

Cryptocurrencies As Security on Property in Polish Criminal Law

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Abstract

This study discusses cryptocurrencies as security on property in the Polish criminal law. In order to shed light on the issues in question, the author introduces the reader to the approach to cryptocurrencies in the Polish criminal procedure and explains the essence of security on property therein. Having laid such a basis, the author then discusses the procedural methodology of Polish justice authorities regarding the suspect's (accused's) possession of cryptocurrencies and the technical and procedural aspects of making them the subject of security on property. The entire study is based on an analysis of the law in force, taking into account the relevant national procedural methodology and author's own observations and it aims to give some insight into the subject discussed, especially to foreign readers who may cooperate with Polish bodies of the judiciary in the course of a criminal trial, in particular as part of international cooperation.

Keywords: cryptocurrencies, security on property, criminal trial

Introduction

The state's efficiency in enforcing penal sanctions awarded is what deters the society from entering the criminal path. It is worth noting that as early as in 2005 a legal commentator Karpiuk-Suchocka (2005, p. 18) pointed out that "nothing emboldens offenders more than ineffectiveness of the law manifested in the inability to enforce punishments. A punishment that was imposed but not enforced for a variety of reasons brings effects that are contrary to those intended. Security on property is a way to ensure that the possible sanction imposed by the court is made real". It is now very difficult to achieve the reality that Karpiuk-Suchocka wrote about as criminal groups now specialise in hiding their property.

One of the methods they use to conceal their assets is investment of funds (often obtained illegally) in cryptocurrencies. Despite the efforts of the Polish law enforcement agencies that aim to secure also those funds that were allocated in cryptocurrenciesⁱ, we need to suspect that in the majority of cases the criminal successfully hides his assets and thus makes it impossible to execute a ruling issued against him. We cannot overlook the evolution, if not revolution, that is happening before our eyes, which blurs territorial boundaries of individual countries. Thanks to the constant expansion of IT and systemic solutions, criminals can take actions difficult to be read by the authorities in their countries of residence, which in turn have been worked-out and are well-known in other countries. This is why countries must cooperate closely in explaining measures they take to tackle crime and which have proved effective on the home ground. This should be helpful both in terms of developing national action methodologies as well as in understanding the actions of the authorities of a different country in the implementation of joint efforts under international cooperation.

This study intends to present how the Polish legislator sees the pursuit of practicability of a criminal sanction, and to be more precise—it aims to explain the perception of cryptocurrencies in the Polish criminal law and actions that Polish law

enforcement agencies take to impose security on cryptocurrencies. The author wishes for the presented study to be helpful in other countries and to contribute to the improvement of combating modern crime.

Cryptocurrencies in the Polish Law

At the beginning of 2018 the Polish legislator noted that cryptocurrency-related matters must be regulated. This was inspired by the introduction on 13 July 2018 to the national legal order of a definition of a virtual currency, according to which a virtual currency is understood as a digital representation of value that is neither: a) a legal tender issued by Narodowy Bank Polski (National Bank of Poland), foreign central banks or other public authority; b) an international unit of account established by an international organization and accepted by individual countries that belong to this organization or cooperate with it; c) electronic money within the meaning of the Act of 19 August 2011 on payment services; d) a financial instrument within the meaning of the Act of 29 July 2005 on trading in financial instruments, or e) a bill of exchange or a cheque—and is transferable in economic trading into a legal tender and accepted as a medium of exchange, and which also may be electronically stored or moved or may be an object of e-trading. This definition was included in Article 2(2)(26) of the Act of 1 March 2018 on counteracting money laundering and the financing of terrorism (Dz. U. (Journal of Laws) of 2021 item 1132, as amended), that is in the most important Polish piece of legislation that regulates the rules and procedure of counteracting money laundering and the financing of terrorism.

The Polish legislator refers directly to this definition in a different legal acts—that is to Article 5a(33a) of the Act of 26 July 1991 on personal income tax (Dz. U. (Journal of Laws) of 2021 item 1128, as amended). The said act taxes the income from transfer of virtual currencies against payment with a 19% tax. What is important for the solution adopted, the income from the transfer of virtual currencies against payment is not joined with the taxpayer's other incomes—it is settled in a separate annual tax return submitted by the taxpayerⁱⁱ.

The said definition—though not directlyⁱⁱⁱ—is also reflected in the interpretation of provisions of legislative acts that are fundamental to Polish criminal law, that is the Act of 6 June 1997—the Criminal Code (Dz. U. (Journal of Laws) of 2020, item 1444 as amended) and the Act of 06 June 1997—the Code of Criminal Procedure (Dz. U. (Journal of Laws) of 2021, item 534, as amended). Under substantive criminal law, rights of an owner of cryptocurrencies are protected, especially by provisions of Chapter XXXIII of the Criminal Code, which include crimes against the protection of information—because in substantive criminal law cryptocurrencies are understood as technical recording of information^{iv}. When it comes to procedure-related provisions, as pointed out by Opitek (2017, p. 47-48), “under the Code of Criminal Procedure, units of cryptocurrencies will demonstrate a different procedure status depending on the role they play in the crime. In other cases, cryptocurrencies may not be directly related to the prohibited act, but will be used by a procedural body to ensure the correct course of criminal procedure. A bitcoin may be: a trace, evidence, the subject of security on property, or the subject of bail”. In consequence, it must be emphasized that this study will later address only a certain scope of the possible use in the Polish criminal law, that is the possibility of making bitcoin the subject of security on property.

The essence of security on property in the Polish criminal procedure

Security on property in the Polish criminal procedure may be established where there is a concern that without such a measure execution of a future final criminal court ruling will be impossible or significantly hindered. This involves the state, represented by the bodies of the judiciary (the prosecutor's office in preparatory proceedings and the criminal court in court proceedings), taking temporary authority over the assets of the suspected or accused perpetrator, and in some cases also assets of other persons. This temporary taking over of assets concerns only goods with a financial value because the mere security on property secures a future court ruling only in the context of financial decisions—that is in the context of the potential fine in a given case and also a financial performance, forfeiture, compensation measures and return to the aggrieved party or another entitled person of the financial gain that the perpetrator achieved through the crime, or its equivalent.

The data published by the Polish Prosecutor's Office shows that the value of assets secured in the course of preparatory proceedings has recently increased significantly. In 2015 the value of assets actually secured was more than PLN 755 million, while in mid-2019 alone it increased four-fold to reach PLN 3.3 billion. In 2019 the value of assets secured was a staggering twenty times higher than in 2011^v. The significant improvement in the amount of the assets secured was associated with a few aspects of the activity of the bodies of the judiciary, where we need to emphasize the authorities' clear direction towards ensuring effectiveness of a future criminal ruling and also the introduction of effective instruments for revealing or securing assets of offenders, which include in particular the so-called extended confiscation.

Extended confiscation was introduced to the national legal system on 27 April 2017 by the act of 23 March 2017 on amending the Criminal Code and certain other acts (Dz. U. (Journal of Laws) item 768). It prescribes greater possibilities to secure property of entities involved in criminal activity, other than the suspect, including especially the entity which achieved a financial gain or performance in association with the commission of the prohibited act. Moreover, it is also possible to establish receivership in an enterprise as security on property, or to rule forfeiture of the company. The information from the National Prosecutor's Office shows that these instruments greatly contribute to the amount of the assets secured^{vi}.

Despite an array of normative solutions stipulated in Chapter 32 of the Code of Criminal Procedure on how to secure property, the Polish legislator has failed to lay down solutions that directly concern the establishment of security on cryptocurrencies. However, this does not mean that such security on property cannot be established. Cryptocurrencies are after all financial assets on which security may be established in Poland, as has been pointed out before. As a consequence, current general regulations must be interpreted so that they reflect the special technical meaning of cryptocurrencies and so that the steps taken by state authorities fit within their competences and at that are an efficient instrument in fighting crime. Later in the study, the author presents a series of steps in his belief should be taken in the course of establishing security on cryptocurrencies, with an emphasis on relevant possible problems. This part of the study is largely based on the already-mentioned methodology of establishing security on property that has been guiding the Polish bodies of the judiciary since 2018.

Establishing security on cryptocurrencies

Establishing security on cryptocurrencies must be preceded by the disclosure that such assets are in possession of the person against whom the court may issue a decision on security on property. Relevant verification steps may be largely taken in the Polish criminal procedure even before the issuance of a decision about security on property is admissible, even at the stage preceding the very initiation of criminal proceedings. They mainly include checking publically available sources, such as social media or internet fora. Such verification involves checking the suspected offender's interest in cryptocurrencies and if this is confirmed, checking whether he has published information about his assets in publically available places, e.g. showing off his purchase before other like-enthusiasts, or checking whether he might be publishing photographs documenting transactions he has made. It is often the case that in the virtual world people use the same nick name (login), which makes it easier to check the information published by them in many places. One should also bear in mind here that the Polish legal system allows operational or procedural surveillance, during which a computer may be wire-tapped to inspect and record the content of the information transferred in an ICT network. These steps are formally defined—operational surveillance performed by the Police is based on Article 19 ff of the Act of 6 April 1990 (Dz. U. (Journal of Laws) of 2020 item 360, as amended), while procedural surveillance is based on the provisions of Chapter 26 of the Code of Criminal Procedure, and is only admissible for crimes enumerated by the legislator. This may reveal the suspected offender's interest in the subject matter of cryptocurrencies by him using cryptocurrency exchanges, making transactions or using virtual wallet applications. Financial information available to law enforcement agencies about the suspected offender is quite significant for this stage of procedure aiming to establish security on cryptocurrencies. We cannot rule out that a given individual reliably declares every year his incomes obtained from the sale of virtual currency by paying personal income tax referred to before. This alone may give a clear signal that in a given moment of proceedings, he may still be in possession of virtual currency if in the last financial year he clearly showed tax deductible expenses resulting from the sale of cryptocurrencies. One should also bear in mind here that the Polish law allows for the law enforcement agencies to have access to data subject to fiscal secrecy or other information about a given person's property resulting from their bank account history or coming from internet payment transaction operators. The last group of information about the potential of the suspected offender's having cryptocurrencies is based on personal sources. Third persons and the suspected offender alike may want to reveal information about securable property to the agencies, where the very action that reveals this knowledge may take the form of e.g. examination as a witness or a suspect or preliminary questions, recorded with relevant documents, especially by a note attached to the case file of criminal proceedings or to the case files of operational and exploratory actions taken.^{vii}

The temporary seizure of movable property by the Police described in Article 295 CCrP is a fundamental, thus presented schematically, procedural action that serves the taking over of the cryptocurrencies owned by a given person later to establish security on them. In the light of the regulation of the statute, the seizure may be performed even against a suspected person, i.e. a person towards whom there is a suspicion that they might become a suspect (that is a person against whom a decision to bring charges will be issued). The Police are authorised to carry out this action for each offence for which financial sanctions stipulated in Article 291 of the Code of Criminal Procedure may be issued. What is important, temporary seizure may be combined with the use of coercive measures applied in search and seizure. Seizure of cryptocurrencies, as part of this measure, must be then approved by the prosecutor who should, within 7 days from the seizure, issue a decision to secure the claim. If such a decision is not issued within 7 days, the seizure is annulled and the seized property must be returned immediately to the person from whom it was seized.

Technical aspects of the performance of temporary seizure are essential. The Polish law allows specialists (Article 205 CCrP) as well as expert witnesses (understood as persons with special knowledge in a given field) to participate in this procedure. These may be persons employed in the Police, such as officers of the Department for Combating Cybercrime at the relevant Regional Police Headquarters or experts of the Forensic Lab, or persons outside the circle of law enforcement agencies who in their professional lives deal with issues useful in performing such a procedure. Their participation seems desired by all means, given the specific characteristics of the necessary actions—steps that have to be taken as soon as possible. The Polish methodology of security on property rightly reinforces a stance according to which the discovery of cryptocurrencies made by the law enforcement agencies should result, in the course of performance of a temporary seizure of movable property, in making the suspected person (or co-perpetrators) unable to dispose of these means. Regardless of the type of a wallet the

suspected persons had (equipment, web, application or computer printout), transferring the seized funds from this person's wallet to the dedicated wallet of law enforcement agencies seems the most appropriate solution. It is vital to note here that current regulations fail to specify technically the issue of law enforcement agencies' having wallets to store cryptocurrencies. Therefore, the way the transfer is made must be described with most details possible in the protocol to the action performed, though without disclosing a target private key. Polish instructions recommend considering here that a fee for verifying the operation be increased, if it proves necessary for efficient security on the cryptocurrency. The fee amount contributes to quicker transfer of the cryptocurrency and may precede, e.g. a transfer order made by the person who co-perpetrated with the suspect.

It is also recommended that after the cryptocurrency is transferred to the wallet of law enforcement agencies the cryptocurrency be materialized in paper form and all electronic copies of the private key be irretrievably deleted. This paper form materialization, with a public address and the private key, should be placed in a secure envelope and then deposited at the National Bank of Poland as a valuable deposit.

The decision on securing the claim issued by the prosecutor within 7 days from the temporary seizure of property (cryptocurrencies) should specify in the most precise manner the scope and procedure of the security on property. It is not enough to specify the amount of cryptocurrencies secured—they must be first averagely converted into the Polish fiat money (PLN). Moreover, the decision on securing the claim must specify the scope of cryptocurrencies at the time of seizure as well as the scope of cryptocurrencies that were ultimately placed in the wallet of law enforcement agencies (after deducting a fee) and the public address under which these cryptocurrencies were secured. Giving the public address strengthens the certainty of actions of the law enforcement agencies as it shows the address under which the cryptocurrency was deposited in the end. However, under no circumstances may the private key be disclosed in the content of the decision, as this could lead to the taking over of the secured cryptocurrency by unauthorised persons, including and most of all the suspected person.

There seems to be no doubt that storing cryptocurrencies is an activity that may be even called risky. Market fluctuations lead to a situation in which a given cryptocurrency may lose significant or even all value in a short period of time. The value of a given cryptocurrency may of course increase in time, however, predicting whether such a trend will take place and how long it will hold is not possible. What is more, a technical aspect of cryptocurrencies involves a risk of losing the cryptocurrency, even if stored most securely, as a result of interference by a third person or an error of a person from the law enforcement agencies responsible for securing it correctly, e.g. by disclosing in one of the court documents addressed to the parties to the proceedings too much data that specifies the location of the secured cryptocurrency. Polish provisions of the Code of Criminal Procedure allow the sale of an object, e.g. whose storage would involve excessive difficulty or cause a significant decrease of its value (see Article 232(1) CCrP). The applicable methodology recommends that this solution be used for cryptocurrencies. The prosecutor may in preparatory proceedings issue a relevant decision on a sale. The sale then proceeds on the basis of provisions typical to a civil procedure (with the participation of the court enforcement officer) or pursuant to provisions on enforcement proceedings in administration (with the participation of the head of the territorially competent tax office), depending on the purpose under Article 291(1) CCrP the security on property was established. After the cryptocurrency is sold, the amount obtained should be deposited in a court deposit and a decision on changing the manner of securing the property should be issued, that is by taking over the cash in the amount obtained from the sale. When a fine, a monetary performance, a forfeiture, a compensatory measure or a return to the aggrieved party or to another entitled entity of the financial benefit which the offender obtained from the offence, or its equivalent is imposed by a final and valid criminal judgement, the funds secured this way will be counted towards the financial sanction imposed.

Summary

The series of steps taken by Polish law enforcement agencies in securing cryptocurrencies may raise doubts as to the situation in which the security on property is annulled (when it is repealed under an appeal review or if facts change) or in which a sanction towards which the security could count is not imposed. Then, the secured property should be returned to the person from whom it was taken away; if the cryptocurrency was converted into fiat money, then the return will be made in the said fiat money. When it comes to cryptocurrencies, it is very likely that the value in fiat money of the cryptocurrency secured when it is seized and then sold will be much lower than when the property secured must be returned. It cannot be ruled out either that a particularly profitable moment for the sale of the cryptocurrency occurs when this currency is in the hands of the law enforcement agencies and its owner could not dispose of it freely, thus upon returning the property secured he lost an opportunity of an exceptionally lucrative transaction, perhaps irretrievably.

There are no relevant specific regulations that could govern the matter of property returned in a possibly fair way. There are none because such situations are rather rare. The bodies of the judiciary decide to secure property only where the facts dictate that such actions must be done. Moreover, it should be assumed that if a decision under which a given person was deprived of cryptocurrencies and thus incurred a loss is deemed contrary to the law, then this person may claim relevant compensation from the State Treasury under Article 417¹(2) of the act of 23 April 1964—the Civil Code (Dz. U. (Journal of Laws) of 2020 item 1740, as amended).

All of the observations made herein aimed to describe the actions taken in Poland when securing property. Even though such steps often require technical actions and there are no relevant special normative solutions, it seems legitimate to conclude that the actions described may be performed in the Polish reality effectively and efficiently. Their description, which again we should hope for, may be beneficial to third-country persons during joint actions taken with their Polish equivalents under international cooperation.

ⁱ See the methodology developed by joint effort of the law enforcement agencies and the judiciary — *Metodyka zabezpieczeń majątkowych*, Warsaw 2018, 290-311 (unpublished) and the press release made by the Public Prosecutor's Office on the Regional Prosecutor in Jelenia Góra securing PLN 237,138 worth of cryptocurrencies (National Prosecutor's Office (2018), 'Prokurator zabezpieczył Bitcoiny zakupione za pieniądze pochodzące z oszustw', *Prokuratura Krajowa*. <https://pk.gov.pl/aktualnosci/aktualnosci-z-kraju/prokurator-zabezpieczyl-bitcoiny-zakupione-za-pieniadze-pochodzace-z-oszustw/> [Online] [Retrieved July 28, 2021]).

ⁱⁱ See more in Małecki, P. and Mazurkiewicz, M. (2020), *CIT. Komentarz. Podatki i rachunkowość*, XI edition, Wolters Kluwer Polska, Warsaw, commentary to Article 22(d).

ⁱⁱⁱ The Polish theory of law assumes that the definition of this term introduced in the legislative act that is fundamental for the given matter should be taken into account also in the interpretation of those legislative acts which use a given term while not defining it separately — see more in (2017), *Wykładnia Prawa. Zasady – reguły – wskazówki*, Wolters Kluwer, Warsaw, 176-191.

^{iv} See in particular Opitek, P. (2017), 'Kryptowaluty jako przedmiot zabezpieczenia i poręczenia majątkowego', *Prokuratura i Prawo* 6, 36-59. At the same time, there is a discussion on the possibility of recognizing cryptocurrencies as a designate of the attribute "subject", "property" or the subject of the offence of money laundering - see more in Pasternak, Ł. (2017), 'Kryptowaluty i pieniądz wirtualny jako przedmiot przestępstwa z art. 310 § 1 kk', *Prokuratura i Prawo* 4, 77-94; Skowron, D. (2018), *Bitcoin jako przedmiot zabezpieczenia w postępowaniu karnym*, Instytut Wymiaru Sprawiedliwości, Warsaw, 11-12; Liberacki, J. (2019), 'Karnoprawne aspekty walut kryptograficznych (bitcoin jako przedmiot przestępstwa)', *Czasopismo Prawa Karnego i Nauk Penalnych* 3, 165-181.

^v National Prosecutor's Office, (2019), 'Przełomowe działania prokuratury w zakresie zabezpieczania przestępczego mienia', *Prokuratura Krajowa*. <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/przelomowe-dzialania-prokuratury-w-zakresie-zabezpieczania-przestepczego-mienia/> [Retrieved July 29, 2021].

^{vi} See National Prosecutor's Office (2017), 'Prokurator zastosował konfiskatę rozszerzoną i przypadek przedsiębiorstwa niestanowiącego własności sprawcy', *Prokuratura Krajowa*. <https://pk.gov.pl/wydzialy-zamiejscowe-pk/aktualnosci-z-wydzialow-pzik/prokurator-zastosowal-konfiskate-rozszerzona-i-przypadek-przedsiębiorstwa-niestanowiącego-własności-sprawcy/> [Online] [Retrieved July 29, 2021]; National Prosecutor's Office (2017), 'Prokurator zastosował konfiskatę rozszerzoną i przypadek mienia', *Prokuratura Krajowa*. <https://pk.gov.pl/aktualnosci/aktualnosci-z-kraju/prokurator-zastosowal-konfiskate-rozszerzona-i-przypadek-mienia/> [Online] [Retrieved July 29, 2021], *Prokuratura Krajowa* (2017), 'Prokuratorzy o stosowaniu nowych przepisów dotyczących konfiskaty rozszerzonej', *Prokuratura Krajowa*. <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/prokuratorzy-o-stosowaniu-nowych-przepisow-dotyczących-konfiskaty-rozszerzonej/> [Online] [Retrieved July 29, 2021].

^{vii} See also Opitek, P. (2018), 'Wybrane aspekty pozyskiwania dowodów cyfrowych w sprawach karnych', *Prokuratura i Prawo* 7-8, 65-85.

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