**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

# *On Interpretation of Article 177.2.3 of the Criminal Code*

# *of the Republic of Azerbaijan*

**09 June 2011 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), S.Salmanova, F.Babayev (Reporter Judge), S. Hasanova, R.Qvaladze, R.Garajayev, R.Ismaylov and I.Najafov;

attended by the Court Clerk I.Ismayilov,

the legal representatives of interested parties: I.Jafarov, Head of Department of mainrance of state prosecution of General Prosecutor’s Office of the Republic of Azerbaijan, E.Askerov, senior adviser of department of the administrative and military legislation of Milli Meclis of the Republic of Azerbaijan,

the expert R.Guliyev, associate professor of Chair of Criminal Law and Criminalistics of Baku State University,

 has examined in open session via special constitutional proceedings in accordance with Article 130.VI of the Constitution of the Republic of Azerbaijan the constitutional case initiated by Office of Public Prosecutor of the Republic of Azerbaijan concerning the interpretation of Article 177.2.3 of the Criminal Code of the Republic of Azerbaijan.

Having heard the report of Judge F.Babayev and statements of representatives of interested parties, opinions of expert and specialists, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Office of Public Prosecutor of the Republic of Azerbaijan (hereinafter - Office of Public Prosecutor) in inquiry addressed to Constitutional Court of the Republic of Azerbaijan (hereinafter - the Constitutional Court) asked to give interpretation to provision «with illegal penetration into other depository» of article 177.2.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter - CC), and also whether a theft of cash assets from a cash dispenser with bringing in of another's card and identification number, admits as «illegal penetration into other depository».

It is underlined in inquiry that the recognition as illegal of penetration into other depository of action of the person at theft of cash assets belonging to other person illegally having entered into a cash dispenser a card against the will of the owner with assignment, belonging to other person, a debit card and identification number (PIN code) creates uncertainty in investigatory and judiciary practice. And this disturbs correct qualification of act and to creation of the uniform investigatory-judiciary practice. According to a conclusion of Office of Public Prosecutor there was a necessity of interpretation of provision «with illegal penetration into other depository» provided in article 177.2.3 of CC, and also whether «the cash dispenser concerns other depositories».

Plenum of the Constitutional Court in connection with the complaint notes the following.

According to article 90 of the Constitutional Law of the Republic of Azerbaijan «On normative legal acts» at revealing uncertainty and distinctions in the normative legal act content, and also contradictions in application practice, law-making body the adopted given act or according to a article 130.4 of the Constitution of the Republic of Azerbaijan, the Constitutional Court of the Republic of Azerbaijan officially gives interpretation of corresponding norms. At interpretation of normative legal act are explained and specified the maintenance of its norms, defined their place in the legislation and also functional and other relations with other norms regulating various aspects of an identical kind of public relations.

According to parts I and II of article 13 of the Constitution of the Republic of Azerbaijan (hereinafter - Constitution) the property in the Azerbaijan Republic is inviolable and is protected by state. The property may be state, private and municipal.

Everyone has the right to own property. Neither kind of property has priority. Ownership right including right for private owners is protected by law (parts I and II of article 29 of the Constitution).

The property is the necessary material-economic relation playing an exclusive role in activity of a society and the state. Being an economic and legal category, the property forms in it set of such actual public relations, as possession, use and the order the material assets got and belonging to proprietor. These relations at regulation by legal norms, assume the legal form, and in a legal order are expressed by such rights of the proprietor, as possession, use and the order belonging to it movable and real estate.

The Constitution and other branch laws have fixed equality of all forms of ownership and protection in the same extent right also interests of all legal subjects of the property. For this reason, in the criminal legislation identical protection of all patterns of ownership is provided.

The property is entered in the list the objects protected by the criminal legislation and its protection is established, as one of primary goals of CC. So, according to article 2.1 tasks of the Criminal Code of the Republic of Azerbaijan are: providing of the peace and safety of mankind, protection of rights and freedom of the person and the citizen, of property, of economic activities, of social order and public safety, of environment, of constitutional building of the Republic of Azerbaijan from criminal encroachments, and also the prevention of crimes.

Chapter 23 of CC is devoted to crimes against the property. Such criminal activity as fraud, misappropriation or peculation, robbery, brigandage and etc. Among these crimes, plunder crimes are distinguished by high public danger.

Article 177 of CC has defined theft, as secret plunder of another's property. The given criminal activity also, concerned to kinds of crimes of plunders from a category of crimes against the property.

The latent way of withdrawal distinguishes theft from other forms of plunder. At the theft, guilty, of irrespective of will of the victim, secretly having withdrawn its property turns it in own disposal. The secret withdrawal is understood as commission of crime hidden, both from the proprietor, and from other persons.

The CC is established recommendatory signs of criminal activity theft. Commitment of theft with penetration into dwelling, a premise, on a warehouse or other depository one of qualifying signs of a crime of theft.

Commitment of theft with penetration into dwelling, a premise, on a warehouse or other depository notable for the public danger. So, more valuable and especially protected subjects belonging physical and legal bodies are stored in apartment, a premise, a warehouse and other depositories. Penetration into the specified places increases the assumption of drawing to persons of more notable damage.

The dwelling noted in article 177.2.3 of CC provides intended for constant and temporary residing of people where are their property of the house, apartments, country cottages, hotel and sanatorium rooms, and also their components. The premise is understood as structures and the constructions intended for a people or placing of material assets. Especially equipped premises, constructions for storage of material assets, and also the depositories equipped with special means of protection, considered as depository.

Plenum of the Constitutional Court, for the purpose of the correct solution of a issue raised in inquiry, considers necessary clear up a matter of words «other depository» and «illegal penetration into depository» reflected in article 177.2.3 of CC.

It is necessary to note that penetration into dwelling, and also a premise or other depository should be regarded, as illegal penetration for the purpose of commitment of theft, robbery or brigandage. Penetration can be made with overcoming of obstacles as in opened, and the hidden form, having broken the resistance of people being there, and also security guards either by their deceit or without commitment of these actions.

It is necessary to consider that capture of the subjects which are in a premise, in a warehouse or other depository, directly without penetration of the person into the provided places with use of different means (a hook, a magnet, the trained animals, and also the deranged, juvenile or honesty confused persons) also concerns with penetration. Penetration is not an objective, but means for acquisition of subjects which wants to take perpetrator. Intention of person to take from the above-stated places material assets, should arise before penetration into these places.

The special construction, place or the site, intended for the constant or temporary storage of valuable material assets for the purpose of protection against damage, destruction, plunder, natural phenomena are concern with other depositories. Safes, carriages enclosed with a fence either supplied with other means of engineering tools or utility structures, sites, etc., provided with other kind of the protection, isolated from inhabited constructions irrespective of their pattern of ownership also concern with other depositories.

In this connection, Plenum of the Constitutional Court concerning a issue of qualification of plunder of cash assets from a cash dispenser with introduction of a another's card and identification number as «illegal penetration into other depository» marks the following.

From the expert's statement which have acted at session of Plenum of the Constitutional Court it becomes clear that according to already formed judicial-investigatory practice, illegal penetration into a cash dispenser is usually made in three tapes:

1. Extraction of money with introduction of the stolen debit card and its identification number (PIN code);

2. A capture of money being in the safe by means of breaking of a cash dispenser or destruction of armor by other ways;

3. Extract of money being in cash dispenser or realization of other operations without drawing of a loss to the safe of a cash dispenser with use of special program mechanisms and constructions.

According to point 2.16 of Regulation «Realization of cash transactions and the organisation of collection of values in the credit organisations of the Republic on Azerbaijan» adopted by the Board of National Bank of the Republic of Azerbaijan of the April 10, 2002 registered by the Ministry of Justice of the Republic of Azerbaijan on April 29, 2002, the cash dispenser is the automatic device used for payment and receiving of cash without participation of the cashier. Point 8 of the specified Regulations establishes the organisation of work with cash dispensers. According to the given point use of cash dispensers for realization of operations is carried out with application of debit cards and identification numerals of clients of the credit organisations. After realization of operations on payment (receiving) of cash cash assets, to the client (upon his/her request) should be eject enumerated check. Repair of modules placed in the safe of cash dispenser and the maintenance service connected with it, should be conducted after full clearing of cash dispenser.

In the same time, from the point of view of possibility of realization of cash or non-cash operations, it is necessary to distinguish cash dispensers taking into account technical features from other installations (a post the terminal, etc.), assigned for the realization of similar operations (cash or non-cash).

In addition with payment and receiving of cash cash assets without participation of the cashier, cash dispenser is the automatic device used for realization of kinds of other payments, operations on transfer of cash assets. Cash dispenser consists of two parts - computer system and cashbox parts and serves for realization of the above-stated operations. In a computer part operations are performed, the personal payment card, identification number and presence of money on the account of the person are checked. And in the cashbox of cash dispenser, cash is stored in special cartridges. Stored money is protected by technical and other means. Stored in the safe of a cash dispenser money belongs to bank to which the cash dispenser concerns.

Upon debit card is entered in cash dispenser cards-reader computer system require identification number (PIN code) of the given card. After introduction of identification number, the cash dispenser suggests to choose one of services of the menu. After a choice of one of services the computer system of a cash dispenser for the purpose of check of the information entered by the person and ascertain the size of a sum of money being on the account, directs inquiry to the centre of processing of the information of bank where there is an account of the person and where the payment card is given out. If the affirmative reply from the centre of processing of the information of bank is received, the cash dispenser gives out to the person money within the sum on bank account or creates a condition for using of one of the services provided in the menu of a cash dispenser.

Taking into account the specified features, Plenum of the Constitutional Court considers that removal of money with placing in a cash dispenser of the stolen debit card and its identification number (PIN code) accordingly does not create formal components of crime reflected in articles 177.2.3, 180.2.3, 181.2.3 of the CC. So, the person with the stolen debit card illegally enter not into the cash dispenser safe but by means of computer system of a cash dispenser in the bank account of the owner of a debit card and after fulfillment of corresponding operations the cash dispenser gives out to the person money being in the safe and within the sum provided on the account. The computer system being in a cash dispenser plays a role of the intermediary between the safe being in a cash dispenser and the bank account of the person and the person oneself.

From this point of view, at placing in of the stolen debit card, the person makes theft not from the cash dispenser safe but from the account of the owner of the given debit card.

Perpetrator at commitment of theft with penetration into dwelling, a premise, on a warehouse or other depository, for the purpose of overcoming of obstacles and misappropriation of property being in the specified objects applies additional force and means. Thus, damaging locks, doors, windows, etc., perpetrator the seriously cause damage to objects of the property.

From specified it is possible to come to such conclusion that for qualification by article 177.2.3 of the CC of theft committed with penetration into a cash dispenser, illegal penetration should be accompanied by only such actions, as breaking of the lock of the safe of a cash dispenser, cutting, tearing or fusing of walls of the safe by welding or other means with application of physical influence, physical strength.

In a case when the person stolen a debit card could not complete the actions directed on misappropriation of a sum of money available in given card or use of the given sum in the material interests, act of the person depending on its intention can be regarded, as attempt to commission of crime. At investigation of the purpose of the person who have stolen a debit card, however for the reasons which are not dependent on its will could not complete deliberately committed act, the reality of its information on the sum of money on a debit card or assumptions of the sum of money on a debit card should be established.

The person who has stolen a debit card, possessing the exact information on the sum of the money which is available on bank account of the owner, the stolen card or possessing the real assumption, however in a case when for the reasons which are not dependent on its will could not complete deliberately committed act, the given act should be qualified, as attempt to commission of crime, and in case of absence of the information on the sum of the money which is available on bank account or the real bases of the assumption concerning a sum of money, available on the account, act of the person should be qualified, as minor larceny provided in article 69 of the Code “On Administrative offences” of the Republic of Azerbaijan.

Plenum of the Constitutional Court note also that in the given Decision interpretation is given position «with illegal penetration into other depositories» from the point of view of requirements of article 177.2.3 of acting CC.

 At the same time, it should be notice that the changes occurring in economic and social areas of public life have caused new tendencies in structure and dynamics of criminality. Appearance of new kinds of the crimes, new forms and means of criminal activity, does necessary an establishment of a criminal liability for such acts. It is possible to attribute to such acts, taking place in practice of last year’s misappropriation of another's property from depositories, or misappropriation from oil or gas pipelines using new technologies. For example, concepts «oil and gas pipelines» at theft though have comprised all signs of "depository" provided in article 177.2.3 of CC, in the legislation has not the reflection a criminal liability for such form of misappropriation.

On the basis of specified, Plenum of the Constitutional Court considers that taking into account requirements of modernity perfection of a disposition of article 177 of CC is expedient.

According to the above-stated, Plenum of the Constitutional Court in connection with an issue raised in inquiry comes to a following conclusion:

- provision «with illegal penetration into other depository» article 177.2.3 of the Criminal Code of the Republic of Azerbaijan does not comprise withdrawal of cash assets from the account of the owner of a debit card with penetration into information system of the cash dispenser using stolen debit card and the identification number, belonging to another person;

- if illegal penetration into a cash dispenser is accompanied by such actions as breaking of the lock of the safe of a cash dispenser, cutting, tearing or fusing of walls of the safe by welding or other means with application of physical influence, physical strength, in that case, committed act should be qualified by article 177.2.3 of CC;

- in improvement of the criminal legislation by Parliament of the Republic of Azerbaijan the position of the Plenum of the Constitutional Court in connection with a disposition of article 177 of CC, reflected in the given decision should be considered.

Being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan, articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provision «with illegal penetration into other depository» article 177.2.3 of the Criminal Code of the Republic of Azerbaijan does not comprise withdrawal of cash assets from the account of the owner of a debit card with penetration into information system of the cash dispenser using stolen debit card and the identification number, belonging to another person.

2. If illegal penetration into a cash dispenser is accompanied by such actions as breaking of the lock of the safe of a cash dispenser, cutting, tearing or fusing of walls of the safe by welding or other means with application of physical influence, physical strength, in that case, committed act should be qualified by article 177.2.3 of CC.

3. In improvement of the criminal legislation by Parliament of the Republic of Azerbaijan the position of the Plenum of the Constitutional Court in connection with a disposition of article 177 of CC, reflected in the given decision should be considered

4. The decision shall come into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.