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International Fraud & Asset Tracing 2022

Poland: Law & Practice
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POLAND

Trends and Developments

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Freezing Funds in an Account in a Bank or Other Financial Institution by the Prosecutor, due to a Suspicion that They May Be Associated with Money Laundering

Quite recently the Supreme Court in Poland issued two important judgments concerning the freezing of funds in accounts due to a suspicion that they may be associated with money laundering.

The phenomenon of money laundering covering all actions aimed at introducing money or intangible assets deriving from illegal sources, or used in the financing of illegal business, to legal trading is perceived as particularly harmful. It is directly associated with the operations of developed, often cross-border, criminal structures. Organised crime, in particular when operating internationally, generates enormous profits (for instance from the drug trade or human trafficking). Criminal groups attempt to introduce this "dirty money" to legal trade, in order to freely and safely use it in the future and to cover the tracks of its illegal origins. The existence of channels that make this possible constitutes a condition for the existence of criminal structures. These channels are used to facilitate the legalisation of the sources of material benefits used by criminal organisations.

Various legal and organisational solutions have been adopted in countries in order to, on the one hand, prevent the phenomenon of money laundering (in particular to counteract the use of the financial system to this end), and on the other hand, where money has been subject to laundering – to allow the relevant state authorities to reveal such instances and hold the perpetrators liable. Various forms of money laundering are criminalised in Poland under Article 299 of the Polish Criminal Code (PCC).

One of the measures used to fight money laundering procedures constitutes the freezing of funds deposited in an account maintained by a bank or other financial institution for a specific period of time. In Poland, the basis for applying this measure is found in Articles 86–87 of the Act on Counteracting Money Laundering and Financing of Terrorism of 1 March 2018 (Journal of Laws of 2022, item 593 as amended; "the AML Act"), and, with respect to bank accounts and accounts maintained by credit unions, the provisions of Article 106a of the Banking Law of 29 August 1997 (Journal of Laws of 2021, item 2439; "Banking Law") and Article 16 of the Act on Credit Unions of 5 November 2009 (Journal of Laws of 2021, item 1844, as amended; "Credit Unions Act").

Freezing funds deposited in an account by a prosecutor constitutes a means of procedural coercion. It is used to block assets in the form of funds deposited in the account by its holder for a specific period of time in order to allow an investigation into the status of the assets while the funds are frozen. In the longer term, if it is confirmed that the asset is connected with a crime, freezing the funds makes it possible to use an asset-based collateral with respect to these assets, and to prevent the funds from being used to commit further criminal acts.

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Freezing an account constitutes an independent, relatively new, out-of-code means of the temporary seizure of assets. It is a measure similar to an asset-based collateral, as governed in Chapter 32 of the Polish Code of Criminal Procedure (PCCP), in particular a temporary seizure of movable property under Article 295 of the PCCP. These measures should, however, be distinguished. The prerequisites for freezing the account and applying this measure, despite certain common elements, differ from those that apply to an asset-based collateral. An account may be frozen irrespective of whether or not criminal proceedings are pending against its holder. On the other hand, an asset-based collateral can only be established on the assets of a person against whom criminal proceedings are pending (see Article 291 Section 1 of the PCCP in conjunction with Article 71 Section 3 of the PCCP), and in extraordinary circumstances – also on assets of a person alleged to have committed a crime (Article 295 of the PCCP) or other entities (Article 291 Section 2 of the PCCP).

Pursuant to the provisions of Articles 86–87 of the AML Act, if there is a suspicion that the crime of money laundering (Article 299 of the PCC) or financing of terrorism (Article 165a of the PCC) has been perpetrated, a prosecutor, either acting under a notice filed by the General Inspector of Financial Information or of their own accord, may freeze the account maintained by a bank or other financial institution in which funds that may be associated with that crime have been deposited. The prosecutor freezes the account for a specific period of time, not longer than six months. The decision must stipulate the scope, form and period of time for which the account is to be frozen. After the introduction of amendments that entered into force on 12 January 2022, the prosecutor is authorised to prolong the freeze for a further specified period of time up to six months. The account holder can complain against the prosecutor's decision to freeze the account, or prolong the freezing of the account, to the relevant court. Similarly, the rules governing the freezing of funds in an account by the prosecutor in relation to a suspicion of the offence of money laundering (Article 299 of the PCC) or the financing of terrorism (Article 165a of the PCC) are laid down in the provisions of Article 106a of the Banking Law and Article 16 of the Credit Unions Act.

Freezing Funds for Additional Reasons

It is worth adding that, according to the applicable provisions, the funds in an account may be frozen not just in relation to a suspicion of money laundering (Article 299 of the PCC) or financing of terrorism (Article 165a of the PCC). The prosecutor may also freeze the account:

- under the provisions of Article 89 of the AML Act, if there is a reasonable suspicion that funds deposited in the account come from any crime or fiscal crime, or are associated with such a crime or fiscal crime;
- under the provisions of Article 106a of the Banking Law, if there is a reasonable suspicion that the operations of a bank are being used to hide criminal activity or are used for purposes associated with a crime or fiscal crime;
- under the provisions of Article 16 of the Credit Unions Act, if there is a reasonable suspicion that the operations of a credit union are being used to hide criminal activity or are being used for purposes associated with a crime or fiscal crime;
- under the provisions of Article 40 of the Act on Supervision over the Capital Markets of 29 July 2005 (Journal of Laws of 2020, item 1400, as amended) if there is a reasonable suspicion that a crime specified in Articles 181–183 of the Act on Trade in Financial Instruments has been committed, or a crime that may have material implications on trade on a regulated market has been committed,

if the account has been used to commit the crime.

It has been the case that the prosecutor's office was unable, whether for reasons within its control or independent of them, to determine whether the funds in an account have been associated with a crime of money laundering or not, and if so, whether the account holder was participating in this procedure when the account was frozen, even for the maximum period of time provided for in the act. In these circumstances, certain prosecutors have opted to avoid the consequences of cancelling the freeze (ie, the account holder being free to use the funds deposited in this account), by prolonging the situation in which these funds are frozen. To do this, they have used the institution of the seizure of movable items treated as evidence (as exhibits) governed by Article 217 et seq of the PCCP, which – it must be emphasised – in principle constitutes a more painful (greater) interference in the property rights of the account holder than the interference arising from the use of the means of coercion in the form of freezing an account, since it is not limited by any statutory time limit. The appearance of legality is ascribed to this practice by the provisions of Article 86 Section 13 of the AML Act, as well as Article 106a Section 8 of the Banking Law and Article 16 Section 9 of the Credit Unions Act, and more specifically the reservation contained therein whereby the funds are released if, before the expiry of the period of time to apply the freezing of the account, no "decision on asset-based collateral" or "decision on exhibits" is issued.

Certain representatives of the jurisprudence and legal environment are right to point out that this practice of the prosecutor's office is inadmissible and constitutes a circumvention of guarantees granted to account holders in the provisions on freezing an account. However, the common courts of law, which check the decisions of prosecutors on the "retention" of funds deposited in accounts as exhibits as a result of complaints filed by the account holders, have tended not to question it. Luckily, there have been courts that have started to express doubts about whether this really complies with the law, and which applied to the Supreme Court to have the issue settled. The Supreme Court treated these doubts as justified.

Implications of Freezing Funds on Ownership Rights

Motivated by the need to counteract discrepancies in the judicature, as well as taking into consideration critical views of the representatives of the jurisprudence and legal environment regarding the dominant interpretation of these provisions, the Supreme Court adopted two resolutions: a resolution of 13 October 2021 (I KZP 1/21) and a resolution of 9 November 2021 (I KZP 3/21), in which the Supreme Court pointed out that the funds collected in a bank account do not bear the characteristics of exhibits within the meaning of Article 86 Section 13 of the AML Act and Article 106a Section 8 of the Banking Law, respectively, since they do not exist as movable items, and are nothing more than entries in the IT system. As a result, the Supreme Court agreed that prolonging the freezing of funds collected in an account for a period of time longer than the maximum period of time specified in Article 86 of the AML Act and Article 106a of the Banking Law through a decision to treat these funds as exhibits is groundless.

In extensive justifications of these resolutions, the Supreme Court emphasised that the regulations included in Article 86 of the AML Act and in Article 106a of the Banking Law interfere heavily in private ownership, which, according to Article 20 of the Constitution of the Republic of Poland, constitutes one of the systemic principles of Poland. Hence, the interpretation of these provisions must not be contrary to either Article 20 or

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Article 31 Section 3 of the Constitution of Poland. The latter provision states that limitations in the scope of exercising constitutional liberties and rights may only be introduced through an act, only when it is necessary for issues of safety or order, for example, and only when they do not violate the essence of these liberties or rights. Also important is Article 64 of the Constitution of Poland, according to which, ownership may only be limited through an act, and only to the extent in which it does not violate the essence of the ownership right.

In light of the statutory regulations of a bank account agreement, the bank account holder's funds, once paid, become the ownership of the bank, while the bank account holder is authorised to exercise a due and payable claim to have them released in the amount arising from the account balance. The claim is a property obligatory right of the account holder. The bank may temporarily invest the free funds in the bank account, but it is obliged to return them in full, or partially, at each demand. The claim is performed by returning the account holder's funds, who at that moment recovers the possession and ownership of the funds, or any other right in rem or obligatory right associated with the funds before they were deposited in the bank.

Freezing funds – as was aptly noted by the Supreme Court – deeply interferes both in the rights of the account holder and of the bank, which is the owner of the funds deposited in the account. What is more, under Article 86 of the AML Act and Article 106a of the Banking Law, the account of a natural (or legal) person who is not a suspect within the procedural meaning, since no charges were pressed against this person and who still enjoys the presumption of innocence, may still be frozen. Applying these measures may have severe negative consequences for the person concerned, including the inability to conduct business activity. For these reasons, the nature of the measures should be treated as extraordinary, while their application should be limited in time to a necessary minimum. The provision that limits the freezing of the account for a specific period of time has the nature of a guarantee and must be interpreted strictly, while the deadline stipulated in it constitutes a maximum and definite period of time.

As has already been mentioned, both Article 86 of the AML Act and Article 106a of the Banking Law adopt a solution whereby the freezing of funds is cancelled if, before the expiry of the period of time to apply it, no decision on asset-based collateral or decision on exhibits is issued.

The Supreme Court aptly indicated that the problem with issuing a decision on asset-based collateral in such a situation raises no doubts. Pursuant to Article 291 Section 1 of the PCCP, this is possible after the criminal proceedings enter the in personam stage, ie, after charges are pressed against a person whose funds have been frozen in their account. In the past, the Polish Constitutional Tribunal has checked the constitutionality of the provision on the asset-based collateral and agreed that it was consistent with the rules of a democratic state of law, proportionality in the limitation of the constitutional rights and liberties, the presumption of innocence and the protection of the ownership right and other property rights. At the same time, the tribunal pointed out that the asset-based collateral certainly interferes with property rights since it deprives a person presented with charges of the possibility of disposing of a specific property. Yet, the nuisance aims at performing one of the fundamental assumptions of a democratic state of law, namely the guarantee of the enforceability of court judgments (see the judgment of the Constitutional Tribunal of 6 September 2004, SK 10/04).

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The Importance of What Constitutes an "Exhibit" when Freezing Funds

The problem of the admissibility of the prosecutor issuing a decision on exhibits that treats the funds frozen earlier as exhibits is not so clear-cut. According to the doctrine of criminal procedure regarding the definition of an "exhibit", the Supreme Court pointed out that it is a thing, which in every case constitutes a physically existing object that may undergo inspection. An exhibit in criminal proceedings always bears individual features, since it carries specific information that is important for the course of the proceedings, as it is a source of evidence. An essence of conducting evidence in court constitutes the process of making assumptions based on this specific piece of evidence, which leads to making arrangements as to the facts. Furthermore, the Supreme Court noted that the funds deposited in a bank account do not have these features, since they do not exist as items, (as objects), but rather constitute entries in the IT system, with no specific items in the form of banknotes or coins that could undergo an inspection. Therefore, the funds in question do not bear the characteristics of evidence in a procedural meaning. What raises no doubt, however, is that account statements, confirmations of payments and withdrawals, and other similar documents, irrespective of whether they are on paper or in an electronic form, can be treated as exhibits. Their content is subject to inspection (irrespective of the nature of the carrier), as it is with respect to any document. A banknote, on the other hand, is an exhibit when it carries such information as, for instance, a specific serial number, fingerprints, biological traces, etc.

The Supreme Court also pointed out that, since definite deadlines are stipulated for the freezing of funds in an account, the provisions on a decision on exhibits concerning these funds must not be interpreted in a way allowing a person (the account holder) with no charges pressed against them to be indefinitely prevented from using the funds. Otherwise, it would be possible to indefinitely deprive a person of one of the most important attributes of ownership without the need to move from an in rem to an in personam stage in the criminal procedure.

The Supreme Court very aptly pointed out that "fighting with crime without respecting the procedural guarantees may lead to repressing an innocent man, and thereby constitutes the denial of an effective instrument of counteracting crime, while accepting the de facto indefinite freezing of funds in a bank account thanks to `treating' them as an exhibit, means that there is no incentive for law enforcement authorities to undertake effective and efficient actions."

The Ministry of Justice, dissatisfied with the position of the Supreme Court (as the Prosecutor General, the Minister of Justice is also the head of the Prosecutor's Office), attempted to defend the practice questioned by the Supreme Court through legislation. Parliament adopted an amendment to the PCCP adding new provisions (a new Article 236b of the PCCP), which, expressis verbis, provide that funds in an account are deemed to be a movable item within the meaning of the provisions on exhibits, and that a decision on exhibits may apply to funds in the account if they have been retained as evidence in a case. This change, introduced by the Act of 17 December 2021 (Journal of Laws of 2021, item 2447), entered into force on 12 January 2022. The opportunity was also used to extend the maximum period of applying this measure in all provisions determining grounds to freeze the account to 12 months.

We will see if the Ministry of Justice's plans will come to fruition. However, it seems that the introduction of Article 236b of the PCCP does not remove the two principal objections formulated against the practice of "retaining" funds in an

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account by subsequently treating them as exhibits–namely that, due to the nature of these funds, this practice cannot serve any evidence-related purposes, and that it breaches the provisions of the Constitution of Poland protecting ownership and other property rights, since it constitutes an excessive, disproportionate interference in the account holder's property rights.

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