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PAYMENT CARDS AS THE TARGET OF CRIMINALS' ACTIVITIES IN THE AREA OF CREDIT FRAUD¹

KARTY PŁATNICZE JAKO CEL DZIAŁAŃ PRZESTĘPCZYCH W OBSZARZE OSZUSTW KREDYTOWYCH

Streszczenie

Celem publikacji jest próba odpowiedzi na pytanie czy sprawcy przestępstw gospodarczych dotyczących kart płatniczych odpowiadać mogą także jako oszuści kredytowi, tj. na podstawie art. 297 § 1 lub § 2 k.k. Omówione zostały karty płatnicze, ich rodzaje kart, dane statystyczne dotyczące wydawania kart i realizowanych transakcji płatniczych. Następnie przedstawiono charakterystykę teoretyczną przestępstwa oszustwa kredytowego godzącego w obrót gospodarczy oraz problemy na jakie trafiają organy ścigania. Na końcu przedstawiono argumenty potwierdzające tezę.

SŁOWA KLUCZOWE: karty płatnicze, obrót gospodarczy, przestępstwa gospodarcze, oszustwo kredytowe, kodeks karny.

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Abstract

The aim of the publication is an attempt to answer the question whether the perpetrators of economic crimes related to payment cards may also be liable as credit fraudsters, i.e. based on art. 297 § 1 or § 2 of Polish Penal Code. Payment cards, card types, statistical data on issuing cards and payment transactions have been discussed. Next, the theoretical description of the crime of credit fraud affecting the economic turnover and problems encountered by law enforcement agencies were presented. Finally, the arguments to confirm the thesis were presented.

KEYWORDS: payment cards, economic turnover, economic crimes, credit fraud, penal code.

INTRODUCTION

Economic criminals are not as stigmatized by society as the perpetrators of common crimes. Economic criminals do not stand out especially. Often, the accident decides about the disclosure of a criminal act. The most common goal of the perpetrators of economic crime is their desire to obtain financial benefits. In organizations they are also: the desire to satisfy their own ambitions, shorten the path of promotion. Also the desire to receive a bonus for financial results, resulting from manipulation of figures and creative accounting. There are also cases where the motive of the perpetrator is the desire to feel the power or expose the organization to a certain risk. Another motive may be the fear of losing a job and for this purpose data is falsified to show off the better side or hide specific errors. It sometimes happens that a given entity is trying to obtain capital for investments, then the management decides to falsify the results [Wróbel, 2014, p. 19–21].

The concept of triangle of abuses was formulated by Donald R. Cressey [Cendrowski, Martin i Petro, 2007, p. 41]. He claimed that three things definitively determine the occurrence of economic crimes and they are: financial motive, opportunity and rationalization. Financial pressure may come from wanting to improve a financial situation. The reason may simply be greed or financial hardship or random problems, independent of the perpetrator, e.g. a close relative's illness. Pressure can also result from financial obligations in connection with gambling or addiction to alcohol or drugs. The opportunity arises in the organization if there are gaps in the control system or the management gives a clear signal to ignore the control procedures. Opportunity also appears when there are gaps in the law.

The perpetrator often makes a certain rationalization of the action in such a way that he justifies his behavior and presents it in a positive way.

The purpose of the publication is to consider whether the perpetrators of card payment offenses may also be liable to credit fraud, i.e. pursuant to Article 297 § 1 or § 2 of Polish Penal Code. The characteristics of payment cards will be presented. The types of cards currently appearing on the Polish market as well as statistical data on card issuance and payment transactions will be described. Next, the characteristics of credit fraud offense from the theoretical side, problems encountered by law enforcement agencies will be presented. Finally, there will be considerations as to whether actually criminals committing offenses related to payment cards can in certain circumstances be held liable on the basis of Article 297 of Polish Penal Code.

CHARACTERISTICS OF PAYMENT CARDS, TYPES OF CARDS AND STATISTICAL DATA ON CARDS

Payment cards, which are the carrier of the so-called plastic money, played a significant role in the world. They are part of the electronic banking system, understood as a form of providing banking services using ICT devices such as: computers (home banking and corporate banking, internet banking), landline telephones (call center) and commonly used cellular phones (mobile banking), as well as electronic devices for accepting cards (ATMs, electronic terminals for accepting payment cards and interactive information points), whose task is to enable remote access to a bank account. Electronic banking is a collection of electronic channels which offer sales, banking services and create new products in bank offers [Świecka, 2015, p. 8]. Electronic banking is a service sector that is growing very fast. One of the most important products that enables the functioning of electronic banking functionality are payment cards. The number of users of so called plastic money is constantly growing. The scale is illustrated by numbers. As an example, in 2014 there were 12 billion of payment cards in circulation in the world, which resulted in 235 billion operations for a total of 20 trillion dollars in that year [Opitek, 2017, p. 7-10].

The situation is similar in Poland. According to the National Bank of Poland [www1], at the end of the second quarter of 2017 there were almost 38 million payment cards on the Polish market. Given the number of citizens of our

country, this number indicates that there is one payment card for each citizen, regardless of age. An upward trend was observed in the area of cards with the contactless payment function. In the second quarter of 2017, 1.2 billion transactions were carried out with payment cards in Poland, for the total amount of PLN 163 billion. The number of terminals adapted to support contactless cards is also growing rapidly. There is also a growing, though with lower intensity, number of transactions made on the Internet using payment cards. This is probably related to the limitations in the use of the internet on a daily basis and with some psychological blockage associated with the belief that giving the card number on the internet is not secure.

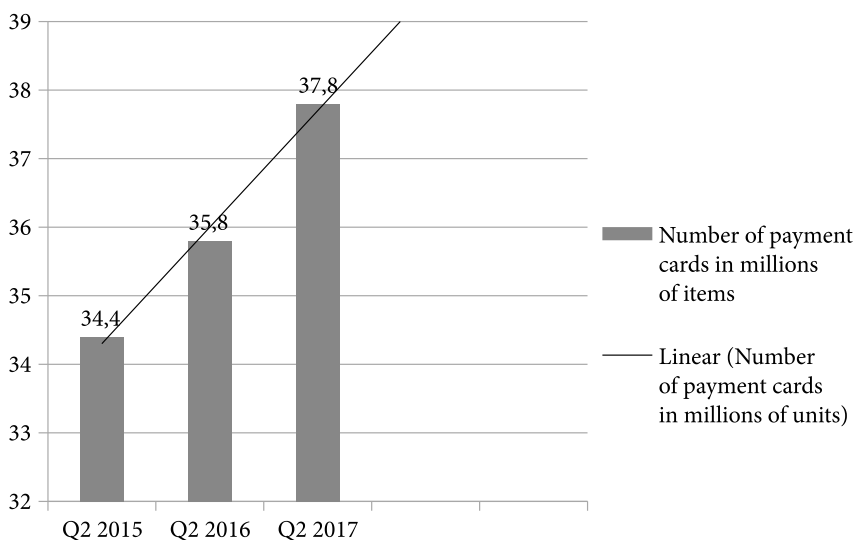


Chart 1. Number of payment cards in Poland Q2 2015 – Q2 2017 – Source: own chart based on NBP data [www1, p. 3]

Article 2 point 15a of the Act on Payment Services [Ustawa o usługach płatniczych] provides a legal definition of a payment card. It is a card that authorizes you to withdraw cash or allows you to place a payment order via an acceptor or settlement agent. There are distinguished payment cards: debit, credit, pre-paid and charge cards.

Debit cards are characterized by the fact that they give the opportunity to execute transactions (e.g. purchase or cash withdrawal) up to the amount of funds deposited on the bank account. These cards are authorized by entering a PIN code, but there is also the possibility to carry out a contactless transaction. In this case, however, often the limit on the amount of transactions each time is small, e.g. up to PLN 50. These cards are usually issued together with the creation of a new bank account.

Credit cards give the opportunity to carry out transactions without having to have certain funds at a given moment. Transaction settlement is delayed and the bank gives so-called interest-free period for settlement. It is only after this period that interest is calculated. Receiving such a card does not require you to have or open a new bank account. The basis for a positive decision regarding the issuance of a credit card is usually documents confirming the fixed income of the applicant. The Bank charges the annual fees for the card, the amount of which depends most often on the amount of the credit limit granted.

Charge cards give the possibility to use the credit limit specified by the bank. However, they differ from the credit cards in that the refund, that is, the repayment of the card must take place within the period specified in the contract and this cards is directly related to the possession of a personal account in the bank.

Prepaid cards are characterized by the fact that before the transaction the payment account assigned to the card must be credited with funds and payments can be made up to the amount of these funds.

The literature also distinguishes between combined cards [Bury, 2014, p. 23–31] and ATMs and virtual cards (e.g. e-cards) [Kaszubski i Obzejta, 2012, p. 62–80]. Combined cards are cards that represent different combinations of services offered in the cards discussed. ATM cards are, in short, the cards that enable the use of ATMs. Currently, each of the types of cards discussed offers this possibility. At the end, more and more common e-cards, which are only a digital record in the bank's IT system and which enable payments in the Internet system. The formula is similar to the prepaid card. You can make payments provided you have adequate funds.

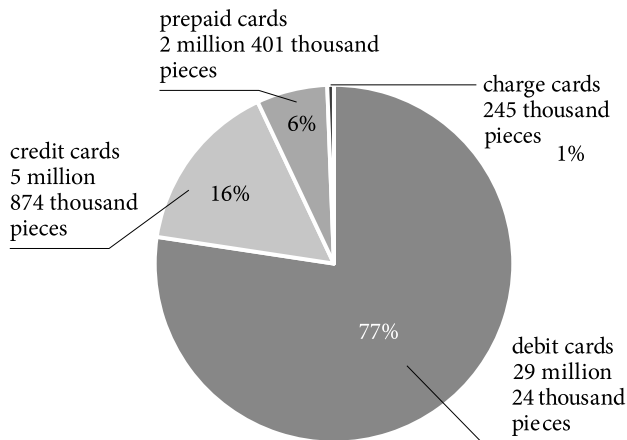


Chart 2. The structure of issued payment cards at the end of the second quarter of 2017 – Source: own chart based on NBP data [www1, p. 4]

This is because the payment card seems to be a product that gives certain profits to both its owner and the issuer, that is to the bank and the seller, i.e. to the acceptor. For the card holder, i.e. the user, it is a way to protect cash money, because having a payment card means you do not have to carry cash with you and at the same time you have access to your accumulated funds or funds allocated within the credit limit. It is also possible to settle debts with the card, also outside the country, which means that there is no need to exchange cash for the currency of another country. For many people it is convenient to delay the date of debiting the account with the amount of the transaction made, which gives the opportunity to carry it out even if there are no adequate funds at the given moment. In some situations e.g. related to business, it is a good idea to have a VIP card. For the bank, payment cards are the basis for new income in the form of margins from acceptors, at the same time provide the opportunity to reduce the costs of maintaining a large number of outlets with service and ensure a continuous supply of customers, in most cases, obtaining a payment card involves the need to have a bank accountb [Opitek, 2017, p. 7–10].

In addition, non-cash transactions gave banks huge opportunities for growth. Therefore, this market will continue to develop. This thesis is confirmed by data presented by the National Bank of Poland [www1] regarding the continuous upward trend in the number of payment card transactions and the value of these transactions.

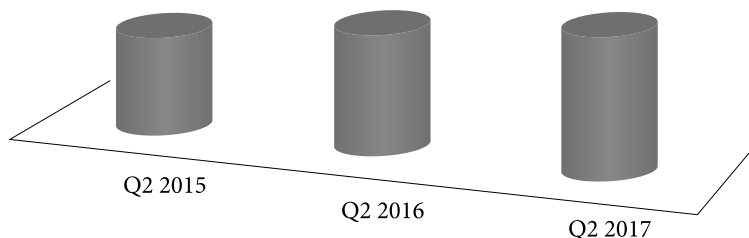


Chart 3. Number of payment card transactions in millions in Poland Q2 2015 – Q2 2017
– Source: own chart based on NBP data [www1]

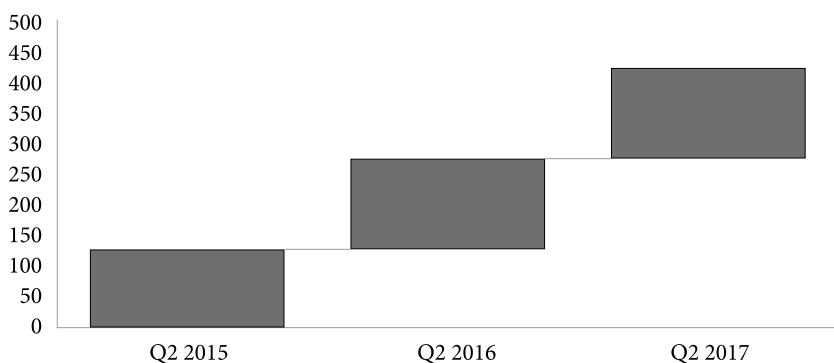


Chart 4. Value of transactions with payment cards in PLN bn in Poland Q2 2015 – Q2 2017
– Source: own chart based on NBP data [www1, p. 12]

Banks are constantly working on new products. Currently, they offer several innovative solutions that lead to even greater of the convenience customers, users while at the same time eliminating paper money efficiently. A good example can be a credit card in the form of a sticker. It can be placed on the phone, which is nowadays always with a user. With this sticker it is possible to carry out successfully the same transactions as with the card, which the sticker replaces. The next one is simply a payment card in the client's mobile phone. Another example is payment using the so-called codes. BLIK. Probably in the near future there will be next, new forms of virtual money.

CREDIT FRAUD (ARTICLE 297 K.K.) **– SHORT CHARACTERISTICS**

As a reminder, the wording of the provision of Article 297 § 1 and § 2 of Polish Penal Code is as follows:

§ 1. Who, in order to obtain for himself or someone else, from a bank or organizational unit conducting similar economic activity under the Act or from an authority or institution with public funds – credit, monetary loan, surety, guarantee, letter of credit, subsidy, confirmation by the bank of a liability arising from a surety or a guarantee or similar cash payment for a specific business purpose, electronic payment instrument or public contract, submit counterfeit, converted, attesting untruth or unreliable document or unreliable written statement regarding circumstances of significant importance in order to obtain the mentioned financial support, payment instrument or order,

it is punishable by imprisonment from 3 months to 5 years.

§ 2. The same penalty shall be imposed on anyone who, in breach of a binding obligation, does not notify the relevant entity of the situation that may affect the cessation or limitation of the financial support referred to in § 1 or the public order or the possibility of further use of the electronic payment instrument.

The generic subject of protection is honest and reliable economic turnover [Wyrok SN, III KK 473/07]. Generally economic turnover can be defined as formal or actual economic relations shaping the organized exchange of goods and services, while the nature of this exchange should not only be legal, i.e. in accordance with applicable law, but also the participants themselves should respect loyalty and honesty as values that they can expect from each other in a market economy [Zawłocki, 2004, p. 99–102].

Another definition says that economic turnover is nothing but the exchange of goods and services using means of payment, in particular money, as well as the legal relations between trading participants arising during this exchange [Skorupka, 2005, p. 22].

“With regard to criminal law, the concept of economic turnover has two basic functions:

- 1. defines indirectly the generic subject of protection,*
- 2. constitutes the axiological and legal basis for criminal interpretation in the area of criminal liability for specific economic crimes” [Wilk i Kalus (red.), 2011, p. 24; Katner i in., 2016, p. 35].*

Economic turnover is not only an area in which economic crimes occur, it is also a formal matrix through which it is possible to identify and analyze these crimes [Wilk i Kalus (red.), 2011, p. 24]. [Ciszewski i in., 2015, p. 28].

In particular, it is about turnover within professional financial institutions [Potulski i Stefański (red.), 2015, p. 1766]. It is considered that goods legally protected by Article 297 § 1 and § 2 of Polish Penal Code are primarily indicated in this provision financial instruments: loan, cash loan, guarantee, letter of credit, monetary loan, surety, guarantee, letter of credit, subsidy, confirmation by the bank of a liability arising from a surety or a guarantee or similar cash payment for a specific business purpose, electronic payment instrument or public contract [Zoll, 1999].

The proper causative action, i.e. the submission of specific documents or statements indicated in the discussed provision. There will be all actions taken by the perpetrator to submit documents or statements to a specific institution often represented by a natural person, such as an employee [Zawłocki, 2006].

For the existence of this crime, the result is irrelevant [Gałązka, Grześkowiak (red.) i Wiak (red.), 2015, p. 1335]. The crime is committed at the time of submitting a document or a written statement [Potulski i Stefański (red.), 2015, p. 1767]. Therefore, in order to fulfil conditions set out in Article 297 of Polish Penal Code, no change in the outside world is required.

Offense under Article 297 § 1 of Polish Penal Code is a type of common offense and can be committed by any person who is capable of criminal liability [Gałązka, Grześkowiak (red.) i Wiak (red.), 2015, p. 1077]. An offense of financial fraud can only be committed through intentional guilt.

Crime committed in Article 297 § 2 of Polish Penal Code is called a credit fraud from omission, because it mainly depends not on a particular behavior but on an omission, failure to perform the expected behaviour [Giezek, 2014]. Acting in the scope of this provision consists in abandoning the notification and only in this form the offense can be committed [Zoll, 1999]. This is both a total abandonment and selective non-disclosure of certain circumstances [Mozgawa i in., 2014]. The notification obligation applies to institutions that have granted rights in the form of a financial instrument, payment instrument, public contract or other financial support. The content of the notification should be circumstances that may affect the suspension or limitation of the amount or the possibility of using financial support or public procurement [Górniok, 2006].

Offense under Article 297 § 2 of Polish Penal Code is of individual nature [Mozgawa i in., 2014]. It can be committed only by the one who is obliged to notify the relevant entity about the situation that may affect the suspension or limitation of the amount of financial support or public procurement granted or the possibility of further use of the payment instrument [Giezek, 2014]. Crime committed in Article 297 § 2 of Polish Penal Code is an intentional crime. It can be committed both in direct intention and possible intention [Zoll, 1999].

Combating economic crimes, in particular those related to the banking and financial spheres, is very difficult. Above all, due to the strong link to the economic area and the use of cyberspace by perpetrators, thanks to which these crimes may have an international reach. The problem is also the links between the perpetrators. Thus, the law enforcement authorities and courts, in order to effectively perform their tasks in this area, must have a specific specialization. Which is not easy due to the complexity of the issues. It should also be noted that effective prevention and combating economic crime is possible when the applicable law is adapted to real threats [Karaźniewicz, 2009, p. 323].

Combating economic crimes is important because a relatively small number of perpetrators causes large losses classified as high material damage and at the same time it strikes many victims [www2, p. 98].

After analyzing the proceedings conducted by prosecutors on charges of economic crimes [www2, p. 72], it was pointed out that the prolongation of the duration of preparatory proceedings was influenced by the following objective reasons:

- the degree of complexity and multithreading of matters, both as to the facts and as in legal terms,
- the size of the evidence, which resulted in extending the time needed to get acquainted with the evidence, conducting analysis and verifying its content,
- repeated suspension of the proceedings,
- the need to carry out activities outside the country, which resulted in a long wait for the results of completed applications for foreign legal aid and a long-awaited translation of the received materials into Polish.
- long waiting for the end of the fiscal control,
- difficulties in finding experts in areas such as finance and accounting
- prolonged waiting for the opinions of these experts.

The analysis indicated not only the objective, independent of prosecutors, the reasons for extending preparatory proceedings. In addition to them, subjective reasons were also observed, including:

- unjustified decisions to suspend the proceedings and at the same time unjustified delays in taking suspended and discontinued proceedings,
- the occurrence of unjustified periods of inactivity and failure to take evidential actions,
- committing errors already at the initial stage of the proceedings, as well as the lack of a plan and concept as to the further course of the proceedings,
- lack of effective supervision or lack of effective implementation of internal business supervision,
- undertaking premature or incorrect substantive decisions,
- premature appointment of experts or blatant delays in their appointment,
- delays or irregularities in the preparation of applications for international legal assistance.

It should be emphasized that the behaviors consisting in the undue acquisition of financial resources are typical and occur in all existing economic systems. The problem that arises in the course of prosecuting credit fraud is the increasingly common use of virtual space to perform financial services or commercial transactions. It forces law enforcement agencies to thorough analysis in the area of cyberspace, which requires appropriate specialization and knowledge as well as technical background.

The next problem is causing large and painful losses by the perpetrators of the crime in question. Therefore, it is postulated to change the approach of law enforcement agencies from a retroactive, characterized by a reaction to an already existing crime, to proactive, that is, carrying out activities before committing a prohibited act or while doing so. It is possible only as a result of analysis of a selected area of phenomena and not as a result of a notification of a crime. This test must be very detailed in order to be able to indicate processes that go beyond the set limits of parameters. It should be noted that it is directed much more on the person of the offender than on the crime [Konieczny i Widacki (red.), 2012, p. 11]. It is predicted that this form will develop because it gives measurable benefits [Konieczny, 2012, p. 3–16].

Another problem of law enforcement agencies is too little support in the area of obtaining IT data and from cyberspace. It is postulated to cooperate between

law enforcement authorities and producers of software in this area. However, modern IT solutions, infrastructure, devices require large financial outlays, and the law enforcement agencies do not have such resources for now [www3; www4].

Currently, it is also difficult to conduct any statistical surveys based on data from individual ministries regarding economic crimes, in particular credit fraud, because these data are not harmonized. Recognition and qualification are subject to different parameters, which makes it impossible to compare.

PAYMENT CARDS AS THE TARGET OF CRIMINALS' ACTIVITIES IN THE AREA OF CREDIT FRAUD UNDER ARTICLE 297 OF POLISH PENAL CODE.

Payment cards are also the target of action of criminals. However, the classification of individual crimes committed in the area of using or operating payment cards seems to pose a lot of problems. It is necessary to ask the question whether crimes described in Article 297 § 1 and 2 of Polish Penal Code also apply to payment cards?

At first glance, comparing the content of this Article together with information on individual payment cards, it seems that the bank and credit appear in both of them. Payment cards in which a loan occurs are a credit card and a charge card, regardless of their form, i.e. whether they are a piece of plastic, sticker or card in a mobile phone. It seems that if the issuance of such a card took place on the basis of the documents indicated in the provision, also appearing in electronic form, then penalisation of such behavior should take place under Article 297 § 1 of Polish Penal Code [Jakubski, Zajder (red.) i Kosiński (red.), 2001, p. 97–100]. However, in the definition of Article 297 of Polish Penal Code the payment instrument also appears. Defined in the Act of 19 August 2011 on payment services [Ustawa o usługach płatniczych] in Article 2 point 10 the payment instrument is each individualized device or a set of procedures agreed by the user and the supplier, which are used by the user to submit a payment order [Giezek, 2014]. Thus, the payment instrument is each payment card. Hence the penalisation based on Article 297 § 1 and 2 of Polish Penal Code the behavior regarding all payment cards consisting in submitting a forged, processed, attesting an untruth or unreliable document or an unreliable written statement regarding circumstances significant for obtaining a payment card of any kind and in any form will

be covered [Kaszubski, 2012]. And also the behavior of the person who is under an obligation, which does not notify the relevant authority about the situation that may affect the suspension of issuing the payment card or the limitation of the amount of e.g. the credit limit granted.

CONCLUSIONS

Payment cards in the form of debit, credit, charge and pre-paid cards effectively replace paper money. They have become a universal payment instrument. It turns out that the features of the crime described in Article 297 § 1 and § 2 of Polish Penal Code may relate to, for example, the circumstances of applying for a payment card, requesting its extension or increasing the credit limit. They may also relate to abandonment of notification about circumstances that may have an impact on negative decisions in the matters referred to above. The courts are also in agreement in this matter. As an example, in a judgment of the Gdańsk Court of Appeal of December 2, 2015 [Wyrok SA w Gdańsku, II AKa 373/15], the court stated that making a false statement regarding employment during the process of applying for a credit card exhausts the grounds for applying penalisation under Article 297 § 1 of Polish Penal Code.

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