs from specific manufacturers for a fee, etc.

In the framework of the above-mentioned survey, respondents were also asked the question: “Has it ever happened to you that a doctor, when prescribing medicines, referred you to a specific pharmacy to buy them there (recommended you to buy medicines in this very pharmacy)?” 171 out of 249 answers, i.e. 68.7%, were affirmative. An interesting fact: a significant proportion of respondents (54.1%) found out later that the price of these drugs in another pharmacy was lower. The difference in cost, according to the respondents, ranged from a few UAH to even \$150.

Less often, but situations of selling medicines directly by a doctor can also take place. 39 out of 249 respondents (15.7%) answered “yes” to the question “Have you ever bought medicines directly from the doctor who prescribed them?” Two more gave answers “sometimes”, “from the agent”.

Of course, such survey results cannot unequivocally indicate the presence of a corruption component in each of these cases, but they undoubtedly indicate the particular corruption vulnerability of this sector.

An example of such a situation is the proceedings of the Main Investigation Department of the Security Service of Ukraine under Part 5 of Article 191 of the Criminal Code of Ukraine. During the pre-trial investigation, it was established that a person with the use of the controllable business entities, in agreement with officials of pharmaceutical companies, created an illegal mechanism for misappropriation of funds and providing illegal benefits to employees of healthcare institutions of Ukraine, in order to promote and sell their products among patients [17].

It should be emphasized once again that if corruption behavior at each of the above-described levels contains the necessary features of a criminal offense, the existing criminal remedies of counteraction to corruption are applied.

As a result of the reform of criminal legislation, which has taken place over the past ten years, Ukraine has created a specific criminal law regime to combat corruption, which includes not only the presence in the Criminal Code of Ukraine [18] of the relevant prohibitions but also:

1) the existence in the Criminal Code of Ukraine of the definitions of the notions “corruption criminal offense” and “criminal offense related to corruption”, which are formulated by providing an exhaustive list of the relevant criminal law prohibitions;

2) restriction on the application to a person found guilty of committing the relevant criminal offense of incentive criminal law measures: discharge from criminal liability, from punishment and from serving it, imposition of a punishment milder than prescribed by the law, etc.

Analysis of the relevant provisions of the Criminal Code of Ukraine makes it possible to conclude that various forms

of corrupt relationships between a doctor and a pharmacist at all the levels identified in this article can receive a criminal assessment under the following articles of the Criminal Code of Ukraine, which can be grouped into two relatively large groups:

- 1) Articles 191; 210; 364; 364¹ – for example, in cases of medicines procurement (qualification under one or another article depends on the specific circumstances);
- 2) Articles 354; 368; 368³; 368⁴; 369; 369³ – in cases of bribery, depending on the characteristics of the special subject and the nature of the opportunities that “are being bought”.

As to the second group of criminal offenses that may be committed in tandem “doctor – pharmacist” – bribery – the following should be borne in mind. Indeed, the legislation of Ukraine prohibits medical workers to receive illegal benefits from business entities or their representatives engaged in the production and/or sale of medicines, medical devices, technical and other means of rehabilitation. This gives some authors grounds to claim that “...free business breakfasts, conferences, round tables, etc., organized by pharmacological companies, are illegal benefits” [1, p. 265]. They are indeed, but from the criminal law point of view, such benefits will be relevant as a feature of bribery only if they are offered, promised, or provided for the behavior of a special subject related to his/her status. In the absence of such relation, the fact of transferring illegal benefit, for example, by a pharmacist to a doctor can be assessed only as an administrative offense under Article 44² of the Code of Ukraine on Administrative Offenses.

Therefore, if the corrupt relationship between a doctor and a pharmacist contains a corpus delicti of any criminal offense provided for in the above-mentioned lists of criminal law prohibitions, the persons found guilty of their commitment are subject to the restrictions inherent in any corruption criminal offense. The effectiveness of these tools will be commensurate with the effectiveness of the legal tools to combat any corruption offense.

So the next question in our research is: **are the existing criminal law tools able to counteract corrupt forms of interaction between a doctor and a pharmacist effectively?**

The answer to this question is essentially the answer to the question of whether it is necessary to single out a special norm in the Criminal Code of Ukraine, which would provide for corrupt forms of relationships between the analyzed subjects? Probably not.

Some reasons to justify such a point of view. Volodymyr Kudryavtsev quite rightly noted that the existence of a special norm is justified only if it solves the issue of criminal liability differently: establishes a higher or a lower sanction, narrower limits of the sanction, etc. [19, p. 250]. That is, for the separation of a certain special norm from the already existing general one to be expedient and necessary, it must reflect either a higher or a lower degree of social danger of the respective types of acts in comparison with the general norm. But is it possible to state unequivocally that the corrupt relationship between a doctor and a pharmacist is more socially dangerous than the corruption in other spheres of social life? Or less socially dangerous? In our

opinion, it is impossible to give an unambiguous answer to this question.

Thus, we come to the conclusion that singling out a special norm, which would provide for the corrupt relationship between a doctor and a pharmacist, will indicate only an excessive differentiation of criminal liability and will not contribute to the effectiveness of the criminal law. The corresponding, most dangerous, forms of illegal interaction between medical and pharmaceutical workers are covered by the existing criminal law norms. This raises the long-standing problem of the dialectical relationship between an abstract and a specified legal prohibition: which one is more effective. The preventive effect of a special norm is questioned in the study of one of the authors of this article [20, pp. 122-151] and there are no other studies in this regard that would refute the obtained results. The reference to foreign experience [21] seems unconvincing since it does not take into account the current state of the Ukrainian legal system, which has the necessary legal tools but uses them inefficiently. Therefore, the appearance of a special (specified) prohibition in the Criminal Code of Ukraine, which would reflect the corrupt relationship between a doctor and a pharmacist, will create, in our opinion, an excess of legal regulation and complicate the already ineffective mechanism of legal regulation.

CONCLUSIONS

The study of the problems of criminal law counteraction to corrupt relationships between a doctor and a pharmacist gives us grounds for such conclusions:

- the problem of corrupt relationships between a doctor and a pharmacist is relevant both for Ukraine and for other countries, and accordingly, requires an adequate legal assessment;
- corrupt interaction between a doctor and a pharmacist may occur at these levels: 1) the level of government relations in terms of the use of budget funds (public authority – pharmaceutical corporations); 2) the level of economic relations between legal entities (hospital – pharmacy); 3) the level of direct provision of medical services (doctor – patient – pharmacist);
- corrupt forms of unlawful interaction between medical and pharmaceutical workers at all these levels are covered by the existing norms of the Criminal Code of Ukraine; there is no need to single out a special norm that would reflect the corrupt relationship between a doctor and a pharmacist.

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