

PRACA POGLĄDOWA
REVIEW ARTICLE

RELEVANT ISSUES OF THE CRIMINAL LIABILITY OF THE PRIVATE DOCTORS FOR CORRUPTION CRIMES

Olha S. Bondarenko, Volodymyr V. Pakhomov, Sergey V. Saulyak, Mykhailo O. Dumchikov
SUMY STATE UNIVERSITY, SUMY, UKRAINE

ABSTRACT

Introduction: Corruption, as a socio-economic problem, is characteristic of every society.

The aim: To study relevant issues of criminal liability of the private doctors for committing corruption crimes.

Materials and methods: In the article general scientific and special-scientific methods of cognition were used which provided an objective analysis of the research purpose.

Review: The article analyzes actual questions of relevant issues of criminal liability of the private doctors for committing corruption crimes. The authors propose to research the criminal responsibility of this specific subject through the prism of the crime, as well as its elements. Thus, special attention is focused on the analysis of the essence of the object of the crimes, the responsibility for which is provided in Art. 365-2 and 368-4 of the Criminal Code of Ukraine. In addition, the concept of "unlawful profit" is investigated, in the context of comparison with the "bribe". The essence of the objective side of corruption crimes, the subject of which is a private doctor, is explained in detail. In particular, the concepts of "authority", "offer", "promise", etc. Particular attention is paid to analyzing the legal status of a private doctor as a person authorized to provide public services. The authors focus on the analysis of the subjective side of these corruption crimes being studied by a private physician. All penalties that can be applied to a private doctor for committing corrupt acts are systematized. At the very end, the issue of the totality of crimes is investigated.

Conclusions: Bringing a private doctor in the responsibility for committing a corrupt act is difficult in this region, because the criminalization of corruption actions of such persons took place relatively recently, therefore, pre-trial investigation bodies have not yet established a well-established system of tactical and methodological actions that would facilitate this process.

KEY WORDS: criminal liability, corruption crimes, private doctors

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INTRODUCTION

Corruption, as a socio-economic problem, is typical of every society. At the same time, the level of corruption in each state varies and depends on the economic, social, political, cultural, moral and psychological development of society like general and individual citizens in particular. Unfortunately, nowadays Ukraine, according to the rating published by Transparency International, is one of the most corrupt countries in the world [1]. According to social studies, one of the most favorable spheres of society's life for the corruption development, after the scope of pre-trial investigation and judicial review, is the medical sphere. Corruption in the area of providing health care and medical care is extremely dangerous. We have to emphasize, that firstly, corruption violates the constitutional prescription, set forth in art. 49 of the Fundamental Law of Ukraine [2]; and secondly, the provisions of art. 21 of the Law of Ukraine "On Labor Remuneration", according to which the employee has the right for pay for his work in accordance with the acts of the law and the collective agreement on the basis of the concluded employment contract [3]. Important in the context of this argument can be considered the provision of medical services falls according to competence of the competent entity, that is, it is obliged to provide them. Moreover, such a person should exercise his powers by providing high-quality and rapid public services. Thus, any attempts or

actions committed for the purpose of "encouragement" or "gratitude" to the competent entity are unlawful, since they discredit the basic principles of labor legislation.

ANALYSIS OF RECENT RESEARCH AND PUBLICATIONS

As for the scientific development of this problem, the study of corruption and corruption was committed, in particular, by such teachings as Yu. Grodetsky, O. Zakharchuk, M. Melnyk, A. Savchenko, T. Slutsk, V. Ttiugin, M. Khavronyuk and others. At the same time, the study devoted exclusively to the relevant issues of criminal liability of private doctors for corruption crimes was not implemented.

THE AIM

The aim of the article consists in research of relevant issues of criminal liability of private doctors for corruption crimes.

MATERIALS AND METHODS

The article uses general scientific and special-scientific methods of cognition, which provided an objective analysis

of the research purpose. Taking into account the specifics of the topic, the main aims and objectives of the study, the dialectical method was first used, which outlines the methodological principles of the study and specifies the essence of the analyzed concepts as criminal-law categories; the method of scientific analysis and generalization used to identify and systematize theoretical foundations of the investigation of the criminal liability of a private doctor for committing corruption crimes; the formal legal method was used to clarify the structure and ratio of the concepts studied, as well as to study the relevant provisions of the Ukrainian legislation on criminal liability for crimes in the field of service activities and professional activities related to the provision of public services. For the in-depth study of the normative provisions on the criminal liability of a private doctor for committing corruptive crimes, a systemic and structural method was used, comparing them with other provisions of the current Criminal Code of Ukraine. These and other research methods were used in the work in the relationship and interdependence, which ensured the completeness and completeness of the research, the reliability of the scientific results obtained.

REVIEW AND DISCUSSION

The legal basis for the legal liability of a private doctor for corruption crimes (that is, socially dangerous acts that encroach upon the criminal law protection of relations in the field of providing public services for which the subject of crime is brought to the established criminal liability law [4 p. 37]) is the Criminal Code Of Ukraine. Thus, the legislator criminalized the abuse of authority by persons providing public services (Article 365-2 of the Criminal Code of Ukraine) and bribing the person who provides public services (Article 368-4 of the Criminal Code of Ukraine). The subject of these crimes is the person providing the public service. Public services are services provided by the public sector (ie public authorities, local governments, enterprises, institutions and organizations of state and communal ownership), and in some cases, the private sector is under the responsibility of the public sector (public authority) and, as a rule, at the expense of public funds (that is, funds from the state and local budgets) “[5, p. 43]. Public services are characterized by the following features: they are aimed at protecting and ensuring conditions for the realization of public interests, rights and interests of legal and natural persons; give rise to legal consequences; the procedure and form of their provision are determined by the state or a body of local self-government [6, p. 862]. In accordance with Part 1 of Art. 3 of the Law of Ukraine “On the Fundamentals of Ukrainian Health Law”, a medical service is a service provided to a patient by a healthcare institution or a sole proprietor who has been registered and has received a license for the conduct of economic activity in medical practice in accordance with the procedure established by law (private doctor), and paid by the customer. The customer of health care services may be the state, relevant local governments, legal and physical

persons, including the patient [7]. Moreover, according to pp. 226 p. 1 tbsp. 14 of the Tax Code of Ukraine, persons who provide public services must recognize self-employed persons who are not only entrepreneurs but also conduct independent professional activities, in particular private doctors, provided that such persons are not employees or sole proprietors and use them hired labor no more than four individuals [8]. Thus, it follows from the analysis of the legislation that the medical service is public service.

According to Part 2 of the Art. 2 of the Criminal Code of Ukraine, the only ground for criminal liability is the presence in the act of a person of the characteristics of the crime [9]. Composition of a crime - a collection of objective (object and objective side), as well as subjective (subject and subjective side) elements that determine a socially dangerous act as a criminal.

The first element of the composition of corruption crimes that may be committed by a private physician is their object, that is, certain social relations, that get harm or the threat of causing such damage. And in this case, it is social relations that arise in connection with the activity of the official in accordance with the regulatory acts, which constitutes the proper work of the state apparatus and the apparatus of local self-government, associations of citizens, enterprises, institutions and organizations independently from forms of ownership, as well as individuals-entrepreneurs and self-employed persons [10, p. 7].

A special place in the structure of the object of crimes, the responsibility for the commission of which is provided for in Art. 365-2 of the Criminal Code of Ukraine and Art. 368-4 of the Criminal Code of Ukraine, there is their subject - those things of material and / or immaterial world to which the offender directly affects the process of a socially dangerous attack and through direct influence on which he acts on the object of the crime. So, the subject of these crimes is unlawful benefit. This concept is not legislative innovation any more, while the public continues to operate on the notion of “bribe”, which differs from “unlawful benefit” not only in form but also in essence. Since the “bribe” has always been interpreted by the legislator and judicial practice, as solely material things, for example, property, money. Instead, the essence of “unlawful benefits” is much more wider, because it has not only cash or other property but also benefits, benefits, services, intangible assets, any other benefits of intangible or non-monetary nature. The content of these terms is interpreted in other normative acts or in doctrinal sources, which in fact are not sources of criminal law. Therefore, it is urgent to update the legislation in order to clarify these concepts for the criminal-law and anti-corruption sphere [11, c. 10].

Regarding the objective aspect of the analyzed corruption crimes, it is an explicit aspect of the crime. It defines: the essence of the crime; the way of its commission; conditions, place, time, circumstances of committing a crime, use of a tool or instrument [6, c. 15]. So, in essence, the crimes, the responsibility for the commission of which is provided for in Art. 365-2 of the Criminal Code of Ukraine and Art. 368-4 of the Criminal Code of Ukraine, are committed in

an active form, that is by way of action: abuse of authority and acceptance of a proposal, acceptance of a promise and obtaining an illegal benefit. The concept of “abuse of authority” is not new to a criminal law, but, given the systemic and complex changes in anti-corruption legislation, needs to be analyzed in detail. In the criminal legal literature it is noted that abuse of powers is the realization of factual and legal possibilities, committed contrary to the purpose, tasks, interests of legal activity, when acts are committed within the limits of the powers granted, but it is unlawful or deliberate not to commit certain actions that must to be done. Unlike excess of power and official powers, abuse of authority, a person does not go beyond the respective rights and powers [12, p. 308]. As to the essence of the concept of “authority”, then, in the opinion of P Lyubchenko, they have the rights and responsibilities that are assigned to a particular special subject, and it is with the specific authority that the person providing the public service has to implement the appropriate competence, which in turn is a set of subjects of authority and authority [13, p. 28]. Crime envisaged by Art. 365-2 of the Criminal Code of Ukraine, is considered complete from the moment of causing significant harm to the rights protected by the law or interests of individual citizens, public or public interests or interests of legal entities. Significant damage should be regarded as such harm, which is 100 times more than the non-taxable minimum income of citizens. That is, considering the wording of the concept of “substantial harm”, the legislator interprets it solely through the material (monetary) form. Thus, A. Savchenko proposes to consider: 1) the losses incurred by a person in connection with the destruction or damage to the thing, as well as the expenses that a person has or should do to restore his violated right (actual damage); 2) income that a person could actually receive in normal circumstances, if his right was not violated (loss of profit). In this case, the amount of monetary compensation for non-pecuniary damage can not be included in the content of substantial harm (as well as grave consequences) [14, c. 92].

Of particular scientific interest, of course, represents the interpretation of the concepts “offer” and “promise”, which are relatively new to the criminal law. Thus, under the proposal of unlawful benefit should be understood, the consent of the private doctor regarding the intention to transfer or to grant him unlawful benefit for the commission or non-execution of any action using his authority or official position and may be carried out in any form (oral, written, SMS-message, etc.) [15, p. 42]. Accordingly, the promise made by a private physician to grant him unlawful benefit is to identify him / her to accept such a benefit in response to a statement made by the person promising it, with the intention of providing it with a statement of the time, place and manner of providing such benefit, and provides for the adjustment of the amount, form or type of unlawful benefit [16, p. 26].

Introduction of criminal liability for the mere fact of accepting an offer (promise) of unlawful benefit deprives a private doctor of further abandoning his criminal inten-

tions. Therefore, it is not excluded that a private doctor may agree to accept a promise of improper benefit: to determine the amount of illegal benefit, to agree on the time and place of the meeting, etc., and in the future to rethink and not take any action to receive it. At the same time, if the fact of accepting them of the promise of unlawful gain will be fixed by law enforcement agencies, means of audio and video control, testimonies of witnesses, etc., in accordance with the provisions of the Criminal Code of Ukraine, he will be prosecuted as an accomplished corrupt crime [17, p. 180].

The third element of the crime, as has already been emphasized, is its subject, that is, a physical, criminal sanity person who committed a crime at the age of which may be criminalized in accordance with the Criminal Code of Ukraine [9]. The subject of the analyzed crimes is not general, but special. He is a person who provides public services. According to the criminal law it is a persons whom providing public services calls an auditor, a notary, an appraiser, an authorized person or an official of the Deposit Guarantee Fund, another person who is not a civil servant, an official of local self-government, but carries out professional activities related to providing public services, including services of an expert, arbitration manager, private agent, independent mediator, member of labor arbitration, arbitration judge (when performing these functions), or a state register pa, subject of state registration of rights, public enforcement and private artist. [9] In addition, in view of the fact that medical service is a kind of public service, in our opinion, the legislative list of persons providing public services needs to be supplemented by a private doctor. Of course, a systematic analysis of legislation confirms this thesis, however, taking into account the fundamental nature of the principle of legal certainty for bringing a person to criminal responsibility, the current criminal law requires the above-mentioned additions.

Regarding the essence of the concept of “private doctor”, according to the order of the Ministry of Health of Ukraine № 49 of February 2, 2011 “On Approval of Licensing Conditions for Conducting Business Practice for Medical Practice”, medical practice is carried out by business entities on the basis of a license provided performance of qualification, organizational, other special requirements established by these License Terms [18]. Qualification requirements for health professionals, regardless of whether they work in state, communal, private health care institutions, are individual entrepreneurs or are independent in their professional activities. Such uniform qualification requirements are set out in the Directory of qualification characteristics of occupations of employees. Issue 78 “Health”, approved by the order of the Ministry of Health of Ukraine № 117 of March 29, 2002 [19]. At the same time, the order of the Ministry of Health of Ukraine № 49 of February 2, 2011, “On Approval of Licensing Conditions for conducting economic activities in medical practice” also establishes special requirements for business entities conducting medical practice. In particular, they include: conducting activities in accordance with the information stated in the medical and pharmacy specialties and specialties of junior specialists

in medical and pharmaceutical education; ensuring the accreditation of the health care institution in accordance with the procedure established by the Cabinet of Ministers of Ukraine; compliance with industry standards, health care standards and clinical protocols in the field of health care; compliance with sanitary norms and rules; Gratuitous provision of medical assistance to citizens in accordance with the legislation; observance of labor legislation on acceptance and registration of individuals for work, etc. [18].

The legal status of persons providing medical services is enshrined in a number of legal acts. Thus, it consists of rights and obligations. Seems a fair position A. Bedenko-Sviridchuk that offers all the rights vested in medical professionals, distributed into two groups: universal and professional [20, c. 58]. Human rights are those rights that are characteristic of all workers, regardless of the scope of their constitutional right to work. These rights are enshrined mainly in legal acts of General importance: the Constitution of Ukraine, The labour code of Ukraine, The law of Ukraine “on labour protection”, The law of Ukraine “on remuneration of labour”. For example, the right to freely choose the place of employment, the right to adequate, safe and healthy working conditions, to wages not lower than those determined by law, legal protection against unlawful dismissal, the right to strike and the like.

Regarding professional rights and freedoms of health care workers, then they, given the analysis of article 77 of the law of Ukraine “fundamentals of legislation of Ukraine on health protection”, adapted and detailed to the needs of health workers human rights: the right to education (paragraph “C” of part 1 of article 77) information (n “d” of part 1 of article 77), insurance (paragraph “e” of part 1 of article 77), for social protection (paragraph “e” of part 1 of article 77), for reduced working time (PP. “z” of part 1 of article 77), for a retirement pension (paragraph “and” part 1 of article 77), housing (clause “I”, “th” part 1 of article 77), municipality (clause “K” of part 1 of article 77), and others.

With regard to the duties of health workers, the S. Bulets calls them provision of medical care of appropriate quality; informing the patient about the diagnosis, methods of treatment, observance of medical secrecy [21, c. 94]. But P. Koval, A. Projno propose to add to this list the duty to adhere to professional ethics and responsibility procedures for conducting clinical research and application of new methods of prevention, diagnostics, treatment, rehabilitation and medicines that are on the consideration in the established order, but not yet approved for use [22, p. 14]. As for the specific duties of a private doctor, due to his specific status (an individual entrepreneur or a self-employed person), they are set out in the economic, civil and tax legislation. And generally, in our opinion, they can be divided into several groups. First, the obligation to obtain a license to engage in private medical practice, for example, the obligation to comply with the requirements for the premises where such activities will be carried out; the obligation to recruit personnel; the obligation regarding the equipment to be used for the provision of medical ser-

vices. Second, reporting obligations, both administrative and tax. Third, the obligation to take measures to ensure occupational safety. Fourth, the obligation to ensure the rules for the provision of paid medical services.

The last element of the crime is the subjective side. The subjective, i.e. internal side of corruption crimes, which can be committed by a private doctor, is characterized by direct intent. A subjective side of the wrongful act, the responsibility for the Commission of which is provided for in article 365-2 of the criminal code of Ukraine may be characterized by a mixed form of guilt, i.e. intent regarding the act and negligence with respect to the consequences in the form of significant harm. Obligatory sign of the subjective party of this crime is also a special purpose – obtaining unlawful benefit for themselves or others [14, p. 115].

Regarding the punishment for corruption crimes, in our opinion, the system of penalties for corruption crimes in Ukraine, the subject of which is a private doctor, is quite differentiated. Punishments for them are a fine, deprivation of the right to occupy certain positions or engage in certain activities, public works, correctional work, arrest, confiscation of property, restriction of freedom and imprisonment for a certain period [23, c. 182]. This systematic approach to the development of penalties for corruption crimes is evidence of a comprehensive legislative approach to combating corruption crime and a vivid expression of the principles of individual and objective criminal responsibility.

An analysis of court practice has shown that the commission of a private doctor of corruption crimes is usually accompanied by the commission of other crimes. In particular, forgery of documents, seals, stamps and forms, sale or use of counterfeit documents, seals, stamps (Article 358 of the Criminal Code of Ukraine), an object which, for example, may be a certificate of health, which certifies a certain fact that is capable of cause legal consequences. In addition, a combination of corruption offenses committed by a private doctor, along with the illegal issue of a recipe for the right to acquire narcotic drugs or psychotropic substances (Article 319 of the Criminal Code of Ukraine) is quite widespread. Register of Judicial Decisions of Ukraine contains more than 200 judgment on the conviction of private doctors in the aggregate of crimes, the responsibility for the committing of which is stipulated in Part 1 of Art. 368-4 and Part 1 of Art. 319 of the Criminal Code of Ukraine. In particular, the verdict of the Trinity District Court of the Luhansk Oblast approved an agreement on the recognition of the guilt of a citizen P, who was a doctor of a psychiatrist at a private medical clinic. Thus, a citizen, guided by an mercenary motive (gaining an unlawful benefit), wrote a recipe for a psychotropic medical preparation, “Fenazepam”, to a person who had no medical indications for his admission [24].

CONCLUSIONS

In practice, to bring a private doctor to responsibility for committing corruption is extremely difficult, since: firstly, the criminalization of corruption crimes of such persons

took place relatively recently, therefore, pre-trial investigation bodies have not yet set up a well-established system of tactical and methodological actions that would simplify this process. Secondly, these crimes are characterized by a high degree of latency, because they are beneficial to both parties: and to a private doctor who may receive unlawful benefits for acts both legal and illegal, and also to the person who proposes, promises or provides such unlawful the benefit of a private doctor's actions or inactivity with the use of the powers granted to him in the interests of the person who offers, promises, or benefits such benefits, or in the interests of a third party. At the same time, it should be noted that the criminalization of the corruption actions of private doctors is an important and significant step aimed not only at combating corruption, but also crime in the area of the circulation of narcotic substances, their analogues and precursors, as well as crimes that encroach on the normal activities of state bodies authorities, local self-government bodies, public organizations, enterprises, institutions and organizations of all forms of ownership.

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CORRESPONDING AUTHOR

Olha S. Bondarenko

Sumy State University, Sumy, Ukraine

tel: + 380662183571

e-mail: olya.tereschenko34@gmail.com

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