

# Property Damage by Deception or Breach of Trust: Theory and Implementation Practice of Article 165 of the Criminal Code of the Russian Federation

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**Abstract:** This article observes current issues of legislative regulation and implementation of criminal accountability for causing property damage by deception or breach of trust. The objective of the research is to identify and consider current problems of implementing criminal liability measures for committing a crime under Article 165 of the Criminal Code of the Russian Federation. The subject of the research is the social relations related to the establishment and application of the specified criminal law provision. The scope of the research is a set of legislative, theoretical and law enforcement nature problems in this field, the study of which contributes to the criminal law theory development. The methodological framework of the research includes universal, general scientific and specific scientific methods, as well as the comparative legal and the simulation ones. As a result of the research, by analyzing and summarizing previous researches and studying court decisions in criminal cases initiated under Article 165 of the Criminal Code of the Russian Federation, qualification and judicial errors were identified, recommendations on the qualification of causing property damage by deception or breach of trust were summarized and proposed, and suggestions for improving criminal legal means of combating this offence were formulated. As part of the research, the authors reached a scientifically sound conclusion about the need for a unified system of criminal-legal and operational-search measures to counter this offence effectively.


## 1 INTRODUCTION


Article 165 of the Criminal Code of the Russian Federation, prescribing liability for inflicting of damage on property by deceit or breach of trust has always maintained a special place among the material elements of offences specified in Chapter 21 of the Criminal Code of the Russian Federation on "Crimes against property". This was justified by the dual legal nature of the offence in question. On the one hand, this crime contained such indications of misappropriation, and in particular fraud, as methods of taking possession of someone else's property or the right to its ownership by deception or breach of trust,

as well as socially dangerous consequences in the form of property damage infliction. On the other hand, there is an indication of the obligatory failure of the misappropriation elements in the disposition in Part 1 of Article 165 of the Criminal Code of the Russian Federation.

This duality has often led to qualification failures in assessing property damage by deception or breach of trust cases, especially in distinguishing them from other property crimes.

The research purpose was to examine the practice of applying Article 165 of the Criminal Code of the Russian Federation, to identify investigative and judicial failures in cases relating to this category of

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offences and to develop proposals for improving the legislative framework and law enforcement practice in countering the crimes in question.

## 2 MATERIALS AND METHODS

The methodological basis for this research was the universal, general scientific and specific scientific methods that include analysis, generalisation, simulation, comparative legal method and other ones. The research was analyzed the available theoretical works on this issue (Lisitsa, Parkhomenko, 2018; Babushkina, 2012; Terskov, Klimovich, 2012; Vedernikova, 2018; Inshakova, Goncharova et al., 2019), the investigative and judicial practice for more 50 criminal cases initiated under Article 165 of the Criminal Code of the Russian Federation, considered by first instance courts of general jurisdiction through the period from 2016 to 2020, and resulted in convictions.

## 3 RESULTS AND DISCUSSIONS

Paragraph 22 of the Russian Federation Supreme Court Plenum Decree of November 30, 2017 No. 48 "On judicial practice in cases of fraud, misappropriation and embezzlement" states that in each case, determining if there were elements of corpus delicti in the offence under Art. 165 of the Criminal Code, it must be established whether the owner or other property possessor suffered real financial damage or damage in the form of loss of profit.

Thus, the mentioned Decree closed the question of what is an effect of crime under Art. 165 of the Criminal Code – real damage or only loss of profit. The Plenum considers that both versions are possible. However, examples cited in the resolution concern only lost profits.

One of the most frequently discussed issues when analyzing the corpus delicti under Article 165 of the Criminal Code of the Russian Federation concerns its subject matter.

According to Babushkina E.A., the crime subject matter under Art. 165 of the Criminal Code of the Russian Federation may be certain objects of civil rights: cash, other things, other property including non-cash funds, uncertified securities, property rights, as well as the results of design works and services, protected intellectual product and individualization similar means (intellectual property

objects), that have value, are not withdrawn from circulation, are capable of being transferred from one entity to another, and are owned (Babushkina, 2018).

In our opinion, this is an overly expansive interpretation of the considered corpus delicti subject matter and, as we subsequently see, judicial practice does not identify most of these subjects, except for electric and thermal energy ones.

Such methods as deception and breach of trust are among the obligatory constructive objective attributes of property damage under Art. 165 of the Criminal Code of the Russian Federation, therefore their establishment is obligatory for the correct qualification of crime in question.

Many authors assume that when damage is caused by deception or breach of trust, it only refers to not benefiting opportunities or lost profits (Ivantsova, Prygunova, 2017; Gribunov, Knyazkov, Kachurova, 2019; Kolobanov, Eriashvili, 2016; Voronin, 2006). Meanwhile, this approach is contrary to the above-mentioned Plenum Decree, which differentiates real damages and lost profits.

We analysed judicial practice in cases on accountability for crimes under Article 165 of the Criminal Code of the Russian Federation for the last five years, from 2016 to 2020. To this end, we studied 50 convictions from the website: <https://sudact.ru/>.

The study showed that the most common damage by deception or breach of trust claims involve managing organisation full or partial failure to pay the contract entity for the utility services including blocks of flats heating ones.

Thus, on July 23, 2020 the Sormovsky Regional Court of Nizhny Novgorod sentenced Medvedev, LLC Sormovskaya housing management company general director, to a suspended term of imprisonment under Part 2 (b) of Art. 165 of the Criminal Code of the Russian Federation, who transferred to the JSC Teploenergo settlement account only 3.5 million rubles instead of 6.16 million rubles collected on heating and hot water services bill, thereby causing JSC Teploenergo extremely large damage in the amount of 2.66 million rubles.

It is unfortunate that the investigation failed to establish and the court verdict did not reflect on which purposes the underpaid money was spent. It is typical situation for the majority of such cases. If this money was used for the needs of the organisation headed by Medvedev and was intended either to gain benefits and advantages for himself and other persons, or to cause harm to others, then it is legitimate to question whether he should be charged with abuse of position under Art. 201(1) of the Criminal Code of the Russian Federation (Tolstaya, 2018; Krekhovets, Nikiforova,

2021). If Medvedev used money for his own benefit, it is clear misappropriation of entrusted property or monetary assets in this case, i.e. embezzlement provided for in Art. 160(4) of the Criminal Code of the Russian Federation (Golovin, Bugaevskaya, 2020).

It is not uncommon situations when property damage is caused by deception or breach of trust without the intention to misappropriate in course of drawing up and executing money-loan contracts.

The criminal case against Abdrashitov, an individual entrepreneur accused of committing a crime under paragraph "b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation, which was considered on November 28, 2019 by the Samara Regional Court, could serve as an example of this type of offence.

Having accounts payable in the amount of 88 million roubles and wishing to solve his financial problems, Abdrashitov asked his acquaintance K. to lend him 5.2 million roubles. Thus, being aware beforehand about impossibility to repay the debt Abdrashitov mislead the latter about his circumstances. S. gave Abdrashitov the specified amount in the presence of witnesses and made borrower sign an acquittance a week later. Abdrashitov did not repay the debt within the agreed period, thereupon prejudiced S. turned to the law enforcement agencies.

According to the case circumstances, the question arises if Abdrashitov's actions were qualified correctly. The point is that the guilty verdict is stated that the defendant had no intention to fulfill his obligations in good faith in drawing up the loan agreement. Available criminal case investigation materials, in particular to the fact that the perpetrator "did not have a real opportunity to repay the loan amount", having an outstanding debt of 88 million roubles, confirm this.

It is submitted that it would be more appropriate to qualify the crime as an especially large-scale fraud, i.e. misappropriation of property committed by deception and breach of trust in this case.

There are examples of the application of Art. 165 of the Criminal Code of the Russian Federation in so-called "defrauded shareholders" cases in judicial practice. (Sukhodolov, Novikova et al., 2018).

On September 25, 2019, the Central District Court of Sochi examined a criminal case against defendant V., accused of committing crimes under paragraph "b" of Part 2 of Art. 165 and part 4 of Art. 159 of the Criminal Code of the Russian Federation. The investigation revealed that V., as the housing construction co-operative director, had collected

several tens of millions of roubles from six persons in order to finance the building a house. The Court found that the applicant had no intention to fulfill his contractual obligations regarding the transfer and registration of ownership for properties to these individuals, but merely wanted to misappropriate the funds belonging to them.

The question arises why did the judicial scrutiny and the Court qualify V.'s crimes as fraud committed on a particularly large scale in some cases (Part 4 of Art. 159 of the Criminal Code of the Russian Federation) and as causing property damage by deception or breach of trust in other absolutely similar ones (paragraph "b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation)? There is no substantiation in judicial decision in the court's verdict, although, in all instances, the case circumstances clearly indicate the facts of misappropriation by deception, with premeditated specific intention.

A typical scheme for causing property damage by deceit or breach of trust is energy supply sources illegal connection and the further use of electricity both for their own needs and for vending it to third parties on a reimbursable basis.

N. and T. together with the unidentified wage workers laid an underground power cable from the transformer substation overpass to the power substation along the ring road. And then illegally connected it to the power supply by means of a band aid circuit.

Hereafter the stolen electricity was sold to third parties. The proceeds were embezzled.

On 9 September 2019 Vsevolozhsk City Court in the Leningrad Region sentenced N. and T. to 1.5 years of a suspended sentence under paragraph "a, b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation.

This case raises several questions and one of them is: to what extent does the crime fall within the actus reus under Article 165 of the Criminal Code of the Russian Federation?

Judging by the case circumstances, there is only large-scale damage to the electricity owner as a corpus delicti of Art. 165 of the Criminal Code of the Russian Federation. There is no evidence of deception or breach of trust though the misappropriation purpose and the unlawful acquisition of someone else's property itself are clear. According to the objective criteria, we can see someone else's property stealing (Art. 158 of the Criminal Code of the Russian Federation). However, it cannot be the object of stealing due to the fact that electric power is not tangible. But not all the corpus

delicti elements under Article 165 of the Criminal Code of the Russian Federation are present in this case.

It seems that despite the fact that electrical and heat energy do not have a tangible form, the issue of recognizing them as property, i.e. objects of stealing, is long overdue, since they are a human activity product of and have a certain value.

Article 165 of the Criminal Code of the Russian Federation is often applied in cases of deliberate failure to fulfill contractual obligations in entrepreneurial activity.

On 8 May 2019, the Tyumen Leninsky Regional Court examined the criminal case against Kazakov, accused of committing a crime under paragraph "b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation.

Kazakov, LLC "M" acting financial director, entered into agreements with the individual entrepreneur B. for the provision of specialized equipment, not intending to fulfill the rendered payment services terms of the contract.

Kazakov transferred funds for a total amount of 28.3 million roubles to the controlled settlement accounts of both individuals and legal entities that were not engaged in any real business activity, thus inflicting material damage on IE B. on a large scale.

It appears that it is legitimate in this situation to consider the possible qualification of the offence under Part 7 of Art. 159 of the Criminal Code of the Russian Federation, which provides for liability for fraud involving willful failure to fulfill contractual obligations in the field of business activities and committed on a large scale.

Classic examples of the offence qualification under Art. 165 of the Criminal Code of the Russian Federation are cases of entrusted property use for personal gain.

On 24 May 2019, the Ryazan Zheleznodorozhny District Court examined the criminal case against Knyazeva, accused of committing a crime under paragraph "b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation.

While working as an accountant in the Tax Accounting and Income Generating Activities Unit of the Accounting and Internal Control Department of the Ryazan State I.P. Pavlov Medical University, Knyazeva received cash from international students as payment for services provided for some of the accommodations. In this way, she illegally used the property belonging to the Federal State Budgetary Educational Institution of Higher Professional Education Russian Ministry of Health "Acad. I.P. Pavlov Ryazan State Medical University", which she

managed at her own discretion, thus causing large-scale damage to the university in the form of non-receipt of income.

While the formal offence qualification is appropriate, in accordance with the Russian Federation Supreme Court Plenum Decree No. 48 of 30 November 2017 'On Judicial Practice in Cases on Fraud, Misappropriation and Embezzlement', the question arises: how does the crime differ from ordinary fraud? There is both deception and large-scale damage. The question remains to be seen whether there is misappropriation of property or not in such situations.

Then would it be possible that those researchers, such as A.A. Bakradze (Bakradze, 2013), suggesting to decriminalise Art. 165 of the Criminal Code of the Russian Federation are right? Or we only need to make appropriate amendments to Article 159 of the Criminal Code, as I.V. Botvin proposed (Botvin, 2018).

There have been cases of bringing the perpetrators to justice under Art. 165 of the Criminal Code of the Russian Federation for the creation of so-called "pyramid investment scheme".

On 3 May 2018 the Kozlovsky Regional Court of the Chuvash Republic examined a criminal case against E., accused of committing an offence under paragraphs "a" and "b" of Part 2 of Art. 165 of the Criminal Code of the Russian Federation.

Without intending to and not having a real opportunity to repay, E., as the executive director of the Kozlovka-Soglasie agricultural consumer credit cooperative, accepted money from natural persons on cash receipt vouchers, thus causing financial damage to the victims in an particularly large scale amounting to 16.5 million roubles.

It is a typical scheme for creating an investment pyramid, which, as a rule, was qualified as a fraud on an especially large scale under Part 4 of Article 159 of the Criminal Code of the Russian Federation.

The Court did not find that E. had committed fraud by deception or breach of trust, confining itself to the following phrase stating that the defendant "did not pursue the aim of personal unlawful enrichment and uncompensated appropriation of other people's property and funds in her favor as well as the other persons' benefit." The question that has to be answered is what was the aim of Mrs. E., who had fraudulently taken the individuals owned money amounting to 16.5 million roubles?

Study of criminal cases instituted on the evidence of offences covered by Art. 165 of the Criminal Code of the Russian Federation showed that such offences are also committed in the insurance industry, the

gambling business, the payment of various subsidies and compensations, pledge relationships, etc.

## 4 CONCLUSIONS

The research revealed a number of both theoretical and practical problems resulting from applying Art. 165 of the Criminal Code of the Russian Federation. The structure of actus reus, for which liability is provided in Part 1 of Article 165 of the Criminal Code of the Russian Federation has a certain deficiency that generates problems of its classification and law enforcement (Borkov, Nikolaev, 2020).

1. Since there are a number of similarities between Article 165 of the Criminal Code of the Russian Federation and the corpus delicti of Fraud (Article 159 of the Criminal Code of the Russian Federation), there is a problem of their differentiation. From the criminal law theory standpoint these crimes are distinguished according to whether there are indications of fraud or not. In practice, however, it is difficult to reliably establish the purpose of causing property damage by deception or breach of trust. In the majority of the criminal cases we have analysed, those convicted under Art. 165 of the Russian Federation Criminal Code pursued the aim of unlawfully appropriating someone else's property, usually the victims' financial means, but the investigating authorities and the court either failed to establish this aim or simply ignored it, merely stating formally that there was no misappropriating financial resources purpose but the purpose to cause property damage to the victims was. As a result, the guilty persons have been prosecuted under a less severe article and have got short, mostly probation sentences in the vast majority of cases.

2. The practice of application of Article 165 of the Criminal Code of the Russian Federation shows that the perpetrators are held criminally liable both for the real damage caused to the victims' property and for lost profits, or specifically, not benefiting from opportunities. In our view, the public danger degree of these crimes is different, but the liability for them is the same, and this fact does not comply with the principle of justice.

3. Article 165 of the Criminal Code of the Russian Federation provides that persons guilty of unlawful use of heat and electricity actually stolen from the lawful owner i.e. as a result of covert embezzlement or per se stealing are often liable to punishment. Unfortunately, neither the theory nor the practice of criminal law acknowledge different types of energy as property and, accordingly, as the object of stealing.

We believe that these problems give rise to the need for their regulation, which is possible by means of the following alternative methods individually or simultaneously.

1. To amend Article 165 of the Criminal Code of the Russian Federation by clarifying the terms of real property damage and loss of profit (not benefiting from opportunities). In addition to this amendment, to clarify in more detail the content of these terms with specific examples in the Russian Federation Supreme Court Plenum Resolution.

2. To limit the content of Article 165 of the Criminal Code only to the concept of property damage in the form of lost profits (not benefiting from opportunities) concurrently with reformulation of Article 159, equating real property damage committed by deception or breach of trust to a form of fraud (Kazanovskaya, 2020).

3. To decriminalise Article 165 of the Criminal Code, as it duplicates to a great extent other property crimes: theft (Article 158 of the Criminal Code), swindling (Article 159 of the Criminal Code), misappropriation or embezzlement (Article 160 of the Criminal Code).

4. To equate various energy sources to property and consider them as objects of stealing.

5. To issue a special resolution of the Russian Federation Supreme Court Plenum Decree to clarify the theory and implementation practice of Article 165 of the Criminal Code of the Russian Federation.

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