

# Criminal Offense or Civil Law Dispute: to the Issue of Assessing Unfair Information Business under the Criminal Legislation of Ukraine

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The article<sup>1</sup> provides a criminal assessment of unfair information business (“information fraud”). Based on the analysis of the Supreme Court’s positions and through the prism of such manifestations as nonfulfillment of obligations and improper fulfillment of obligations (untimely, incomplete and poor-quality fulfillment of obligations in the form of service), it is determined whether this phenomenon falls under criminal fraud within the legislation of Ukraine.

**Keywords:** information fraud, information product, criminal offense, fraud, deception, breach of trust.

## **Baudžiamasis nusikaltimas ar civilinis ginčas: nesąžiningos informacinės veiklos vertinimas pagal Ukrainos baudžiamuosius įstatymus**

Straipsnyje pateikiamas nusikalstamas nesąžiningą informaciją teikiančio verslo vertinimas („sukčiavimas informacijos srityje“). Remiantis Aukščiausiojo Teismo praktikos analize dėl įsipareigojimų nevykdymo ar netinkamo įsipareigojimų vykdymo, kuris yra ne laiku, nebaigtas ar prastos kokybės, yra nustatoma, kas, vadovaujantis Ukrainos teisės aktais, yra nusikalstamo sukčiavimo objektas.

**Pagrindiniai žodžiai:** informacinis sukčiavimas, informacinis produktas, nusikalstama veika, sukčiavimas, apgaulė, pasitikėjimo pažeidimas.

<sup>1</sup> The study was prepared based on the report of the author „Infraud: criminal law assessment“ at the VI International Scientific and Practical Conference „Criminal Law Protection of Information Security“, held on 12.05.2022 online (organizers: Research Institute problems of crime named after Academician V.V. Stashys of the National Academy of Law of Ukraine, etc.).

## Introduction

Information business (infobusiness), which involves the sale of information products in the form of courses, guides, trainings, etc. via the Internet for profit has become widespread in the world and in Ukraine, in particular, in recent years. The rapid spread of infobusiness was influenced, in particular, by the growth of users' activity in social networks, increasing demand for online education, intensity of citizens' search for additional income, etc.

At the same time, dishonest activities in this direction have become widespread. Developers of info products can promise their buyers quick success without investments, achievement of certain results (realization of dreams, possibility to receive certain earnings immediately after or even during passing courses/trainings, acquisition of some knowledge, skills, etc.). Infobusinessmen abuse people's desire for self-improvement, quick earnings and a luxurious life, a quick solution to their pressing problems. At the same time, many consumers, having paid their money (often, those are amounts that are significant for them and that were accumulated over time), remain dissatisfied with the services received due to their low quality. As a result, dishonest infobusiness has come to be known as information fraud.

Among the signs of dishonest infobusiness experts distinguish: 1) methods of self-promotion and promises that are loud, aimed at the vulnerable points of the audience; 2) bait mechanisms – buyers are found through social networks, lured by a free course or webinar, and then persuaded to invest their money; 3) the result – except for enriching the fraudsters themselves, their courses, trainings and promises, it does not and cannot have any significant effect (Chernousov, 2021). In addition, paid information products often provide information that is available free of charge, including on the Internet.

It should be noted that the customers of paid info products are often minors. Moreover, some courses, trainings, etc. are designed specifically for schoolchildren (Gryackih, 2022). For infobusinessmen, children are a very profitable target audience, because their worldview and critical thinking are in the process of formation and they are more susceptible to the influence of their authorities and manipulation.

Due to the mass spread of such dishonest activities, large profits made from them and abundance of consumer complaints, the question of assessing these actions under the criminal law of Ukraine, namely whether they fall under such a criminal offense as fraud, arose.<sup>2</sup> Finding an answer to this question is the **purpose of this study**, which will use such **methods** as dialectical, analytical-synthetic ones, comparative analysis and specification.

It should be noted that the issues of signs of criminal fraud have been widely studied in the Ukrainian scientific literature, in particular, they were analyzed by N.O. Antonyuk, O.O. Dudorov, M.V. Emelyanov, M.I. Panov, A.V. Savchenko, Y. L. Shulyak and others. At the same time, no attention was paid to solving such a specific issue as the criminal law assessment of unfair infobusiness in terms of its relationship with fraud.

## Key aspects of legislation and law enforcement practice

According to Art. 190 of the Criminal Code of Ukraine, fraud provides for criminal liability for illegal possession of someone else's property or acquisition of property rights by deception or breach of trust. Fraud is a type of criminal offense against property, related to the illegal circulation of someone

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<sup>2</sup> This issue may be raised in the presence of damage to the victim accounting for more than 0.2 nontaxable minimum incomes, which as of January 1, 2022 is 248 hryvnias or 8.08 euros (according to Article 51 of the Code of Administrative Offenses and paragraph 5 of Section XX "Transitional Provisions", item 169.1.1, item 169.1, Article 169 of the Tax Code of Ukraine, the Law of Ukraine "On the State Budget of Ukraine for 2022").

else's property in favor of the perpetrator or other people. The subject matter of fraud is property or the right to property.

Actions and methods are features of the objective side of fraud. The action is expressed in the illegal possession of someone else's property or the acquisition of property rights. An important feature of the actions is free circulation of someone else's property/right to property in perpetrators' favor, as it is not returned to the owner, it is not paid for, it is not reimbursed in value terms. A criminal offense is considered completed from the moment of taking someone else's property or acquiring the right to property. The method of committing a criminal offense is deception or breach of trust. *Deception* is providing the victim false information or hiding certain circumstances that need to be reported. Deception can be expressed orally, in writing, in the form of forged documents, etc. *Breach of trust* is the unfair use of the victim's trust, which may be based on family, friends, office or other relationships. The subjective side of fraud is characterized by direct intent and selfish motive (Tatsyi, Borysov, Tiutiuhin et al., 2020, pp. 188, 189, 199, 200; Melnyk, Khavroniuk, 2007, pp. 486-489; Dudurov, Khavroniuk, 2014, pp. 571, 577).

Regarding the qualification of fraud in Ukraine, the Supreme Court has formulated several key points:

- criminal liability for fraud is related to the establishment of perpetrator's awareness of the fact of illegal possession of someone else's property with the aim of its free, irrevocable circulation in their (or third parties') favor in the absence of legal grounds, and resulting in the increase of their own property funds or property funds of third parties (Decision of the Supreme Court of 04.08.2021 in case № 712/10080/15-k);
- deception (giving false information to the victim or concealment of certain circumstances) or breach of trust (unfair use of the victim's trust) as fraud are used by the perpetrator in order to give the victim confidence in the profitability or obligation to transfer property or rights. A necessary sign of fraud is the victim's voluntary transfer of property or property rights (the Resolution of the Plenary Session of the Supreme Court of Ukraine of 06.11.2009 No. 7, paragraph 17);
- while distinguishing fraud from civil delicts, it must be assumed that the acquisition of property with the condition of fulfillment of any obligation may be classified as fraud if it is established that the person at the time of illegal possession of this property had an intention to appropriate it without fulfilling the obligation (the Resolution of the Plenary Session of the Supreme Court of Ukraine of 06.11.2009 No. 7, paragraph 18; Decision of the Supreme Court of 24.11.2016 in case № 5-250ks16; Decision of the Supreme Court of 11.12.2018 in case № 712/7368/13-k; Decision of the Supreme Court of 02.10.2018 in case № 127/9767/14-k);
- when accusing a person of committing fraud during the conclusion of contracts of a civil law nature, it is mandatory to establish the intent of the person to seize property at the time of its receipt; in other case, there will be a lack of *corpus delicti* of "fraud" and the relations between persons will be of a civil law nature (Decision of the Supreme Court of 24.11.2016 in case № 5-250ks16);
- the absence of at least one of the constituent elements of fraud, including the objective or subjective side, means that the actions of persons whose conduct is assessed may be in a different than criminal legal dimension, namely stipulating the presence of civil or economic dispute (Decision of the Supreme Court of 11.12.2018 in case № 712/7368/13-k; Decision of the Supreme Court of 02.10.2018 in case № 127/9767/14-k).

## Types of violations of obligations in the provision of information services and criminal assessment of relevant actions.

While solving the question raised it is reasonable to turn to the area of civil law, as the relationship between the seller of the information product and its customer is an obligation in the form of provision of information services, which is the object of civil law relations and governed by civil law. In accordance with Art. 901 of the Civil Code of Ukraine, under the contract for the provision of services, one party (contractor) undertakes as per the other party's (customer's) order to provide a service used in the course of a certain action or activity, and the customer undertakes to pay the contractor unless otherwise provided by contract. In accordance with Part 1 of Art. 23 of the Law of Ukraine "On Information", information service is the activity of providing information products to consumers in order to meet their needs. Information product is a materialized result of information activities, designed to meet the needs of the subjects of information relations.

We consider it expedient to provide criminal law assessment of unfair infobusiness in a differentiated manner regarding such possible manifestations of breaches of obligations in the provision of information services as nonperformance and improper performance (performance in violation of the conditions specified in the obligation) in accordance with Art. 611 of the Civil Code of Ukraine.

1. With regard to the situation of *nonfulfillment of the obligation of the seller of the infoproduct*, on the basis of the above positions of the Supreme Court, the following conclusions can be made:

1) the actions of the seller of the information product (service provider) show signs of fraud, only if he/she received the payment from the customer while already intending to misappropriate funds and not to provide services;

2) if the service provider did not provide the service, and the intention to misappropriate the property arose not when he/she received payment from the customer but after some time, criminal liability is excluded in his/her actions, classifying it as a civil dispute. With regard to this conclusion, it should be noted that it is not supported by the consumers' side, as they are deprived of the opportunity to protect their violated rights by means of criminal law.

It should also be noted that establishing the exact moment of intent to misappropriate someone else's property in practice causes significant difficulties, and, in addition, all doubts are always interpreted in favor of the accused (Article 62 of the Constitution of Ukraine). These circumstances determine the tendency to resolve such disputes in the field of purely civil law.

2. There are many more difficulties in qualifying fraud in situations of *improper fulfillment of obligation*. In such cases, the service, although in breach of the terms of the obligation, is still provided, and therefore, some work is performed for the benefit of the customer, for which he/she has paid. Regarding the improper fulfillment of the obligation to provide information services by the contractor, we will consider such possible manifestations as: untimely fulfillment, incomplete fulfillment and poor-quality fulfillment of the obligation.

2.1. In case of *untimely fulfillment of obligation*, when the contractor does not provide the info product within the stipulated period, but provides it later, the dispute should be resolved in the civil law field. The lack of free use of property by the perpetrators in their favor as a sign of fraud determines the lack of grounds for criminal prosecution, if the service was subsequently provided.

2.2. In resolving the issue of incriminating a person on fraud for *poor-quality performance* of the obligation, when the customer received the service, but is dissatisfied with its quality, it is considered appropriate to apply another position of the Supreme Court, expressed in the decision of 24.11.2016 p. Based on its content, if a person enters into a civil contract only in order to hide the true nature of their

actions aimed at illegal gratuitous appropriation of someone else's property, there is a deception of intent – deception about the purposes for which received property is intended to be used on the basis of the contract. In other words, the existence of formal (even properly executed) civil law relations, through which the subject seeks to conceal his/her criminal intent, should not be an obstacle to assessing the action as a crime under Article 190 of the Criminal Code (Decision of the Supreme Court of 24.11.2016 in case № 5-250ks16). From this position it is possible to identify and use the *factor of formality of civil law relations in the veiled criminally illegal intent of a person to seize someone else's property*. When there is a simulation of information services, for example, when the product is primitive in content and does not contain any useful information, and the customer has not achieved and could not achieve the promised results, it becomes a reason to raise the question of fraud. However, it is important to keep in mind that customer's satisfaction with the service is a subjective category, and dissatisfaction can occur even with quality work of the contractor. Therefore, it is difficult to establish the presence of this factor in practice. To this end, the knowledge of a specialist in the relevant field may be useful during court proceedings.

2.3. *Incomplete fulfillment of the obligation* may occur if the contractor does not provide the service to the extent provided for in the obligation (for example, the contractor promised to conduct 20 classes in the course, but actually conducted 10). The Supreme Court does not explain how to qualify the actions of a person who, at the time of taking possession of the property or in the process of fulfilling the obligation, intended only to fulfill it partially. It is seen that if the service is provided in part and is done so qualitatively, it eliminates such a sign of fraud as gratuitous circulation of property to the perpetrators in their favor and in this case it is impossible to bring infobusinessmen to justice for fraud. In this situation, the dispute must be resolved in the field of civil relations. In particular, the consumer of the service may claim compensation from the contractor for damages due to improper performance of the contract (Article 906 of the Civil Code of Ukraine). However, in each case of incomplete fulfillment of the obligation, it is necessary to find out the presence or absence of the above factor of formality of civil relations in the veiled criminal intent of the person to seize someone else's property, which should be associated with quality services. Establishing this factor in the absence of service quality raises the question of the presence of a criminal fraud in the actions of a person. For example, if one or more introductory or organizational classes are conducted throughout the course, such a relationship can be considered formal and the perpetrator may be charged with criminal fraud.

It is important to emphasize that in any case the means of counteracting the activities of dishonest infobusinessmen remains civil liability (according to Article 906 of the Civil Code of Ukraine and Article 10, paragraph 11, part 1 of Article 23 of the Law of Ukraine “On Consumer Protection”). Other measures that can be useful in combating low-quality information services include disseminating information about the content of such information products, publishing negative reviews about them and leaving complaints on the Internet.

## Conclusions

1. The study provides a criminal assessment of dishonest infobusiness (“information fraud”) in terms of whether this phenomenon falls under the category of criminal fraud. The qualification of these actions was based on the analysis of the Supreme Court's position on fraud through the prism of such manifestations as nonperformance of obligations and improper fulfillment of obligations (late, incomplete and poor-quality performance of obligations in provision of services).

2. In case of nonfulfillment of the obligation to provide information services, the actions of the seller of the infoproduct show signs of fraud only if he/she, when receiving payment from the customer, already intended to misappropriate funds and not provide the service.
3. In case of untimely fulfillment of the obligation, when the customer does not provide the info product within the stipulated period, but provides it later, the dispute should be resolved in the civil law field.
4. In case of poor-quality performance of the obligation, the position of the Supreme Court should be applied, which formulates the factor of formality of civil law relations in the case of veiled criminally illegal intent of a person to seize someone else's property. When there is a simulation of information services, for example, when the product is primitive in content and does not contain any useful information, and the customer has not achieved and could not achieve the promised results, it becomes a reason to raise the question of fraud.
5. In case of incomplete fulfillment of the obligation, it is important to consider two aspects when deciding on the incrimination of the perpetrator on fraud. First of all, if the service is provided in part and is done so qualitatively, it eliminates the characteristic of fraud sign of gratuitous turnover of property in the perpetrator's favor. However, in each case it is necessary to find out the presence or absence of the above factor of formality of civil relations in the veiled criminal intent of a person to seize someone else's property, which should be associated with the quality of services provided. Establishing this factor in the absence of quality of service allows to raise the question of the presence of signs of fraud in the actions of the person.

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### S u m m a r y

The article provides a criminal assessment of unfair information business (“information fraud”). Based on the analysis of the Supreme Court’s positions and through the prism of such manifestations as nonfulfillment of obligations and improper fulfillment of obligations (untimely, incomplete and poor-quality fulfillment of obligations in the form of service), it is determined whether this phenomenon falls under criminal fraud under the legislation of Ukraine. The signs of unfair information business are considered, specific signs of criminal fraud are highlighted, and the positions of the Supreme Court which can be applied in differentiation between fraud and behavior that is not illegal under criminal law are accumulated.

It was found that in case of nonfulfillment of the obligation to provide information services, incrimination of fraud against the seller of the information product is possible only if the intention to misappropriate someone else’s funds took place at the time of their receipt, and in case of untimely fulfillment of the obligation the dispute should be resolved in civil law. In case of poor-quality performance of the obligation, the decisive factor in establishing the signs of fraud in the actions of a person is the presence of formality of civil law relations with veiled criminally illegal intent of the person to seize someone else’s property; and in case of incomplete fulfillment of the obligation it is important to take into account the following aspects: partial but at the same time high-quality fulfillment of the obligation excludes such sign of fraud as free circulation of property by an offender in his/her favor; at the same time, establishing the presence of the factor of formality of civil law relations with veiled criminal intent of the person to seize someone else’s property and the lack of quality of service raises the issue of the presence of signs of fraud.

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### **S a n t r a u k a**

Straipsnyje pateikiamas nusikalstamas nesąžiningą informaciją teikiančio verslo vertinimas („sukčiavimas informacijos srityje“). Remiantis Aukščiausiojo Teismo praktikos analize dėl įsipareigojimų nevykdymo ar netinkamo įsipareigojimų vykdymo, kuris yra ne laiku, nebaigtas ar prastos kokybės, yra nustatoma, kas, vadovaujantis Ukrainos teisės aktais, yra nusikalstamo sukčiavimo objektas. Atsižvelgiant į verslo informavimo srityje sukčiavimo požymius, yra nurodomi konkretūs nusikalstamo sukčiavimo požymiai ir atkreipiamas dėmesys į Aukščiausiojo Teismo poziciją, kuri gali būti taikoma atskiriant sukčiavimą nuo elgesio, kuris pagal baudžiamąją teisę nėra neteisėtas.

Nustatyta, kad nesilaikant įsipareigojimo teikti informavimo paslaugas, apkaltinti informacijos produkto pardavėją sukčiavimu galima tik tuo atveju, jei ketinimas netinkamai panaudoti kito asmens lėšas atsirado iki jų gavimo momento, tačiau jeigu informavimo paslaugos nebuvo suteiktos laiku, ginčas turėtų būti sprendžiamas pagal civilinę teisę. Esant netinkamai prievolės vykdymo kokybei, lemiamas veiksnys, nustatant, ar asmens veiksmai turi sukčiavimo požymių, yra asmens ketinimas pasisavinti kito asmens turtą. Tais atvejais, kai prievolės, susijusios su informacijos teikimu, nėra baigtos, svarbu atsižvelgti į šiuos aspektus: dalinio, bet kartu ir kokybiško prievolės vykdymo negali būti tokių sukčiavimo požymių kaip disponavimas svetimu turtu įstatymų pažeidėjo naudai. Be kita ko, nustačius civilinės teisės santykius su paslėptu asmens ketinimu pasisavinti kito asmens turtą, kai paslaugos teikiamos nekokybiškai, atsiranda galimybė identifikuoti sukčiavimo požymius.

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