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**PROBLEMS OF QUALIFICATION OF THEFT USING
ELECTRONIC MEANS OF PAYMENT**

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Abstract

Theft of other people's property is the most common crime that is committed on the territory of our country. The most prominent of them are theft and fraud. At the same time, it should be noted that at present, taking into account the task set by the President of the Russian Federation to digitalize the country, most of human activity has been transferred to the virtual space. This trend has not been spared by financial management technologies. Legal entities and individuals were able to quickly and accurately pay for services, fulfill their financial obligations remotely using the so-called electronic means of payment. This article deals with the problem of distinguishing acts that contain signs of crimes provided for in paragraph "d" of part three of article 158 of the criminal code and article 159.3 of the criminal code. In particular, the paper defines such concepts as electronic money and electronic means of payment. There are signs of the objective side of crimes, for which the considered elements must be distinguished. The influence of illegal acquisition of electronic means of payment on the qualification of stolen funds is considered. On the basis of the legal analysis of the articles of the Criminal code, opinions of the Supreme court of the Russian Federation and taking into account the decisions of the enforcers, the authors identified relevant distinctive features. The proposed recommendations can be used both in law enforcement practice and in educational activities.

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1. Introduction

For many years, theft of other people's property is one of the most common crimes on the territory of Russia. For example, in 2016, according to the website of the Ministry of Internal Affairs of the Russian Federation, 871,084 cases of theft and 208,926 frauds were registered in our country, in 2017 – 788,531 thefts and 222,772 frauds, in 2018-756,395 thefts and 215,036 frauds, in 2019 – 774,159 thefts and 257,187 frauds, in January - September 2020 – 556,735 thefts and 247,592 frauds (Website of the Ministry of Internal Affairs of the Russian Federation, 2020). These figures indicate a slight decrease in the total number of thefts and an increase in the number of frauds. Such patterns may be dictated, among other things, by certain legislative changes.

The technical development of the company determines the emergence of new legal relations, in particular those related to the implementation of property rights in the digital space. However, this also leads to infringement of property rights. For example, the Main investigation Department of the Ministry of internal Affairs of Russia in the Sverdlovsk region completed the investigation of a criminal case against a resident of Yekaterinburg, who embezzled money from customers of an online store. The investigation found that at the end of 2018, the scammer remotely found a job in an online store as a consultant operator. Her job was to work with clients. The employer gave her a username and password to work in the program. Having gained access to the system, the attacker made money transfers from clients' accounts to her own. The damage from illegal actions exceeded 1 million rubles. The woman was charged with committing crimes under part 3 of article 158 of the Criminal code of the Russian Federation "Theft" and article 272 of the Criminal code of the Russian Federation "Unauthorized access to computer information" (Website of the Ministry of internal Affairs of the Russian Federation, 2020).

2. Problem Statement

The recognition, observance, and protection of the rights and freedoms of citizens is a direct responsibility of the state. These responsibilities are implemented, among other things, by issuing normative legal acts, which include the Decree of the President of the Russian Federation dated 07.05.2018 N 204 "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024". In particular, it refers to the need to develop a national program "Digital economy of the Russian Federation", which includes the Federal project "Information security", where paragraph 1.17 States that in order to implement this project, the criminal code of the Russian Federation (Hereinafter referred to as the Criminal code of the Russian Federation) has been amended to expand the criminalization of new types of acts committed using information technologies. However, changes in the criminal code of the Russian Federation not only fill in the gaps in the current legislation, but also determine the emergence of new issues. The topic of combating theft is also relevant on the pages of foreign publications (El Orche et al., 2018; El Orche & Bahaj, 2019; Huang & Huang, 2019; Pracidelli & Lopes, 2020; Tretiak & Ryabova, 2020).

Thus, the following problem should be solved within the framework of this study. For example, a person stole a credit card from the victim and withdrew part of the money using an ATM, and the other part in the form of payment for purchases in the store. How to properly qualify the actions of a criminal, if

formally they contain signs of article 158 and 159 of the Criminal code? Are actions aimed at stealing the credit card itself subject to additional qualification?

3. Research Questions

In particular, p. "g" of part 3 of article 158 of the criminal code, which criminalizes theft from a Bank account, as well as in respect of electronic money (in the absence of signs of a crime under article 159.3 of the criminal code). A comparative analysis of the articles under consideration allows us to identify the following distinctive features of the crime.

First, crimes differ in the way they are committed. For theft, it is secret theft, and for fraud, it is deception or abuse of trust. Secondly, to qualify theft, the legislator establishes such mandatory features as the place of the crime, "from a Bank account" or the subject of the crime – "electronic money". However, it is not necessary that the features exist simultaneously. one of the considered features is sufficient for qualification. For fraud, a mandatory feature is a means of committing a crime, which is described by the legislator as "electronic means of payment". Another important condition for the qualification of theft is the absence of signs of fraud in the act, which we attributed to the method of committing the crime and its means.

The Supreme Court of the Russian Federation makes very contradictory comments on the situation under consideration, pointing out that non-cash funds and electronic funds can be the subject of fraud (Resolution of the Plenum of the Supreme Court of the Russian Federation No. 48 dated 30.11.2017). Thus, according to the court, electronic money is the subject of both theft and fraud, that is, apparently we are talking about article 159 of the criminal code of the Russian Federation. Also, according to the court, it is not fraud to steal someone else's money by using a pre-stolen payment card, if the cash was issued using an ATM without the participation of an authorized employee of the Bank. It is recommended to qualify such actions as theft. In the case of using a stolen payment card by deception or omission of its ownership by an employee of the organization where the payment is made, it is recommended to qualify such actions as fraud. Comparison of these recommendations allows us to conclude that fraud using a payment card requires deceiving an employee of the relevant organization, and not the owner of the funds. Thus, if a person secretly steals the victim's Bank card, and then pays with it for their purchases, for example, in a store, then his actions contain signs of article 159.3 of the criminal code of the Russian Federation, while the amount stolen must be more than 2500 rubles, since he deceives an employee of the relevant organization. However, if any amount is stolen using an ATM, the same act should be qualified as theft in relation to electronic funds or from a Bank account. Therefore, actions that are similar in content differ dramatically in the degree of social activity. Is this fair? We think not.

The intermediate result of the above can be the following theses.

1. To qualify the considered action does not matter the method of appropriation of payment cards, but matters how you use it.
2. The subject of theft and fraud may be electronic cash.
3. Literally the only distinguishing feature of a crime under article 159.3 of the Criminal code is the crime of electronic means of payment.

4. Purpose of the Study

The objectives of this study are as follows. Pay attention to the problems of qualifying theft using electronic means of payment. Identify the distinctive features of the elements of crimes provided for in paragraph " d " of part 3 of article 158 and article 159.3 of the Criminal code. Resolve the issue of the impact on the qualification of crimes of the method of theft of electronic means of payment. Consider suggestions on the identified problems of other authors. Consider how these issues are resolved in practice. Assess the fairness of the legislator's allocation of such an additional type of theft as theft from a Bank account or electronic money. Formulate recommendations for solving the identified problems. It is possible that the developed comments will improve the efficiency of the courts and law enforcement agencies. Also, the developed recommendations will have to improve the fairness of law enforcement decisions, and therefore preserve the trust of citizens in justice.

5. Research Methods

The use of effective research tools is the key to its successful completion. Currently, there is a significant methodological tool that allows you to solve a significant block of theoretical and applied problems. Each science block has a specific set of tools. At the same time, it should be noted that universal methods should not be neglected in the study of law. The methodological basis of the research is the dialectical method of cognition of real reality in its connection and interaction. Various research methods were used in the course of the study. Of these, we can distinguish General scientific and special ones. For example, the statistical method was used to justify the relevance of the topic chosen for research. The modeling method was used to formulate the research problem. The method of analysis was used to identify the distinctive features of similar crimes. The method of synthesis for the formulation of conclusions. The selected features were compared using the appropriate method. We believe that the methods used allow us to achieve our goals and solve the designated tasks.

6. Findings

What are electronic money and electronic means of payment?

In accordance with the current legislation of electronic money - money that previously provided by one person (the person providing the funds) to another person, taking into account information about the amount of funds provided without opening a Bank account (obligor) for the performance of monetary obligations of the grantor of the funds before third parties and in respect of which the person providing the funds, has the right to transfer instructions exclusively using electronic means of payment. Thus, an order to fulfill obligations using electronic money is not possible without using an electronic means of payment, such as a Bank card. A distinctive feature of electronic money, for example, from non-cash is its storage not in a Bank account.

For the purposes of this study, it is also necessary to define an electronic means of payment, which in the current legislation is understood as a means and (or) method that allows the client of a money transfer operator to draw up, certify and transmit orders for the purpose of transferring funds within the framework of applied forms of non-cash payments using information and communication technologies, electronic

media, including payment cards, as well as other technical devices (The Federal law dated 27.06.2011 N 161-FZ "On the national payment system").

Why is it not important to take possession of an electronic means of payment in the form of a card? In the specialized literature, this is most clearly explained by Yevtushenko, having considered the classic example of taking the key to an apartment where valuables are stored. By itself, the fact of taking the key secretly or by deception does not affect the method of subsequent withdrawal of funds, which is used for qualification (Yevtushenko, 2019).

The courts also take a similar position in their activities. For example, 04.01.2020 G. about 06 hours 00 minutes Abdullayev, being in the car, landed as a passenger K.A.B. 04.01.2020 about 07 hours 20 minutes Abdullayev delivered K.A.B. to a public transport stop, where he demanded payment for the trip from the latter. In order to pay for the trip, K.A.B. opened an application for electronic money transfer on his cell phone and handed the cell phone to Abdullayev for making a non-cash payment. Abdullaev about 07 hours 20 minutes 04.01.2020, taking advantage of the fact that being in a state of alcoholic intoxication K.A.B. fell asleep and does not see his criminal actions, that is, acting secretly intentionally from mercenary motives, in order to steal money from the Bank account of the victim's Bank card, entered the number of his Bank card, indicating the transfer amount of 10,000 rubles, and transferred about 07 hours 20 minutes 04.01.2020 from the victim's Bank account to his Bank account. The court fairly qualified these actions under paragraph "d" of part 3 of article 158 of the criminal code (Verdict No. 1-263 / 2020 of may 29, 2020). In this example, a mobile phone with a special application installed is an electronic payment method. Funds were stolen from a Bank account. The victim did not see how the transfer was made, and therefore the theft was a secret for him. The fact that the victim handed over the phone voluntarily, trusting the driver, did not affect the qualification. Thus, the following characteristics are characteristic of theft: method-secret theft, place of crime-Bank account, subject of crime-electronic money, which in the special literature include money stored on the so-called "electronic wallets" such as payment systems such as WebMoney, Qiwi, Yandex.Money and others. Fraud is characterized by the following features: method – deception or abuse of trust and means of committing a crime-electronic means of payment(article 159.3 of the Criminal code of the Russian Federation). However, it should be noted that the method of theft of an electronic means of payment does not matter to distinguish between theft and fraud. The way it is used at the time of an illegal transfer of funds is important. If the transfer procedure involves people who are misled by the criminal, then the latter's actions must be qualified as fraud. If the money is transferred without the participation of people, then theft occurs.

For example, if a person pays with someone else's Bank card without the permission of its owner in a store and thus misleads the employee of this institution by omitting or providing false information, such actions are qualified as fraud. Theft will also be considered a withdrawal of cash via an ATM or payment for a purchase with a stolen Bank card using a self-service checkout.

The method of acquiring an electronic means of payment in the form of a card is also not important for qualification. There is a classic example of taking the key to an apartment where valuables are stored. By itself, the fact that the key is taken secretly or by deception does not affect the method of subsequent withdrawal of funds, which is used for qualification.

7. Conclusion

In conclusion, it should be noted that this article contains a criminal law analysis of the elements of crimes provided for in paragraph "d" of part 3 of article 158 of the criminal code and article 159.3 of the criminal code. The study suggests that the compared compositions are largely similar in their characteristics, which in practice often leads to errors. We believe that the legislator has concentrated the distinctive features in the object and objective side of the compositions under consideration. If interpreted literally, they should include: the object, method, place and means of committing the crime. However, in fact, the only distinguishing feature is the method of committing the crime. This opinion is confirmed by both scientists and practitioners. It should also be noted that the method of acquiring an electronic means of payment, as a rule, does not affect the overall qualification.

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