Distinction Between the Crime of Facilitating Cybercrime Through Payment/Settlement Activities and the Crime of Concealing Criminal Proceeds

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Abstract: *In recent years, the crime of assisting information network criminal activities has shown an increasingly evident trend of becoming a "catch-all offense". The objective acts of the crime of assisting cybercrime through payment/settlement activities and the crime of concealing criminal proceeds bear significant similarities, and the unclear boundary between them has been a key factor contributing to the rapid judicial expansion of the former. Therefore, it is necessary to establish clear criteria to distinguish these two offenses. Although the crime of assisting cybercrime is stipulated as an independent offense, its substantive nature remains that of an accomplice (accessory), and its assistingcharacter has not changed. According to the causative theory of complicity, thecrime of assisting cybercrime can only be established before the consummation of the upstream crime. In contrast, the crime of concealing criminal proceeds can be established after the consummation of the upstream crime, or even when the criminal conduct has been completed but the crime has not yet been consummated. For the overlapping stage where both offenses could potentially apply, a concrete examination should be conducted regarding the legal interest infringed upon by the actor, combined with the actor's subjective knowledge at the time of the act, to determine the specific offense under the guidance of the principle of consistency between subjective and objective elements.*

Keywords: *Assisting nature (in criminal law); Crime of assisting cybercrime through payment/settlement activities; Crime of concealing criminal proceeds; Distinguishing criteria*

1. Proposition of the Issue

In October 2020, the State Council held a meeting and decided to launch the "Card-Breaking Campaign" to combat new types of telecommunications and network fraud. Against this background, the judicial application of the relevant legal provisions of the crime of aiding information network criminal activities (hereinafter referred to as the "aiding crime") as stipulated in Article 287 bis of the Criminal Code reached a historical peak. According to the Special Judicial Big Data Report on the Characteristics and Trends of Information Network-Related Crimes (January 2017–December 2021) published by the Supreme People's Court in 2022, the proportion of the aiding crime among information network-related criminal cases began to surge dramatically in 2021, rising from 5.78% in 2020 to 54.27% in 2021. Among these, cases in which providing payment and settlement assistance served as the modus operandi accounted for 53.45% of the aiding crime, exceeding half of the total.

The behavioral type of "providing payment and settlement assistance" in the aiding crime is highly similar to the objective conduct elements of the crime of concealing and disguising criminal proceeds and proceeds derived from criminal proceeds (hereinafter referred to as the "concealing-and-disguising crime"). Both involve using one's own or another person's bank cards to provide payment and settlement services, such as fund transfers, for upstream criminal acts, which leads to difficulty in accurately distinguishing between the two crimes in judicial practice. The payment-and-settlement-type aiding crime accounts for a relatively large proportion of the aiding crime, and its boundary with the concealing-and-disguising crime is ambiguous. Therefore, it has become one of the important reasons for the sharp increase in the number of aiding crime cases. Thus, it is necessary to re-examine the normative attributes of the aiding crime and, on that basis, to establish criteria for differentiation so as to clarify the boundary between the two crimes and regulate their judicial application.

2. Prerequisite for Differentiation: The Act of Aiding Information Network Criminal Activities Possesses the Nature of Assistance

2.1 The Aiding Crime Possesses Independence

The most significant difference between internet-facilitated joint crime and traditional joint crime lies in the former's feature of "decentralization": the accomplice acts are not closely integrated around the principal offender's conduct, and the mutual intent among various actors is diluted, resulting in a separation between criminal acts and the forms of complicity.[1] In response to the needs of a risk society, the Criminal Law Amendment (IX) created the new offense of the aiding crime, prescribing complete constituent elements and sentencing for this crime at the level of criminal legislation. From that point on, the aiding crime has had its own conditions for establishment independent of the upstream principal offender. When judicial authorities determine whether an act constitutes aiding, they no longer need to regulate it under the general provisions of the Criminal Code concerning joint crime, but instead may convict and punish it through independent provisions in the specific part. In October 2019, Article 12, Paragraph 2 of the judicial interpretation on criminal cases involving the aiding crime (hereinafter referred to as the "Interpretation on the Aiding Crime") issued by the Supreme People's Court and the Supreme People's Procuratorate further clarified that even if, due to objective limitations, it is impossible to confirm whether the conduct of the assisted party constitutes a crime, as long as the relevant amounts accumulatively reach more than five times the statutory standard, or if especially serious consequences are caused, the perpetrator may still be pursued for criminal liability. The above approaches break through the traditional framework of accomplice doctrine and independently criminalize aiding acts, all of which demonstrate that the aiding crime, as an independent offense, possesses its own legislative independence.

2.2 The Aiding Crime, as an Accessory, Possesses a Nature of Assistance

However, at the same time, it must be acknowledged that the assisting nature, as a natural attribute of the aiding crime, has not disappeared. Legislatively, according to the provisions of Article 287 bis of the Criminal Code, the subjective constitutive element of the aiding crime is "knowing that others are using information networks to commit crimes," and the objective constitutive element is "providing ... assistance for crimes." Regardless of whether "knowing" is interpreted as "clearly knowing," or as "clearly knowing" and "should have known," or otherwise, the perpetrator, having learned of the existence of the assisted act, nonetheless decides to carry out acts such as providing payment and settlement assistance to help complete the information network crime.[2] This indicates that the actual conduct of the aiding crime is essentially assisting conduct.

From a practical perspective, the aiding crime and its related offenses exhibit a dependency relationship along the upstream-downstream assembly line of cybercrime. Taking telecommunications network fraud as an example, its criminal process typically relies on a series of divisions of labor and collaboration, including front-end internet access services, provision and identification of personal information, as well as back-end payment and settlement processing, transfer of case-related funds, and other key links. These assisting acts are not only necessary conditions for the implementation of telecommunications network fraud, but their very existence is also highly dependent on the continuous unfolding of the upstream criminal activities.[3]

In academic theory, various debates over the nature of the aiding crime have not denied the assisting nature of the conduct involved in this offense. Among the scholarly theories on the nature of the aiding crime, the most typical are the "sentencing rule theory" and the "theory of principal-offender-ization of assisting acts." The sentencing rule theory holds that the crime of aiding information network criminal activities still essentially falls within the traditional category of complicity.[4] Professor Zhang Mingkai points out that most arguments claiming that the aiding crime constitutes principal-offender-ization of complicity actually depart from the principle of accessory nature of complicity. The assertion that "independent criminalization of assisting acts indicates principal-offender-ization" in fact confuses formal requirements with substantive criteria for determination. Although the aiding crime has established independent constitutive elements at the legislative level, at the level of determining the nature of the offense, its identification must still strictly follow the principle of accessory nature of complicity, and must be premised on the upstream principal offender's commission of an unlawful act that satisfies the constitutive elements. After determining that an act constitutes the aiding crime, the sentencing of the aiding conduct no longer applies the general provisions of the Criminal Code regarding lenient treatment of accomplices, but directly applies the provisions of the specific part.

Therefore, the aiding crime is a sentencing rule.[5]

Proponents of the principal-offender-ization theory of assisting acts argue that the criminal attribution of aiding conduct should be based on the characteristics of its independent constitutive elements as actual conduct and on the basis of its criminal punishability. Therefore, judicial authorities may directly apply the corresponding provisions of the specific part of the Criminal Code to convict and punish the perpetrator. However, Professor Chen Xingliang points out that the "principal offender" in the context of principal-offender-ization of assisting acts is essentially different from the principal offender in traditional forms of criminal participation, which directly takes organizing, instigating, or assisting acts as its substantive content. The core characteristic of the "principal offender" in principal-offender-ization of assisting acts lies in the fact that such acts are originally accomplice acts and still possess the nature of complicity in essence; in the absence of special provisions in the specific part, they must be handled by returning to the framework of complicity theory.[6] It can thus be seen that even though the principal-offender-ization of assisting acts has been achieved through legislative techniques, this theory is still constructed on the basis of the accomplice nature inherent in the assisting acts.

Although there are disagreements regarding the nature of the aiding crime as a charge, a basic consensus has been reached at the level of understanding the nature of the conduct in question—that is, the objective conduct regulated by this offense consistently exhibits a clear accomplice nature. Specifically, regarding the objective conduct of "providing payment and settlement assistance," it manifests concretely as providing technical support services such as fund transfers, cash withdrawals, and cashing out for upstream crimes, which further fully confirms the characteristics of this offense as an accessory act. Therefore, as an assisting act, the natural attribute of "assisting nature" of the aiding crime remains unchanged.

3. Examination of the Main Existing Differentiation Views

3.1 The Objective Conduct Theory and Its Deficiencies

Some scholars advocate distinguishing the two crimes on the basis of differences in the conduct objectively manifested. They argue that the objective conduct of the payment-and-settlement-type aiding crime manifests as providing assistance such as supplying bank cards to receive money for upstream offenders, without involving fund transfer activities such as the movement of funds. The concealing-and-disguising crime, by contrast, manifests as the perpetrator's conduct of concealing the proceeds and gains of upstream crimes through acts such as transferring funds. This method of distinction fails to touch upon the essential characteristics of "payment and settlement."[7] First, Article 4 of the 2022 Meeting Minutes on Relevant Legal Application Issues in the "Card-Breaking" Campaign issued by the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security clearly states that if a perpetrator merely engages in the rental or sale of credit cards without participating in subsequent fund transfer or realization operations, or without providing auxiliary services such as biometric verification, such conduct does not meet the "payment and settlement" conduct elements as defined in the Interpretation on the Aiding Crime. From the perspective of literal interpretation, payment and settlement conduct is not merely the basic act of supplying bank cards or credit cards; it also involves the transfer of property. It can thus be seen that the essential characteristic of the payment-and-settlement-type aiding crime lies in providing services such as "fund transfers, cashing out, and cash withdrawals." Moreover, if the objective conduct of the payment-and-settlement-type aiding crime is simplistically understood as acts such as providing mobile phone cards or bank cards, it would result in undue expansion of the aiding crime. Leaving aside the issue that the objective conduct theory misconstrues the core characteristics of "payment and settlement," the primary reason for the blurred boundary and difficulty in distinguishing the two crimes is precisely the similarity in objective appearance. It is obviously inappropriate to distinguish them again from the perspective of objective conduct. Therefore, differences in objective conduct cannot accurately differentiate the two crimes.

3.2 The Theory of Timing of Intervention of Conduct and Its Deficiencies

The theory of timing of intervention of conduct holds that, as an accessory, the aiding crime should be constrained by the causal accomplice theory, namely, both the act of providing payment and settlement assistance and the principal offender's perpetrating conduct in the upstream related crime have a causal relationship with the occurrence of the result. Therefore, the aiding perpetrator's conduct can only intervene after the commencement of the upstream crime and before its completion; only in this way can it provide physical or psychological assistance to the perpetrator of the upstream crime, contribute to the principal offender's act, and link to the criminal result of the upstream related crime, thereby establishing a causal relationship with the criminal result.

It should be noted that there is room for the establishment of the concealing-and-disguising crime when the upstream crime has been completed in its execution but has not yet reached consummation; that is, at the time when the perpetrator of the concealing-and-disguising crime commits acts to conceal or disguise the criminal proceeds, the upstream crime may not yet have been consummated. Taking telecommunications fraud as an example, the prevailing view in both theory and practice regarding the standard for consummation of telecommunications fraud is the control theory. However, it does not mean that once the funds reach the primary-level bank card, they have met the control standard of free disposal. Even if the funds have already arrived in the account of the concealing-and-disguising perpetrator, as long as the victim promptly becomes aware of the fraud and reports it to the police, the investigating authorities may, in accordance with the law, notify the bank to take corresponding measures such as freezing the account.[9] This shows that the upstream offender faces the risk of the funds being reported as lost at any time, and at that point it is difficult to speak of control over the funds, and consequently difficult to speak of consummation.

In summary, there is also room for the establishment of the concealing-and-disguising crime when the upstream crime is attempted. Therefore, the theory of timing of intervention of conduct cannot accurately distinguish the two crimes.

4. Justification of the Standard of Consistency between Subjectivity and Objectivity

Before the execution of the upstream criminal act has been completed, if the perpetrator provides payment and settlement assistance to the upstream offender, there is only a possibility of establishing the aiding crime; after the upstream crime has been consummated, if the perpetrator provides bank cards or other assistance to facilitate fund transfers or similar acts, only the concealing-and-disguising crime may be established. However, during the period between the completion of the execution of the upstream crime and its consummation, there is an overlapping space for the two crimes. The author believes that, in accordance with the sequential order of criminalization examination, from objectivity to subjectivity, the principle of consistency between subjectivity and objectivity should be followed to distinguish the two crimes that may fall within the overlapping phase. When examining the objective elements, a formal judgment should first be made, that is, whether the harmful act committed by the perpetrator conforms to the statutory description of the offense. In cases where the objective conduct of the payment-and-settlement-type aiding crime and the concealing-and-disguising crime are similar in appearance and difficult to distinguish, a substantive judgment must further be conducted to determine whether the act infringes upon legal interests and, if so, which legal interests are infringed.

4.1 Necessity of Determining the Legal Interests Infringed by the Act

Both the aiding crime and the concealing-and-disguising crime are categorized under Chapter VI of the Criminal Code, "Crimes of Obstructing the Administration of Social Order." Among them, the aiding crime is explicitly placed under Section 1 of that chapter, "Crimes of Disrupting Public Order," and it aims to protect the public order of information networks; whereas the concealing-and-disguising crime is stipulated in Section 2 of that chapter, "Crimes of Obstructing Justice," and the legal interest it protects is the normal operation of judicial authorities' activities. It can thus be seen that there is an essential difference between the aiding crime and the concealing-and-disguising crime at the level of the legal interests intended by criminal law.

When the perpetrator provides payment and settlement assistance for an information network crime that the upstream offender has already commenced but has not yet reached consummation, it is necessary to further examine which legal interest has actually been infringed by the perpetrator's assisting act. If the perpetrator merely receives funds, or after receiving funds only transfers the portion that is not criminal proceeds, the act solely infringes upon the single legal interest of the security order of information networks, and should be determined as the aiding crime. Correspondingly, if the perpetrator, after receiving funds, transfers the illicit money contained therein, the act then infringes upon both the security order of information networks and judicial order,[11] and should be determined as the concealing-and-disguising crime in accordance with the provisions of Article 287 bis, Paragraph 3 of the Criminal Code.

4.2 Necessity of Examining the Perpetrator's Subjective Cognitive Factors

In addition to considering the legal interests infringed by the perpetrator's act of providing payment and settlement assistance, the subjective cognition of the perpetrator at the time of the act should also be included in the scope of considerations for distinguishing the two crimes, and the perpetrator's charge should be determined in accordance with the principle of consistency between subjectivity and objectivity. The primary difference between the two crimes lies in the different requirements regarding the content of the perpetrator's subjective cognition. The aiding crime requires that the perpetrator must clearly know that "others are using information networks to commit crimes," that is, clearly know that the object he is assisting is using information networks to commit a crime, whereas the concealing-and-disguising crime requires that the perpetrator clearly know that the property in question is "criminal proceeds and gains derived therefrom." Secondly, the two crimes also differ in the required degree of knowledge of "crime." The author believes that, based on the assisting nature of the aiding crime, the limited subordination theory should be adopted, namely, that the establishment of accomplice liability only requires that the principal offender has committed an unlawful act that satisfies the constitutive elements prescribed in the specific part, without requiring the principal offender to bear culpability, because culpability is individual, and whether the principal offender bears culpability does not affect the establishment of accomplice liability. As for "crime" in the phrase "criminal proceeds and gains derived therefrom" in the concealing-and-disguising crime, it requires that the perpetrator clearly knows that the upstream act fully meets the degree of criminal establishment.[12] Only when the perpetrator recognizes the establishment of the upstream crime can he recognize the nature of the stolen goods he harbors or transfers, and thereby further recognize that his concealing-and-disguising act will obstruct normal judicial activities.

4.3 Differentiation Based on the Standard of Consistency between Subjectivity and Objectivity

The principle of consistency between subjectivity and objectivity emphasizes that only when the perpetrator's subjective culpability matches the objective conduct can he be found to have committed the corresponding crime.[13] When a certain act objectively infringes upon judicial order, but the perpetrator subjectively possesses only the intent to commit the aiding crime, given that the payment-and-settlement-type aiding crime and the concealing-and-disguising crime are basically similar in the objective conduct of providing payment and settlement assistance, the conduct of the concealing-and-disguising crime can be inclusively evaluated as the conduct of the aiding crime, and the perpetrator may be found to have committed the consummated aiding crime depending on the specific circumstances. When the perpetrator subjectively possesses the intent to commit the concealing-and-disguising crime but has only committed acts of providing payment and settlement assistance that infringe upon the public order of information networks, since the perpetrator of the aiding crime only needs to know that the object of his assistance is an unlawful act that is committed through information networks and that satisfies the constitutive elements prescribed in the specific part of the Criminal Code, the subjective knowledge requirement of the concealing-and-disguising crime demands that the perpetrator must clearly recognize that the object he handles is criminal proceeds and gains derived therefrom. This itself entails a prerequisite: the perpetrator clearly knows that the property originates from an upstream crime that has already occurred. Therefore, the "clear knowledge" required by the concealing-and-disguising crime essentially includes that the perpetrator has a definite understanding of the upstream criminal activities to which his concealing-and-disguising conduct is directed. The degree of subjective knowledge required by the concealing-and-disguising crime is higher than that required by the aiding crime, and thus the content of subjective knowledge of the concealing-and-disguising crime can be inclusively evaluated as the content of subjective knowledge of the aiding crime.[14] In such a case, the perpetrator should be found to have committed the aiding crime.

5. Conclusion

It should be acknowledged that the aiding crime, as an independent offense, has clear constitutive elements and sentencing standards. At the same time, however, its establishment depends on the existence of the assisted party, and it has a natural dependency on the assisted party. Therefore, its assisting nature should be affirmed, and the distinction between the aiding crime and the concealing-and-disguising crime should be based on the characteristics of the aiding crime as an assisting act. As an accessory, the aiding crime can only be established before the consummation of the upstream crime, whereas the concealing-and-disguising crime has room for establishment after the execution of the upstream crime has been completed. Therefore, during the period when the execution of the upstream crime has been completed but it has not yet reached consummation, the payment-and-settlement-type aiding crime and the concealing-and-disguising crime may be differentiated according to the legal interests infringed by the perpetrator's act, in combination with the perpetrator's subjective cognition, and in adherence to the principle of consistency between subjectivity and objectivity. Only by clarifying the boundary between the two can we maintain clarity when facing complex judicial practice and correctly determine convictions and impose punishments.

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