

Bank and credit cards in Turkey: an outline of the criminal law

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The development of computer technology and network communications have significantly affected the economy, trade, public and private services.¹ This means it is necessary to amend legislation and adopt new legislation in order to provide effective remedies and to introduce new criminal offences in line with the technological developments.

The purpose of this article is to analyze the substantive crimes created by article 245 of the Turkish Penal Code Number 5237 (TPC) in the light of the main principles of Turkish criminal theory governing the evaluation of the actions as offences. The analysis includes a discussion that some items of legislation are contrary to law; particularities of the offences; the investigation and prosecution stages, and the reasons that act to mitigate punishment and enforcement. Turkish Appeal Court decisions will be mentioned accordingly.

In this respect, the Turkish Appeal Court² does not apply the same interpretation in its precedents with regard to offences set forth in articles 243, 244, and 245 of the TPC in relation to 'Offences in the Field of Information Technology'. This leads to several issues regarding the definition of offences.

While crimes of 'illegal access to computers' (article 243) and 'hindrance or destruction of the system, deletion or alteration of data' (article 244) provide for offences against computer systems, 'improper use of bank or credit cards' (article 245) punishes actions that aim to profit with real or counterfeit cards.

Article 245 of the TPC defines three individual crimes. The first subsection of article 245 provides for crimes of 'benefiting from improper use of real bank or credit cards', the second subsection provides for crimes of 'fabricating counterfeit bank or credit cards', and the third subsection provides for crimes of 'benefiting from the usage of counterfeit bank or credit cards.' There are also mitigating clauses: a personal reason

that seeks mitigation of punishment; and, in reference to offences against property, which deals with effective repentance.

The aim of the lawmaker regarding article 245 is clearly stated as follows:

Madde, banka veya kredi kartlarının hukuka aykırı olarak kullanılması suretiyle bankaların veya kredi sahiplerinin zarara sokulmasını, bu yolla çıkar sağlanmasını önlemek ve faileri cezalandırmak amacıyla kaleme alınmıştır.

This article is written with the aim to prevent harm towards banks or cardholders through the improper and unlawful use of cards and unlawful gain and to punish the perpetrators.

This means that the improper use of bank or credit cards and unlawful gains through their use are punished whether the bank or credit card is a real one obtained from a customer or thief, or if it is counterfeited or fabricated. Additionally, even if the crime does not involve an unlawful gain, the fabrication or exchange of counterfeit cards are defined as crimes. However, Turkish legal scholars and lawyers have criticized the actions in relation to counterfeiting tools and machines are not defined as part of the criminal act.

Protected legal value of the crime

The crimes created by article 245 of the TPC are meant to protect legal values that are preserved in crimes of theft, fraud, misuse of trust, and forgery. The legal values protected are personal property, confidence, and trust towards documents assured by the government. In addition, ensuring that banking services operate in a safe and rapid manner in order to preserve the wellbeing of the economic system of the State. The crimes created by article 245 of the TPC are classified under the section of crimes in the field of information technology, instead of the section of crimes against property. Since this goes against the structure of the law, it is suggested that these criminal definitions should be reformulated under the 'crimes

¹ Murat Volkan Dülger, *Bilişim Suçları ve İnternet İletişim Hukuku*, 5th Edition, Seçkin Publishing House, October 2014, p. 71.

² In Turkey, Appeal Court decisions provide guidance to the courts, prosecutors and lawyers. The decisions are referenced in the literature either support the opinions of authors or indicate dissent.

against property' section.³ The provisions referring to personal reasons, which seek mitigation of punishment and sincere repentance provision, demonstrate this.⁴

Typicality

Turkey is one of the Continental law system countries. There are different opinions regarding the explanation of criminal theory. According to the theory that the majority have adopted, the crime comprises elements of typicality and unlawfulness. Fault, on the other hand, is a standard judgment regarding the accuser's act, therefore moral elements such as intent and negligence are not included in fault. In short, the act (actus reus) and the mental element (mens rea) in the common law system are analyzed under 'typicality' in the continental law system. This distinction occurs because of the importance of the philosophy of the subject matter, practical utility and the explanation of criminal theory.

The meaning of 'typicality' is in the overlap of the legal norms and the act of the accused, and the moral settlement of the accused while committing the offence. If those terms diverge, the offence will not occur. The analysis will be formed in accordance with continental law.

The objective elements of typicality

The accused

Any person is capable of offending in relation to the crimes described above. It requires an expert knowledge in order to produce a counterfeit credit or bank card, yet taken together this fact, taken with article 37 of the TPC,⁵ it is not necessary to have an expert knowledge of data processing systems.

The fourth subsection of article 245, which was subsequently added to the law, reads as follows:

³ Dülger, p. 448; Özbek, p. 1022; Sacit Yılmaz, Banka veya Kredi Kartlarının Kötüye Kullanılması Suçu, Türkiye Barolar Birliği Dergisi, Issue 87, 2010, p. 267.

⁴ Veli Özer Özbek/Nihat Kanbur/Pınar Bacaksız/Koray Doğan/İlker Tepe, Türk Ceza Hukuku Özel Hükümler, Seçkin Publishing House, Ankara, 2011, p. 885; Yılmaz, p. 290.

⁵ Perpetration

Article 37-(1) Each one of the persons who jointly execute the act defined as crime in the law is responsible from its legal consequences as the offender.

(2) Also, a person who uses another person in commission of a crime is also responsible as the offender. The punishment of the persons who uses a person(s) lacking culpability is increased from one-third up to one half.

Birinci fıkrada yer alan suçun (Başkasına ait bir banka veya kredi kartını, her ne suretle olursa olsun ele geçiren veya elinde bulunduran kimse, kart sahibinin veya kartın kendisine verilmesi gereken kişinin rızası olmaksızın bunu kullanarak veya kullandırtarak kendisine veya başkasına yarar sağlarsa, üç yıldan altı yıla kadar hapis ve beşbin güne kadar adli para cezası ile cezalandırılır.);

a) Haklarında ayrılık kararı verilmemiş eşlerden birinin,

b) Üstsoy veya altsoyunun veya bu derecede kayın hısımlarından birinin veya evlat edinen veya evlâtlığın,

c) Aynı konutta beraber yaşayan kardeşlerden birinin, zararına olarak işlenmesi hâlinde, ilgili akraba hakkında cezaya hükmolunmaz.

In the crime defined in subsection 1 (Any person who acquires or holds bank or credit cards of another person(s) whatever the reason is, or uses these cards without consent of the card holder or the receiver of the card, or secures benefit for himself or third parties by allowing use of the same by others, is punished with imprisonment from three years to six years, and also imposed punitive fine.);

a) one of the spouses that are not legally separated under a decree of separate maintenance,

b) any one of antecedents or descendants or blood relations or adopters or adoptees,

c) any one of the brothers/sisters living in the same dwelling, no punishment is imposed on the subject relative in case of commission of offences.

This provision provides a person in one of the categories set out in the subsection to put forward a personal reason for the mitigation of punishment. This does not prevent the occurrence of the crime, it only states that even if the crime is completed with all its aspects, there can be no punishment assigned to these specified persons.⁶ It is a legal reason for not being punished, thus the accused cannot be convicted. Regardless of whether the unlawful gains

⁶ Dülger, p. 459.

are enjoyed by the perpetrator or a third party, the perpetrator will be the accused of the crime if the actions defined in the article are fulfilled.

The victim

In order to determine the victim of such crimes, the terms 'card owner' and 'card receiver' in the definition of the crimes needs to be elaborated on. The term 'card holder' is used instead of the term 'card owner' in the law named 'Code of Bank Cards and Credit Cards' number 5464 (CBCCC) (Banka ve Kredi Kartları Kanunu). This is a different meaning from article 245 of the TPC. A card holder is the beneficiary of a card, not of the owner of a card. The actual owners of bank or credit cards are the banks or credit organizations. Accordingly, the term 'card owner' in the TPC should be understood as 'card holder' with regard to this specification in the CBCCC.⁷ In article 3 of Code number 5464, the card holder is defined as:

Kart hamili banka kartı veya kredi kartı hizmetlerinden yararlanan gerçek veya tüzel kişidir.

A real or juridical person who benefits from bank or credit card services.

A customer who has not received the card issued in their name, even though it was drawn up in their name, is the victim of such crimes. According to Turkish criminal theory (as in German criminal theory and in other continental European criminal theories) this suggests that the victim must be a real person. If the owner of the card is a legal entity, the legal entity is not the victim of the crime, and can only be an injured party.⁸ The difference between a victim and an injured party is that the victim is a party of the criminal procedure, while an injured party is a party to the legal interaction, and their claim is inherently derived from their legal status.⁹ A victim is the person who is directly affected by the crime. On the other

hand, the injured party is the person who is affected by the consequences of the crime. Only real persons can be victims of the crime; a legal entity can only be an injured party.

The subject of crime

In order to understand the subject of this crime, the definition and function of 'bank card' and 'credit card' needs to be elaborated on. Even though the crime is phrased as the improper use of bank or credit cards, cards that are used to secure goods and services come in many forms.¹⁰ The most common forms are plastic cards, otherwise known as plastic money, payment cards, bank cards, credit cards, debit cards, ATM cards, store cards, smart cards, chip cards, affinity cards, and virtual cards.¹¹ Article 245 of the TPC cannot be applied to cards other than bank or credit cards. A bank or credit card alone does not constitute the subject of the crime. The object of the crime is the gain that the accused obtains from using the card or the data stored on the card. Therefore, tangible gains constitute the subject of this crime. There are three different types of crime regulated under article 245 of the TPC. The crimes defined in subsection 1 read as follows:

Any person who acquires or holds bank or credit cards of another person(s) whatever the reason is, or uses these cards without consent of the card holder or the receiver of the card, or secures benefit for himself or third parties by allowing use of the same by others, is punished by imprisonment from three years to six years, and also imposed punitive fine.

Subsection 3 reads as follows:

Any person who secures a benefit for himself or another by using a counterfeit or falsified bank or credit card shall be sentenced to a penalty of imprisonment for a term of four to eight years and judicial fine of up to five thousand days, provided such act does not constitute a separate offence.

Credit cards constitute the subject of the crime, in addition to the unlawful gains, since the crime can only be committed with bank or credit cards. Whereas, the subject of the crime defined in subsection 2 of article reads as follows:

⁷ Dülger, p. 460; Özbek/Kanbur/Bacaksız/Doğan/Tepe, p. 880.

⁸ Dülger, p. 464; Yılmaz, p. 268; Additionally, in one decision the Appeal Court Assembly of Penal Chambers, the judge said: 'The victim of the crime designed in article 245/1 of TPC is the holder of the bank or credit card. Also, the receiver of the card mentioned in subsection one is the holder of the card as well. Even though the cyber systems of the bank or credit institution are used as a vessel in the crime and the ownership of the bank card belongs to the bank, these facts do not deem the bank to be the victim of the crime. Banks and credit organizations are in the position of the injured party in these cases.' (Appeal Court Assembly of Penal Chambers, 18.10.2011 Date 2011/6-166 File Number and 2011/ 213 Decision Number.)

⁹ Yılmaz, p. 268.

¹⁰ Dülger, p. 465.

¹¹ Eyüp Yılmaz, *Türkiye'de Kredi Kartı Uygulaması ve Ekonomik Etkileri*, İstanbul, Türkmen Bookstore, 2000, p. 8.

Any person who secures benefit for himself or third parties by using a counterfeit bank or credit card is punished by imprisonment from four years to seven years if the act executed does not constitute any offence other than forgery.

It is not necessary to prove unlawful gain for the crime of using fabricated of bank or credit cards. To commit the crime as defined in subsection 1 of article 245, the card that is the subject of the crime must be in possession of a person and someone other than the accused of the crime. While this is not a prerequisite, it is an element of the subject of the crime. Therefore, a customer in legitimate possession of a card cannot commit this crime with his or her card. The persons specified in the personal reasons that seek mitigation of punishment in subsection 4 of article 245 are included in the condition of 'owned by someone else'.¹²

Action – the act that forms the offence

The act of the crime is defined by subsection 1 of article 245 of the TPC. The act constitutes unlawful gains that are obtained by the first or third party use of bank or credit cards without the consent of the cardholder or the person who is legally entitled to possess the card.¹³

Subsection 2 of the article stipulates that the act of forging, selling, transferring, buying or accepting counterfeit bank or credit cards that are associated with the account of someone else comprise the acts that form the crime. Subsection 3 of article 245 defines the crime of unlawful first or third party gains through the use of counterfeit bank or credit cards that are forged by associating with someone else's account or the use of genuine bank or credit cards that are altered. As shown, there are three different crimes provided for in this article, and qualifies them as an independent action¹⁴ (subsection 1 and 3) and an alternative action (subsection 2).

Unlawful gains through bank or credit cards owned by others (245/1)

Unlawful gains through the use of someone else's bank or credit card can occur in several different ways. This crime could be committed to achieve unlawful gains by using someone else's cards in ATMs

for cash withdrawals, in commercial establishments for shopping, or in transaction networks.¹⁵ As new technologies are developed, different methods of committing such crime emerge. Therefore, no limitations are set in the law in this aspect.

As an initial condition for the crime to transpire, the accused needs to have the bank or credit card in their possession. However, this act alone does not fulfil the full act of the crime. The accused must also use or make use of the card for unlawful gain. For that reason, this type of crime is defined as an independent joint action. What is important is that unlawful gain is obtained through the combination of these actions: possession and unlawful gain.

There is no difference where the card is stolen, found or replaced afterwards or obtained by the consent of the victim. What is important is that the accused obtains the card. While the obtaining of the card is usually through illegal means, the holding of the card could transpire legally. However, being in possession of the card alone is not a crime in itself. It is also necessary to receive illegal gains with the card.

It is also not sufficient to illegally obtain or hold the card. In this crime, the card needs to be used or made use of by a third party without the consent of the card owner or the person who ought to be in legitimate possession of the card.¹⁶ In both instances, since the third party is informed of using the card without any rights to it, article 245/1 will be applied to the third party. In this condition, it is necessary to investigate whether the third party accused is 'informed' or not.¹⁷

Previously, in circumstances where the card that is issued by the bank is stolen before it reaches the card owner and is used in ATMs for cash withdrawals, the Appeal Court defined the case as a crime of fraud.¹⁸ Also, the Appeal Court defined as theft under article 149/3 of the TPC where the accused, with the consent of the cardholder, obtains the card and password.¹⁹ However, the lawmakers reformed the law to deem all criminal actions with bank or credit cards under article 245 of the TPC. Consequently, these differences that were present in the old TPC no longer apply.

¹⁵ Dülger, p. 469.

¹⁶ Özbek, p. 1031.

¹⁷ Dülger, p. 471.

¹⁸ Penal Chamber no. 6 of the Appeal Court. 24.3.1999, File Number.1998/12638, Decision Number. 1999/1628.

¹⁹ Penal Chamber no. 11 of the Appeal Court. 8.4.2002, FN. 2517 DN. 2929.

¹² Dülger, p. 467.

¹³ Dülger, p. 468.

¹⁴ In the legal definition of the crime, there is no specification as to which acts constitute the crime.

In the case where the bank or credit card is used in a commercial transaction, if the accused presents the card to the commercial establishment as his or her own card, the accused benefits from either a forged identification that matches the information on the card, or the failure of the commercial establishment to adequately confirm they have the mandate of the customer to enter a transaction by correctly identifying the customer.²⁰ With the enactment of TPC number 5237, the Appeal Court now evaluates these actions under article 245/1.²¹

Another situation in which this crime can occur is the case where unlawful gains are obtained through a card even though the card is not physically seized. One opinion on this matter suggests that the crime requires the physical use of a card by a third party.²² However, if unlawful gains are obtained, article 245/1 should be applied.²³ In fact, the Appeal Court has subsumed online shopping with credit card information under article 245/1, and therefore has not limited the scope of the article to the physical possession of the credit card.²⁴

There are times when an issuer will provide a supplementary card to the same credit card account, for instance, by giving a card to a husband and wife, even though the card is in the name of the husband. Where a thief uses the identification and credit card information of the victim to apply for a supplementary card in the name of the victim through online banking, and then obtains the card from the courier and subsequently obtains unlawful gains,²⁵ the provisions of article 245/1 would be applied to this situation.²⁶

Article 245 of the TPC includes the phrases 'acquires or holds bank or credit cards of another person whatever the reason is' and 'without consent of the card owner or the receiver of the card'. The scope of this crime includes cases where the bank or credit card is used when the account is made overdrawn or exceeds the limit in ATMs or the internet.

²⁰ Dülger, p. 463.

²¹ Penal Chamber no. 11 of the Appeal Court. FN. 2008/4588, DN. 2010/489.

²² Özbek, p. 1031.

²³ Dülger, p. 480.

²⁴ Penal Chamber no. 11 of the Appeal Court. FN. 2009/10354, DN. 2010/141 cf. Dülger, p. 465; Penal Chamber no. 8 of the Appeal Court. 1.4.2014 FN. 2013/2611, DN. 2014/8185.

²⁵ Dülger, p. 480.

²⁶ Dülger, p. 480; Appeal Court indicated that Article 245/1 also applies in the situation of obtaining unlawful gains with the use of another person's bank or credit card. (Penal Chamber no. 11 of the Appeal Court. 14.10.2010, FN. 2010/10947, DN. 2010/11189).

One of the most frequently used methods is fraudulent conduct at ATMs, such as the altering of the ATM machine.²⁷ The doctrine suggests that article 245/1 also applies in such situations.²⁸

There are different opinions as to which crime applies in the case of preventing the dispensing of the money at ATMs by installing a mechanism at the cash-dispensing slot, and receiving the money after the cardholder leaves the ATM. The legal scholarship suggests that article 244/4, instead of article 245/1 can be applicable to these situations.²⁹ The decisions of the Appeal Court at the time of TPC number 765, on the other hand, consider these a crime of theft.³⁰

Another commonly observed situation is the withdrawal of cash or salary with the bank card of a deceased person. The Appeal Court has judged that these actions should be considered under article 245/1 of the TPC.³¹

Due to the increased security benefits, the use of chip and pass code in card transactions have become commonplace. However, it is still possible to bypass this option and use cards without entering the pass code while using the card.³² Unlawful gains can be procured by pretending that the card holder authorized the transaction. This method is employed by card acceptor establishments and their partnering crime organizations that accept payment by card.³³

²⁷ For more details of such attacks by thieves on ATMs, see Stephen Mason, *When Bank Systems Fail Debit cards, Credit cards, ATMs, mobile and online banking: your rights and what to do when things go wrong* (2nd edn, PP Publishing, 2014).

²⁸ Dülger, p. 482. This method has been discussed in Appeal Court decisions and it accepted as improper use of bank or credit cards. (Penal Chamber no. 11 of the Appeal Court. 12.07.2010, FN. 2008/9810, DN. 2010/8428)

²⁹ It is indisputable that ATM devices as a whole are cyber systems (known as networked systems), in fact a part of the cyber system of the banks otherwise known as networked communications. Therefore, hindering the workings of the machines by way of physical interaction and the unlawful gain resulting from this hindrance falls under the scope of article 244/4 of the TPC. The accused must be penalized with respect to this subsection for the unlawful gain acquired without the use of a card but with use of physical interaction (Dülger, p. 483).

³⁰ Penal Chamber no. 6 of the Appeal Court 11.3.1997, FN. 23588, DN. 2515; Penal Chamber no. 6 of the Appeal Court. 23.11.1995, FN. 11688, DN. 12125.

³¹ Penal Chamber no. 11 of the Appeal Court. 17.5.2001, FN. 8352, DN. 9183; Penal Chamber no. 11 of the Appeal Court. 15.9.2008, FN. 10263, DN. 8833; Penal Chamber no. 11 of the Appeal Court. 12.3.2007, FN. 8843, DN. 1582.

³² Stephen Mason, *When Bank Systems Fail Debit cards, credit cards, ATMs, mobile and online banking: your rights and what to do when things go wrong*, chapter 3.

³³ Dülger, p. 486.

The Appeal Court subsumes these situations under article 245/1.³⁴

The fabrication, selling, transferring, purchasing, or accepting of counterfeit bank or credit cards by linking the card to accounts owned by others (245/2)

The crime defined by article 245 subsection 2 of the TPC is designed as an alternative. For instance, the act of fabrication and selling of a counterfeit card by the accused constitutes a crime. However, if the person fabricating and selling the counterfeit card is a different person, then each person will be separately considered for violation of article 245/2.³⁵

Additionally, 'the fabrication of counterfeit bank or credit cards by linking the card to accounts owned by others', which an alternative action defined in subsection 2 of article 245, includes multiple actions that are interconnected. Since these actions are outlined individually, this is a fixed action crime. Fixed action crimes are those where the law defines which types of acts constitute the crime.³⁶

The reason why the actions of selling, transferring, buying or accepting are separate crimes in the law is to incriminate these actions regardless of whether they result in unlawful gain or not. Additionally, even though the actions of accepting and buying involves the action of possessing, this action should be separately added to the law according to the principle of legality.³⁷

The production of counterfeit bank or credit cards can occur through a variety of ways. One of the most common methods is the collection of information on the card user and bank accounts through data transfer networks and ATMs, and the transfer of this information on the magnetic strip of a plastic card printed in the name of the perpetrator.³⁸

Moreover, the production of counterfeit cards should not only be understood as physical cards, but should also include the use of the virtual environment, such as internet banking in financial transactions.³⁹

This crime also applies in situations where virtual counterfeit cards associated with a real bank account are sold, transferred, bought, or accepted. In subsection 2 of article 245, the obtaining of unlawful gains through the manufacture, sale, transfer etc. of counterfeit cards is not necessary. These actions suffice in constituting a crime in themselves. Therefore, for this type of crime, the crime is based on the element of action, not the element of conclusion.⁴⁰ As the Code of Bank Cards and Credit Cards and the Appeal Court decisions clearly specify, both physical and virtual cards are included in the category of bank or credit cards.⁴¹

The Appeal Court has judged the situations where counterfeit documents are presented to banks for the purpose of opening an account to be included in article 37/2 of Code of Bank Cards and Credit Cards. Thus, if a credit card is issued to an accused who has applied to open an account with counterfeit identification, article 245/1 of the TPC applies; if the credit card is not issued to the accused, then article 37/2 of Code number 5456 applies.⁴²

If one accused commits these actions, only one crime is committed; if more than one accused carries out the action, then each of the accused is considered to have carried out the offence.

Unlawful gain through fabricated or altered bank or credit cards (245/3)

Subsection 3 of article 245 defines the crime of first or third party unlawful gain through the use of fabricated or altered bank or credit cards.⁴³ This type of crime is designed as alternative action crime.⁴⁴ The accused does not need to fabricate or alter the card in order to be charged under this crime; procuring an unlawful gain with the counterfeit crime with the information that is stored on the card is counterfeit is sufficient.⁴⁵

Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?', *Computer and Telecommunications Law Review*, 2015, Volume 21, Issue 5, 135 – 148.

⁴⁰ Dülger, p 488.

⁴¹ Penal Chamber no. 11 of the Appeal Court. 14.10.2010, FN. 2008/20436, DN. 2010/11188.

⁴² Penal Chamber no. 11 of the Appeal Court. 8.5.2013, FN. 2011/10450, DN. 2013/7470; Penal Chamber no. 11 of the Appeal Court. 13.2.2013, FN. 2010/15673, DN.2013/2350; Penal Chamber no. 11 of the Appeal Court. 24.6.2009, FN. 6640, DN. 7968.

⁴³ Penal Chamber no. 11 of the Appeal Court, 11.3.2009, FN. 5813, DN. 2309; Penal Chamber no. 11 of the Appeal Court, 28.11.2008, FN. 17722, DN. 12548.

⁴⁴ In penal doctrine, alternative action crimes are crimes where more than one act is committed independently of each other and the fulfillment of any one of these acts constitute the crime.

⁴⁵ Dülger, p. 491-492.

³⁴ Penal Chamber no. 11 of the Appeal Court. 22.2.2012, FN. 2012/1289, DN. 2012/2012; Penal Chamber no. 11 of the Appeal Court. 19.3.2012, FN. 17457, DN. 3681.

³⁵ Dülger, p. 487

³⁶ Özbek, p. 1047.

³⁷ Özbek, p. 1047.

³⁸ Penal Chamber no. 11 of the Appeal Court, 27.12.2006, FN. 7193, DN. 10572; Stephen Mason, *When Bank Systems Fail Debit cards, credit cards, ATMs, mobile and online banking: your rights and what to do when things go wrong*, chapter 3.

³⁹ It is only digital data that is communicated between systems, so the physical item is not that important. For a discussion, see Stephen Mason and Timothy S. Reiniger: "Trust" Between

Following the enactment of TPC number 5237, Penal Chamber no. 11 of the Appeal Court decided that acts in which unlawful gain are procured with cards that are produced with counterfeit documentation will be judged under article 158/1-f of the TPC.⁴⁶ However, the Appeal Court Assembly of Penal Chambers ruled in one case dated 27.05.2008, that such actions will be judged under article 245/3.⁴⁷ This article is characterized as a special provision over article 158/1-f, which provides for crimes of cyber fraud.

In cases where unlawful gains are procured with counterfeit sales slips that are produced with forged cards with the complicity of a person from within the paying institution, subsection 3 of article 245 applies. Since the fraudulent action is not committed against a natural person, the use of counterfeit credit cards in financial transactions are not considered as a crime of fraud, but as a crime of unlawful gain with counterfeit cards. The decisions of the Appeal Court reaffirm this interpretation.⁴⁸

In cases where making an agreement with business owners to make it appear as though a transaction was completed with the use of counterfeit cards and unlawful gains are made, the Appeal Court prefers the provisions of article 245/3 to be charged.⁴⁹

Consequence

In criminal law, it is not necessary to establish a consequence in all types of crime. This element is expressly provided for in crimes where consequence is included in the type of crime and is required for the typicality to be achieved. In the crimes provided for in subsections 1 and 3 of article 245, this consequence is the 'gain' that the accused accrues through the criminal action.⁵⁰ This gain has to be tangible with a monetary value. Subsection 1 considers cases where the criminal activity that is carried out with the intention to accrue gains is interrupted, subsection 2 provides for a conditional attempt, and subsection 3 provides for the completion of a crime.

On the other hand, the unlawful use of others' bank or credit cards through public distributions of cash

withdrawals and charitable donations for the purpose of intangible gains is considered as tangible gains, since the accused accrues gains through asserting authority over the money.⁵¹ In other words, the use of a bank or debit card without authorization of the account holder by taking money and giving the money to a charity without aiming at any tangible gains is still considered as a tangible gain. In the definition of the crime, gains procured by the accused are specified; damages to the victim are not.

In the crime outlined in subsection 2 of article 245, it is not necessary for the accused to complete the act or obtain unlawful gain in order to complete the elements of the crime. Fabrication of counterfeit cards is necessary to consider the act as a crime. Other elements such as harm to others are not included in the definition of this type of crime. In terms of the type of crime defined in article 245, intangible elements other than the intent of the accused are not sought.

The subjective element – intent

With regards to the crimes defined in subsections 1, 2 and 3, criminal intent constitutes the moral element. Criminal intent is the intention to cause harm and being aware of the legal consequences of the crime as defined in law.⁵² The definition of the crime in article 245 does not include intent. The element of intent is not included in this crime, even when interpreted by the courts.⁵³ Negligence is not a moral element of these three types of crimes.

Element of unlawfulness

The element of unlawfulness is defined as violation of a legal regulation or a legal statute. In cases where the accused completes the actions constituting the elements of the crime with the consent of the victim, a crime does not occur. Consent is not a part of the intent. This is because the consent of the card user or the person in possession of the card makes the action of the accused legal, yet if the accused tricked the customer into giving out information, it will be considered as a crime.

⁴⁶ Penal Chamber no. 11 of the Appeal Court. 2.7.2007, FN.4211 DN.4564.

⁴⁷ Appeal Court Assembly of Penal Chambers. 27.5.2008, FN. 2008/11-87, DN. 2008/150.

⁴⁸ Penal Chamber no. 11 of the Appeal Court. FN. 2007/722, DN.2010/434.

⁴⁹ Penal Chamber no. 11 of the Appeal Court. 9.11.2010, FN. 2008/11048, DN. 2010/12705.

⁵⁰ Dülger, p. 503.

⁵¹ Dülger, p. 503-504.

⁵² Article 21 of TPC.

⁵³ Dülger, p. 505.

Particularities of the offences

Attempt

Since the first three subsections of article 245 define different crimes, the attempt of these crimes should be analyzed separately. The crimes explained in subsections 1 and 3 of article 245 are defined through unlawful gain. In cases where the accused has completed the actions but the consequences are not reached, the actions are qualified as crimes of attempt. However, according to the provision of article 36 of the TPC,⁵⁴ if the accused uses the card but ceases the action intentionally before gains are procured, there is no punishment.⁵⁵

In cases where the accused is caught before having had the opportunity to use the card, and if the action is determined to constitute a crime in itself, the action is not defined as an attempt, and the accused can be punished for the crime. Indeed, the Appeal Court has ratified this in its latest decision.⁵⁶

In subsection 2 of article 245, unlawful gains are not required as a consequence for the actions of the accused to constitute a crime. The crime is completed at the moment of fabrication, sale, transfer, or acceptance of the counterfeit card.⁵⁷ However, if the accused attempts to fabricate counterfeit credit cards, and the bank realizes this before the completion of the fabrication and manages to apprehend the accused, then article 37/2 of CBCCC number 5464 applies.⁵⁸

In cases where the accused buys or takes over a fabricated or altered counterfeit card with the intention to accrue unlawful gains and is caught before using the card, the complete version of the crime defined in subsection 2, instead of an attempted version of the crime defined in subsection 3 applies.⁵⁹

⁵⁴ Voluntary Abandonment

Article 36 - If a person voluntarily abandons performance of the acts necessary to commit the crime, or avoids accomplishment of the crime with his own efforts, then he may not be punished for this crime; however, where the accomplished part constitutes an offence, punishment is given only for this specific offence.

⁵⁵ Dülger, p. 491.

⁵⁶ Penal Chamber no. 11 of the Appeal Court. 3.6.2014, FN. 2014/2546, DN. 2014/13667.

⁵⁷ Yılmaz, p. 282.

⁵⁸ Dülger, p. 512; Thus Appeal Court agrees with it. (Penal Chamber no. 11 of the Appeal Court. 22.12.2010, FN. 2010/14173, DN. 2010/14817).

⁵⁹ Dülger, p. 512; Penal Chamber no. 11 of the Appeal Court. FN. 2008/1964, DN. 2010/19.

Complicity

Complicity is the involvement as an accomplice in an act or a crime. Subsections 1, 2 and 3 of article 245 do not have qualifiers for complicity. Therefore, questions of complicity in these crimes should be analyzed according to the general provisions of the TPC in relation to complicity. All forms of complicity are possible for these crimes.

In cases where unlawful gain is accrued by person A by using persons B's bank or credit card, for example, in circumstances where person A is given B's card by person C, the mere acceptance of these gains by person A does not constitute the crime defined in article 245/1. In these situations, article 165 of the TPC applies.⁶⁰ For the crime defined in subsection 3 of article 245, person A is considered as an accused in cases where person C is an accomplice to the crime committed with the counterfeit card and is a beneficiary of the unlawful gains.⁶¹

Joinder of offences

Article 245 of the TPC is meant to apply to related actions regardless of how the card is obtained. Since the text of subsection 2 of article 245 specifies 'unless the action constitutes another crime that requires a stricter punishment', the joinder of the mental element in this combination of crimes is not possible.⁶²

The crime defined in subsection 1 of article 245 can be committed successively. The Appeal Court has decided that in situations where the same person obtains and uses cards belonging to different banks, a separate crime is considered to be committed for each card.⁶³ Since there are multiple actions instead of one action in this case, article 43/2 cannot apply. Therefore, the identification of the victim of the crime is important. As previously stated, the victim of this crime can only be a natural person. An injured legal entity, such as the card owner bank or financial institution is not considered the victim of the crime in law.⁶⁴

⁶⁰ Dülger, p. 512; Appeal Court agrees with it (Penal Chamber no. 11 of the Appeal Court. 22.12.2010, FN 2010/14173, DN. 2010/14817)

⁶¹ Penal Chamber no. 11 of the Appeal Court. 30.10.2006, FN. 2006/5208, DN. 2006/8493.

⁶² Dülger, p. 518.

⁶³ Penal Chamber no. 11 of the Appeal Court. 14.10.2010, FN. 2009/22925, DN. 2010/11207. The reasoning of this decision was based on the fact that banks that are legal entities that issue the card are not considered the victim of the crime.

⁶⁴ Dülger, p. 523; Özbek, p. 1042.

The decision of the Appeal Court of Penal Chambers (ACPC) dated 18.10.2011 suggests that the crime occurs according to the number of victims, not the number of cards. If the crime is committed against the same victim a number of times, the successive crime rule should be applied.⁶⁵ If the same accused fabricates multiple cards instead of one, one action is committed in a legal sense. If this action is committed serially, the accused is punished with only one crime.⁶⁶

There are different opinions as to whether a crime of theft is also committed alongside the violation of article 245/1 if a bank card is obtained illegally. The ACPC has decided that in such cases, both article 245/1 and article 142 will apply together, but article 145 will not be referred to.⁶⁷ One opinion criticizes the qualification of the ACPC regarding the element of typicality of the crime, since all forms of receiving the card, regardless of its legality, are included in the typicality of the crime.⁶⁸

In cases where the bank card is obtained under the pretence of helping the victim, and the accused receives the money, a crime of theft is committed.⁶⁹ If the bank or credit card is obtained through fraud, since the crime of fraud and the crime designed under article 245/1 are not compound offences, the punishment should be added through a physical joinder.⁷⁰ However, the Appeal Court disagrees, and has decided that article 245/1 of the TPC alone should determine the punishment.⁷¹

If the accused obtains the money after the victim leaves the ATM, since there is no obtaining of the bank card, cyber systems are not used, and qualified actions are not used to deceive the victim, the action constitutes the crime of simple theft. The Appeal Court agrees.⁷² On the other hand, since it is possible to fabricate counterfeit bank or credit cards without committing forgery in official documentation, the accused should be charged separately for the crimes of forgery in official documentation, and according to the action, the crimes of fabrication of bank or

counterfeit credit cards (245/2) or accruing unlawful gains with bank or credit cards.⁷³ According to the opinion of the Appeal Court, a crime of unlawful gain using bank or credit cards is not a crime of fraud when applied in cases where the accused copies the card information belonging to the victim and fabricates a counterfeit card in his or her own name and gains unlawful benefits.⁷⁴

If the accused first buys the fabricated or altered counterfeit bank or credit card (a crime defined under articles 245/2) and then uses this card to accrue unlawful gains (a crime defined under articles 245/3), the accused should be punished according to articles 245/3. However, the Appeal Court disagrees, and rules that the accused should be punished for each of these crimes individually.⁷⁵

Mitigation of punishment

In some conditions, although the act that is criminalized in the law is committed, the punishment can be excused or mitigated. Personal reasons, which seek mitigation of punishment, are conditions that exist during the commission of the offence and prevent the accused from being penalized. Excusatory causes, on the other hand, occur after the completion of the crime. According to the clarifications in both fourth and fifth subsections, the personal reason for mitigation of punishment is defined in subsection 4 of article 245 reads as follows:

In the crime outlined in subsection 1:

- a) one of the spouses not subject to separation under court decree
 - b) any one of antecedents or descendants or blood relations or adopters or adoptees
 - c) any one of the brothers/sisters living in the same dwelling,
- no punishment is imposed on the subject relative in case of commission of offences

Sincere repentance in subsection 5 of article 245 reads as follows: 'The provisions of effective remorse in respect of offences against property in this code shall be applicable to acts which falls within the scope

⁶⁵ Dülger, p. 523.

⁶⁶ Dülger, p. 532.

⁶⁷ Appeal Court Assembly of Penal Chambers. 30.3.2010, FN. 2010/11-17, DN. 2010/65.

⁶⁸ Dülger, p. 514.

⁶⁹ Penal Chamber no. 11 of the Appeal Court. 31.3.2011, FN. 2011/821, DN. 2011/1777.

⁷⁰ Dülger, p. 523.

⁷¹ Penal Chamber no. 8 of the Appeal Court. 13.6.2012, FN. 2012/11116, DN. 2012/20386.

⁷² Penal Chamber no. 11 of the Appeal Court. 12.4.2010, FN. 2007/6701, DN. 2010/4353.

⁷³ Dülger, p. 550.

⁷⁴ Penal Chamber no. 11 of the Appeal Court. 13.4.2009, FN. 2007/5473, DN. 2009/4127.

⁷⁵ Penal Chamber no. 11 of the Appeal Court. 29.11.2010, FN. 2010/7594, DN. 2010/13649.

of section one.’ This subsection applies only towards the crime defined in subsection 1.⁷⁶

The relationship between the offender and victim

The subsection 4 of article 245 provides as follows:

In the crime outlined in subsection 1:

- a) one of the spouses not subject to separation under court decree;
- b) any one of antecedents or descendants or blood relations or adopters or adoptees;
- c) any one of the brothers/sisters living in the same dwelling,

no punishment is imposed on the subject relative in case of commission of offences.

This subsection provides that where relatives of the accused are convicted of a crime, they cannot be punished.⁷⁷

Sincere repentance

In subsection 5 of article 245, a condition of sincere repentance is included with the phrase ‘With regards to the actions within the scope of subsection one, the sincere repentance provisions related to offences against property outlined in this law apply’. Sincere repentance related to crimes against property is defined under article 168 of the TPC. For the sincere repentance condition to apply, the accused has to commit the relevant actions with his or her free will.⁷⁸ It is difficult for an offender in a penitentiary to mitigate damage, but it if his or her family fulfils this condition at the request of the offender; the condition of sincere repentance is obtained.⁷⁹

In crimes of complicity, other accomplices who do not participate in the mitigation of damages do not benefit from the sincere repentance condition.⁸⁰ The court has a prerogative in determining the reduction in the sentence.

⁷⁶ Dülger, p. 558; Penal Chamber no. 8 of the Appeal Court. 29.5.2013, FN. 2012/37166, DN. 2013/16416 cf. Dülger, p. 558.

⁷⁷ Dülger, p. 561.

⁷⁸ Dülger, p. 537.

⁷⁹ Penal Chamber no. 11 of the Appeal Court 26.3.2008, FN.282, DN. 1793.

⁸⁰ Dülger, p. 568.

Enforcement, investigation and prosecution

If the crime defined in subsection 1 of article 245 is committed, the offender is liable to a punishment of between three and six years of imprisonment, and a punitive fine of up to five thousand days. The punishment for the crime defined in subsection 2 of article 245 is a minimum of three, and a maximum of seven years of imprisonment. A monetary fine is offered as an option. If the action criminalized in subsection 3 is committed, four to eight years of imprisonment and monetary fines of up to five thousand days are foreseen.

According to article 246 of the TPC, if legal entities accrue unlawful gain through this crime, distinctive security measures regulated under article 60 of the TPC⁸¹ will be applied.

If the counterfeit card is connected to offshore accounts or is issued by institutions abroad, and the transaction occurs domestically, matters of jurisdiction do not arise. Local courts claim jurisdiction if the accused accrues unlawful gains domestically. The Appeal Court agrees with this view.⁸² For the three crimes delineated in article 245, the duty of prosecution belongs to Penal Court of General Jurisdiction.

Concluding observations

Technological development continue to present new challenges. It is an affirmative action to regulate such crimes separately as set out in article 245 of the TPC. Additionally, a subsidiary aim of the regulation is to prevent complications between the decisions of District Courts and Appeal Court at the time of the passing into law of TPC number 765.

The protected legal value inherent in bank or credit cards is based on the personal property of individuals.

⁸¹ Security Precaution For The Legal Entities Article 60- (1) In case of conviction of a crime through participation of the organs or representatives of a legal entity subject to special law and operating under the license granted by a public institution or misuse of authorization conferred upon by this license, the court may decide cancellation of this license.

(2) The provisions relating to confiscation are applied also for the legal entities involved in commission of offence.

(3) In cases where application of the provisions of the aforementioned subsections is likely to create heavier consequences, the judge may refrain from imposition of such precautions.

(4) The provisions of this article are applicable for the cases specifically defined by the law.

⁸² Penal Chamber no. 11 of the Appeal Court. 2.2.2009, FN. 2008/5405, DN. 2009/397 cf. Dülger, p. 572.

Crimes that cover bank or credit cards are defined as crimes against data processing, instead of crimes against property. Conceptually, these definitions are better formulated under the 'data processing systems' section as a consequence of stealing property by using data processing systems.

One of the situations that includes this crime is where unlawful gains are obtained from a card even though the card is not physically obtained. One opinion on this matter suggests that the crime requires the physical use of the card or that a third party makes use of the card – but the question remains how a third party can make use of the card if it is not in their possession. However, if unlawful gains are obtained, it is suggested that article 245/1 ought to be applied. In fact it should be noted that the Appeal Court has not limited the scope of the article to the physical possession of the credit card.

The Appeal Court has decided that in situations where the same person obtains and uses cards belonging to different banks, a separate crime is considered to be committed for each card. Therefore, the identification of the victim of the crime is important. According to Turkish criminal theory, the victim of crimes have to be real persons. If the owner of the card is a legal entity, the legal entity is not the victim of the crime, and can only be an injured party.

Another problematic situation occurs when the accused first buys the fabricated or altered counterfeit bank or credit card (defined under article 245/2) and then uses this card to accrue unlawful gains (crime defined under article 245/3). In such circumstances, the offender should be punished according to article 245/3. However, the Appeal Court disagrees, and rules that the offender should be punished for each of these crimes individually.

The problem is, there is a legal gap regarding the improper use of bank or credit cards, and this needs to be considered by the Turkish legislator. It is not helpful for the law to ignore the rights of the issuer of the card.

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