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

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Abstract: *Recently, the crime of assisting in the operation of an information network criminal group has gradually become a type of "catch-all offence". The objective crimes of assisting in cybercrimes through payment and settlement activities and the crime of concealing criminal proceeds are very similar, and the lack of clarity in their boundaries has been one of the reasons for the rapid development of judicial enforcement in the former. Therefore, we need to set clear criteria to distinguish between the two crimes. Although the crime of assisting in cybercrime is provided for separately, it is still an offence of participation and has not changed in nature to that of an accessory. According to the causative theory of complicity, the crime of assisting in cybercrime can only be established after the occurrence of the upstream crime. At the same time, the crime of concealing criminal proceeds can be committed after the completion of the upstream crime, or even when the criminal conduct has been carried out but the crime has not yet been realised. In the overlapping stage of the two offences, it needs to be determined whether both the legal interest infringed by one's conduct and one's subjective knowledge at the time of the act meet the requirements for both crimes under the principle of consistency between subjective and objective elements, and thus which specific crimes should be established.*

Keywords: *Assisting Nature of Crime (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 carry out the "Card-Breaking Campaign" to combat new types of telecommunications and network fraud. Given the reasons above, judicial application of the relevant provisions of Article 287 bis of the Criminal Code for the crime of aiding information network criminal activities (hereinafter referred to as the "aiding crime") has achieved a certain level in recent years. 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 aiding crimes in information network-related criminal cases started to rise rapidly in 2021, reaching 54.27% in 2021 from 5.78% in 2020. Among them, the proportion of cases in which the method of operation for providing payment and settlement assistance was this type was 53.45%, more than half of the total.

The behavioural type of "providing payment and settlement assistance" in the aiding crime is very close 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 for payment and settlement of fund transfers in the upstream criminal act, so it is difficult to distinguish between the two crimes accurately in judicial practice. The proportion of payment-and-settlement-type aiding crimes among all aiding crimes is relatively high, and there is no clear distinction with concealing-and-disguising crimes. Therefore, it has been one of the main reasons for the significant rise in the number of aiding crime cases. Therefore, we need to reassess the normative attributes of the aiding crime, establish differentiation standards based on this revision, clarify the boundaries of the two crimes, and regulate their judicial application.

2. Prerequisite for Differentiation: The Act of Aiding Information Network Criminal Activities is in the nature of assistance

2.1 The Aiding Crime Has Independence

The most obvious difference between internet-facilitated joint crime and traditional joint crime is that the former is "decentralised"; the behaviour of the accomplice is not closely related to that of the main offender, and the mutual intention of all parties involved is diluted, resulting in a separation between the criminal act and the form of complicity[1]. In light of the demands of a risk society, the Criminal Law Amendment (IX) has added a new crime of aiding the crime, and all the constituent elements and penalties for this crime have been stipulated at the level of criminal legislation. From then on, the conditions for the occurrence of the aiding crime will be independent of the upstream principal offender. When the judicial authorities determine that the act is one of assistance, they do not need to apply the general provisions on joint crimes in the Criminal Code, but can convict and punish it according to the specific provisions in this part. On October 25, 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 provided that even if it cannot be objectively determined whether the conduct of the assisted party constitutes a crime, the perpetrator may still be held criminally liable if the total amount exceeds five times the statutory standard or if there are especially serious consequences. The above methods have broken away from the traditional framework of the accomplice doctrine and independently criminalised aiding acts; all of this shows that the aiding crime, as an independent offence, has its own legislative foundation.

2.2 Aiding and abetting crimes are acts that help to commit a crime

At the same time, we should also be aware that the auxiliary character is still an intrinsic attribute of the helping crime. 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". Whether "knowing" is taken to mean "knowing clearly", as "clearly knowing" and "should have known", or in any other way, a person who has learned of the existence of an assisted act will still engage in acts such as providing payment and settlement assistance to help complete the information network crime[2]. Therefore, it can be concluded that the actual operation of the aiding crime is in fact assisting conduct.

In fact, crimes and the crimes they consist of have been shown to be dependent along the upstream-downstream assembly line of cybercrime. A typical case is telecom network fraud, and generally, the criminal process of such fraud involves division of labour and collaboration among all parties, such as the front-end Internet access service, provision and identification of personal information, back-end payment and settlement processing, transfer of case-related funds, etc., and other key links. These helping acts are needed for the operation of telecommunications network fraud, and their very existence is also highly dependent on the continuous development of upstream criminal activities[3].

Many academic theories on the nature of the aiding crime have not denied that the conduct in question is an act of helping another person commit a crime. Among the scholarly theories on the nature of the aiding crime, the two most typical are the "sentencing rule theory" and the "theory of principal-offender-isation of assisting acts". The sentencing rule theory believes that the crime of aiding the information network criminal group is still, in fact, a type of complicity. Professor Zhang Mingkai believes that most arguments claiming that the aiding crime is a case of principal-offender-isation of complicity are in fact off-topic from the rule of accessory nature of complicity. In fact, the sentence "independent criminalisation of assisting acts indicates principal-offenderisation" is a formal error due to a lack of content. Although assisting in the commission of a crime has formed an independent constituent element at the level of legislation, in determining the nature of the offence, identification should still be based on the principle of the accessory nature of complicity and must be premised on the commission of an unlawful act by the upstream principal offender that meets the constitutive elements. After determining that an act is an aiding crime, the punishment for the aiding conduct does not fall under the general provisions of the Criminal Code on lenient treatment of accomplices, but rather the provisions in the special part are applied directly. Therefore, the helping crime is a punishment norm.

Advocates of the principle of principal-offenderisation for assisting acts believe that the criminal attribution of aiding conduct should be based on the attributes of its independent constitutive elements as actual conduct and on the grounds of its criminal punishability. Therefore, the judicial authorities can directly apply the relevant provisions of the special part of the Criminal Code to convict and punish the offender. Professor Chen Xingliang believes that the "principal offender" in the context of the principal-offenderisation of assisting acts is not the same as the principal offender in traditional forms of criminal participation; rather, it directly refers to organisation, instigation or assistance for the commission of the crime. The main feature of the "principal offender" in principal-offenderisation of assisting acts is that these acts were originally accomplice acts and still have the nature of complicity in essence; in the absence of special provisions in the particular part, they must be handled according to the framework of the complicity theory[6]. Therefore, it can be seen that although the principal-offenderisation of assisting acts has been achieved by legislative techniques, this theory is still based on the accomplice nature of the assisting acts.

Although it has not been determined whether to attribute the type of helping crime to this offence, at the level of understanding the nature of the act involved, there is a general agreement: that is to say, the objective behaviour regulated by this crime consistently exhibits characteristics of complicity. For the purpose of "providing payment and settlement assistance", it is in the form of offering technical support services for the fund transfer, cash withdrawal and cashing out of upstream crimes, and thus also meets the criteria of an accessory act. Therefore, as an accessory to the main crime, it should be classified as an accessory crime.

3. Examination of the Main Existing Differentiation Views

3.1 The Goal Conduct Theory and Its Shortcomings

Some scholars believe that the two crimes should be distinguished according to the different purposes of the behaviour shown. They believe that the objective conduct of the payment-and-settlement type of aiding crime in providing assistance takes the form of supplying bank cards to receive money for upstream offenders, and does not involve fund transfer or movement of funds. At the same time, covering up and disguising crimes refer to obtaining illegal income from the upstream crime and then concealing this fund and other means. The first reason is that it does not fall under the category of "payment and settlement". According to Article 4 of the 2022 Meeting Minutes on Relevant Legal Application Issues in the "Card-Breaking" Campaign issued by the Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security, if a perpetrator only rents or sells a credit card and does not participate in the subsequent fund transfer and settlement process, nor provide auxiliary services such as biometric verification, this act does not meet the "payment and settlement" conduct element mentioned in the Interpretation on the Aiding Crime. Based on a literal interpretation, the behaviour of payment and settlement is not only the fundamental act of using bank cards or credit cards but also a transfer of property. Therefore, it can be concluded that the necessary attribute of the payment-and-settlement-type aiding crime is the provision of services such as "fund transfer, cash-out and cash withdrawal". In addition, if we take the objective conduct of the payment-and-settlement-type aiding crime to be acts such as providing mobile phone cards or bank cards, there will be an excessive expansion of the concept of aiding crime. Excluding the problem of the objective conduct theory failing to grasp the essential features of "payment and settlement", the main reason for the indistinct boundary and difficulty in distinguishing between the two crimes is that they have the same external form. From the above, it can be seen that they are not different in observable behaviour. Thus, the difference in the objective conduct cannot distinguish between the two crimes.

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

According to the theory of the timing of intervention in conduct, as an accessory, the aiding crime should be limited by the causal accomplice theory; that is to say, both the act of providing payment and settlement assistance and the principal offender's perpetrating conduct in the upstream related crime must have a causal connection with the occurrence of the result. Therefore, the conduct of the aiding perpetrator can only intervene after the start of the upstream crime and before its end; only in this way can it provide physical or psychological support to the perpetrator of the upstream crime, help achieve the act of the principal offender, connect with the criminal result of the upstream-related crime, and thus establish a causal link to that criminal result.

It should be pointed out that there is a place for the commission of a concealing-and-disguising crime when the upstream crime has been carried out in its execution but has not yet reached consummation; that is, at the time the perpetrator of the concealing-and-disguising crime takes actions to conceal or disguise the criminal proceeds, the upstream crime has not yet been consummated. Telecommunications fraud is a typical case, and the general view in both theory and practice on the standard for consummation of telecommunications fraud is the control theory. However, the fact that the funds have reached the primary-level bank card does not mean that the control standard for free disposal has been met. Even if the funds have already reached the account of the person who concealed and disguised them, if the victim finds out about the fraud in time and reports it to the police, the investigating authorities can, according to the law, have the bank freeze the account and take other countermeasures[9]. It can be seen that the upstream offender is constantly anxious about their funds being reported as missing; at that time, it is no longer practical to talk about controlling the funds, and thus, consummation cannot be achieved.

In short, there is also a case for the concealment-and-disguise crime when only the upstream crime is attempted. Therefore, the theory of timing for intervention in conduct cannot distinguish between the two crimes properly.

4. Justification for the Standard of Consistency Between Subjectivity and Objectivity

Before the completion of the execution of the upstream criminal act, if the perpetrator offers payment and settlement assistance to the upstream offender, there is only a possibility of establishing an aiding crime; after the consummation of the upstream crime, if the perpetrator provides bank cards or other assistance to facilitate fund transfer or similar acts, only the concealing-and-disguising crime can be established. However, in the time between the completion of the execution of the upstream crime and its consummation, there is an overlap with the second crime. According to the sequence of criminalisation examination, from objectivity to subjectivity, the rule of consistency between subjectivity and objectivity should be used to distinguish between the two crimes that may fall under the overlapping phase. Based on observations of objective facts, it should be determined in the first instance whether the harmful act committed by the perpetrator meets the legal conditions for a crime. If the purpose of the conduct in the payment-and-settlement-type aiding crime and the concealment-and-disguising crime is the same and they are difficult to distinguish, then, by way of substantive judgment, it shall be determined whether the act has violated legal interests and, if so, which particular legal interests have been harmed.

4.1 The Need to Identify the Legal Interests Affected by the Act

Both the aiding crime and the crime of concealing and disguising fall under Chapter VI of the Criminal Code, which is titled "Crimes of Obstructing the Administration of Social Order". Among them, the aiding crime is specifically mentioned in Section 1 of that chapter, "Crimes of Disrupting Public Order", and its purpose is to protect the public order of information networks; on the other hand, the concealing-and-disguising crime is stipulated in Section 2 of the same chapter, "Crimes of Obstructing Justice", and the legal interest it safeguards is the normal operation of judicial authorities' activities. Therefore, it can be seen that there is a basic difference in the legal interests pursued by criminal law at the level of the aiding crime and the concealing-and-disguising crime.

When the perpetrator provides payment and settlement assistance for an information network crime that has already been started under the direction of an upstream offender but has not been completed, it should be determined which legal interest has been violated by the perpetrator's assisting act. If the perpetrator only receives the funds, or transfers only the part that is not criminal proceeds after obtaining the funds, then this act does not violate any other single legal interest of the security order of information networks and should be treated as an aiding crime. Therefore, if the perpetrator transfers the illicit money after receiving it and uses it abroad, this will be considered an infringement of the security order of information networks and judicial order[11], and it should be dealt with as a concealing-and-disguising crime in accordance with the provisions of Article 287 bis, Paragraph 3 of the Criminal Code.

4.2 Reason for Studying the Offender's Subjective Cognitive Factors

In addition to considering the legal interests harmed 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 taken into account in the scope of consideration for distinguishing between the two crimes, and the perpetrator's charges should be determined in accordance with the principle of consistency between subjectivity and objectivity. The main difference between the two crimes is that they have different demands on the content of the perpetrator's subjective awareness. The aiding crime requires that the perpetrator knows that "others are using information networks to commit crimes"; that is to say, he is fully aware that the object of his assistance will be employed in the commission of a crime via information networks, whereas in the concealing-and-disguising crime, the perpetrator must be fully aware that the property in question constitutes "criminal proceeds and gains derived therefrom". Second, the two crimes are distinguished by the required degree of knowledge of "crime". Given that helping crime is a type of assisting crime, the author believes that the limited subordination theory should be applied; that is to say, to establish accomplice liability, it is only necessary to prove that the principal offender has committed an unlawful act meeting the constitutive elements specified in that particular part, and it does not need to be proven that the principal offender is culpable, as culpability is an attribute of individuals, and whether the principal offender is culpable does not affect the formation of accomplice liability. As for "crime" in the phrase "criminal proceeds and gains derived therefrom" of the concealing-and-disguising crime, it is necessary that the perpetrator is aware that the upstream act fully meets the degree of criminal establishment[12]. Only when the perpetrator knows that there has been a crime upstream will he be able to identify the nature of the stolen goods he is hiding or transporting and realise that his act of concealment and disguise will interfere with the regular course of justice.

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

In line with the rule of consistency between subjectivity and objectivity, only when the subject's fault is in harmony with the external expression of behaviour can it be determined that a crime has actually occurred[13]. Even if a particular act violates the rule of law, if the person who committed it is only subjectively aware of their intention to commit an aiding crime, and given that the objective conduct of providing payment and settlement assistance is essentially the same as that of concealing and disguising, then the conduct of concealing and disguising can be considered an inclusive form of aiding behaviour, and the person may be held criminally liable for the consummated aiding crime under certain circumstances. When the perpetrator has the subjective intention to commit the crime of concealment and disguise but has only carried out acts of providing payment and settlement assistance that violate 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 committed through information networks and that it meets the constitutive elements prescribed in the specific part of the Criminal Code, the subjective knowledge requirement of the crime of concealment and disguise requires that the perpetrator clearly recognises that the object he handles is criminal proceeds and gains derived from them. In turn, it should be known by the offender where the property comes from and that they have been involved in a prior crime. Therefore, the "clear knowledge" required for the crime of concealing and disguising generally refers to the fact that the perpetrator knows about the upstream criminal activities to which their act of concealing and disguising is directed. The degree of subjective knowledge required for the concealing-and-disguising crime is higher than that for the aiding crime, so the content of subjective knowledge for the concealing-and-disguising crime can be included in the content of subjective knowledge for the aiding crime[14]. Given the above, it can be concluded that the person committed the crime of aiding.

5. Conclusion

It should be noted that the aiding crime is an independent crime with its own constitutive conditions and punishments. At the same time, however, the establishment of it requires the existence of an assisted party, and it is naturally dependent on that assisted party. Therefore, its auxiliary character should be affirmed, and the distinction between the aiding crime and the concealing-and-disguising crime should be based on the attributes of the aiding crime as an assisting act. As an accessory crime, the aided crime can only be established before the commission of the principal crime; however, the crime of concealment and disguise may be committed after the principal crime has been carried out. Therefore, in the period after the execution of the upstream crime has been completed but before it has reached consummation, the payment-and-settlement-type aiding crime and the concealing-and-disguising crime can be distinguished according to the legal interests infringed upon by the perpetrator's act, in conjunction with the perpetrator's subjective awareness, and in line with the rule of consistency between subjectivity and objectivity. Only when the border between the two is clear will we be able to handle the many problems in judicial practice properly and issue correct verdicts and sentences.

References

[1] Zhang Wei. The Doctrinal Development of the Crime of Aiding Information Network Criminal Activities. Comparative Law Research, 2023, (01): 97-111.

[2] Qian Yeliu. A Doctrinal Analysis of the Crime of Aiding Information Network Criminal Activities: Adherence to the Principle of Accessory Nature of Complicity. Peking University Law Journal, 2023, 35(01): 143-161.

[3] Yu Chong. The Independence and Dependency of the Crime of Aiding Information Network Criminal Activities. Journal of National Prosecutors College, 2023, 31(01): 106-120.

[4] Zhang Mingkai. On the Crime of Aiding Information Network Criminal Activities. Politics and Law, 2016, (02): 2-16.

[5] Zhang Mingkai. A Re-discussion on the Crime of Aiding Information Network Criminal Activities. Law and Business Research, 2024, 41(01): 21-41.

[6] Chen Xingliang. Principal-offender-ization of Accomplice Acts: From the Perspective of the Crime of Aiding Information Network Criminal Activities. Comparative Law Research, 2022, (02): 44-58.

[7] Gu Yang, Jin Shuo. Issues on the Determination of Conduct in the "Payment-and-Settlement-Type" Crime of Aiding Information Network Criminal Activities. Crime Research, 2023, (03): 91-99.

[8] Liu Xianquan, Wei Tong. Criminal Law Characterization of "Peripheral" Assisting Acts in Telecommunications Fraud. Crime Research, 2022, (04): 2-15.

[9] Li Huibin. Determination of Complicity in the Act of Assisting Withdrawal in Telecommunications Fraud. Journal of National Prosecutors College, 2017, 25(01): 105-113+174-175.

[10] Qian Yeliu. A Doctrinal Analysis of the Crime of Aiding Information Network Criminal Activities: Adherence to the Principle of Accessory Nature of Complicity. Peking University Law Journal, 2023, 35(01): 143-161.

[11] Yang Xinlü. Criteria for Distinguishing the Crime of Aiding Information Network Criminal Activities from the Crime of Concealing and Disguising Criminal Proceeds. Journal of Jiangsu Police College, 2024, 39(01): 10-23.

[12] Pi Yong. A Doctrinal Analysis and Judicial Empirical Study of the Independence of New-Type Cybercrimes. Politics and Law, 2021, (10): 91-106.

[13] Guo Zeqiang, Wang Xuanbo. On the Distinction between the Crime of Aiding Information Network Criminal Activities and the Crime of Concealing and Disguising Criminal Proceeds. Journal of Hubei Police College, 2024, 37(04): 69-79.

[14] Wang Shenghua, Jiang Chenyan. A Doctrinal Distinction between the "Aiding Crime" and the "Concealing-and-Disguising Crime" in Criminal Law. Journal of Hefei University, 2025, 42(01): 37-43.