

## Regarding the procedure for handing over items deposited by a client with a bank or credit union in criminal proceedings

Regulation

- Act No. 141/1961 Coll., on Criminal Proceedings (Criminal Procedure Code), as amended (hereinafter the “CPC”)
- Act No. 89/2012 Coll., the Civil Code (hereinafter the “CC”)

Provisions

- Articles 78, 79, 83 and 83a of the CPC
- Article 2201 et seq. and Article 2402 et seq. of the CC

Question

***What are the conditions for handing over, on the basis of a warrant of a law enforcement authority, items important for criminal proceedings which are deposited by a client with a bank or credit union?***

Answer

In general, a client may deposit movable property (e.g. documents, jewels and other valuables or assets) with a bank<sup>1</sup> or credit union (jointly “credit institutions”)

- in a safe deposit box rented out by the credit institution on the basis of a lease contract pursuant to Article 2201 et seq. of the CC,
- in another protected place (usually a safe) on the basis of a custody contract<sup>2</sup> pursuant to Article 2402 et seq. of the CC.

### 1. Search warrant for a safe deposit box rented out by a credit institution to a client, or for other areas of the credit institution’s premises

If reasonable suspicion exists that a safe deposit box rented out by the credit institution to the client, or other areas of the credit institution’s premises, contain an item important for criminal proceedings (“corpus delicti”), the chairman of a court, or a judge in preparatory proceedings at the request of a prosecuting attorney, may issue, under conditions stipulated in Articles 82 and 83 of the CPC, a search warrant for other areas pursuant to Article 83a of the CPC (hereinafter a “search warrant”). In urgent matters, the chairman of a court (sole judge) or a judge in whose district the search of other areas and land is to be performed may issue the warrant instead of the competent chairman (sole judge) or judge. The warrant must be issued in writing and must be justified. The search is conducted by the police at the order of the chairman of the court or judge. Where a prosecuting attorney is conducting the investigation or accelerated preparatory proceedings (Articles 161(4) and 161(5b) and Article 179a(3) of the CPC), he may conduct the search himself.

The search may be conducted without a warrant only where

- the issuance of a warrant cannot be achieved in advance and the matter brooks no delay (in such case the police must immediately request additional consent from the authority entitled to issue the warrant; the results of the search cannot be used as evidence in further proceedings unless additional consent to the search is granted), or
- the owner or other authorised user of the premises declares in writing that he agrees with the search and hands over that declaration to the police.

<sup>1</sup> In this context, a bank also means a foreign bank entitled to carry on banking activities in the Czech Republic on the basis of a single licence according to European Union law and a foreign bank with a registered office outside the European Economic Area operating in the Czech Republic on the basis of a licence granted by the Czech National Bank.

<sup>2</sup> If a bank or foreign bank branch is authorised to carry on the activity “renting safe deposit boxes” pursuant to Article 1(3)(n) of the Act on Banks, or a bank with a single licence to carry on the activity “safe custody services” pursuant to Article 5d(n) of the Act on Banks and a credit union to carry on the activity “renting safe deposit boxes to members” pursuant to Article 3(g) of the Act on Credit Unions, they may enter into custody contracts under Article 2402 of the CC (until 31 December 2013 the “contract on the deposit of an item with a bank” pursuant to Article 700 et seq. of the Commercial Code). We agree with the view of the commenting literature: Pihera V., Smutný A., Sýkora P: Zákon o bankách, komentář, C. H. Beck, Praha 2011, 1<sup>st</sup> edition, p. 29 and 87, which favours an extensive interpretation of the renting of safe deposit boxes within the meaning of “safe custody” pursuant to the annex to Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (now Directive 2013/36/EU).

In addition to the general prerequisites (analogously to Articles 134(1) and 134(2) of the CPC), a search warrant must include an order to conduct the search, as well as other relevant information, in particular the extent and purpose of the search, the obligation of the owner or other user to be subjected to the search, including information on the possibility of overcoming resistance or hindrance (Article 85a of the CPC), and the obligation to hand over items important for the criminal proceedings, including a warning that such items will be seized if they are not handed over voluntarily (Article 78 and 79 of the CPC).<sup>3</sup>

A warrant for other areas pursuant to Article 83a of the Criminal Procedure Code is a ruling in its own right; it must be issued in writing and must be justified. The search warrant must exactly specify the credit institution (including the exact address) which rented out the safe deposit box to the client or in whose other areas (safe etc.) the item is located (usually an organisational unit of the bank, a foreign bank branch etc.) and the client of the credit institution who rented the safe deposit box in which, on the basis of reasonable suspicion, the item is located (cf. Articles 82(1) and 82(2) of the CPC). The search warrant must be directed both at the credit institution, as access to the safe deposit box, which is always located at the credit institution's premises, needs to be ensured, and at its client who has rented the safe deposit box and uses it under contract with the credit institution; the search warrant must be served not only on the credit institution which rented out the safe deposit box to its client, but also on the client, as the client is the user of the safe deposit box area. However, if the user of the safe deposit box could not be reached or could not be present during the search for other reasons (for example because he is abroad or is a suspect on the run), this does not stop the safe deposit box being searched, as according to Article 83(1) of the CRC it is sufficient to serve the search warrant at a later time, although no later than 24 hours after the obstacle preventing it from being served has been removed.<sup>4</sup>

Pursuant to Article 84 of the CPC, the search may only be conducted after a previous interrogation of the person at whose premises it is to be performed, and only if the interrogation did not result in voluntary handover of the item or the removal of any other reason which led to the search being ordered. A previous interrogation of the person at whose premises the search is to be conducted is not necessary where the matter brooks no delay and the interrogation cannot be performed immediately.

The authority conducting the search of the safe deposit box rented out by the credit institution to the client, or of other areas of the credit institution's premises, must allow the client, or, in the case of other areas, an employee of the credit institution, to be present during the search. It must inform these persons about their right to be present during the search (Article 85(1) of the CPC).

## 2. Submission or handover of an item deposited in a safe deposit box

Where an item important for criminal proceedings has been deposited by the client in a rented safe deposit box, the credit institution cannot be called upon to submit or hand over the item pursuant to Article 78(1) of the CPC or issue an order against it pursuant to Article 79(1) of the CPC, as the credit institution does not have the item in its custody and therefore, pursuant to Articles 78(1) and 79(1) of the CPC, does not hold it. In the contract to rent out the safe deposit box, the credit institution merely undertakes to ensure a secure space. It does not accept the items deposited in the box into custody, and usually it does not even know what the client has deposited in the box. Therefore, the credit institution cannot hand over an item deposited by the client in a rented safe deposit box on the basis of a

<sup>3</sup> A more detailed interpretation of the conditions and prerequisites for issuing a search warrant for other areas and land is contained, for example, in Šámal, P. et al.: *Trestní řád. Komentář*. 7<sup>th</sup> edition. Praha: C. H. Beck, 2013, p. 1127 onwards. In addition, the Constitutional Court has expressed its opinion on this issue in detail several times, for example in Ruling No. IV. ÚS 528/98.

<sup>4</sup> For details, see the opinion of the Supreme Prosecuting Attorney's Office No. 14/2001 regarding the procedure to be followed by law enforcement authorities when obtaining items from a safe deposit box rented to a client of a bank.

call pursuant to Article 78 of the CPC. The call to submit or hand over an item (Article 78 of the CPC), or the warrant to seize an item pursuant to Article 79 of the CPC if the client does not cooperate, is addressed by the law enforcement authority directly to the client, not the credit institution.

### 3. Submission or handover of an item deposited on the basis of a custody contract

Where, however, the client enters into a custody contract with the credit institution pursuant to Article 2402 et seq. of the CC, the subject of which is an individually specified item kept in a safe of the credit institution, the credit institution takes over the item from its client, subsequently deposits it in its safe and undertakes to keep it in custody with due care. In such cases the credit institution has the item deposited in its safe under its control, as it is keeping it in custody for its client, i.e. it has it in its possession pursuant to Articles 78(1) and 79(1) of the CPC. Therefore, law enforcement authorities can call upon the credit institution to submit or hand over such an item provided that it is important for criminal proceedings and that the provision of information or the handover of a document containing protected information is not prevented by an obstacle pursuant to Article 78(2) of the CPC consisting in the obligation to keep confidential information which is subject to banking secrecy or, in the case of a credit union, a similar confidentiality obligation, unless the credit institution has been relieved of the confidentiality obligation. In such case the credit institution provides documents containing data protected by the confidentiality obligation only after they have been requested using the procedure under Article 8 of the CPC and in accordance with the Act on Banks or, where relevant, the Act on Credit Unions.

If the above obstacles have been removed but the credit institution has failed to comply with the search warrant or hand over the requested items, a warrant to seize the items may also be issued against it. In these cases, a search warrant for other areas directed at a search of the credit institution's safe where the item is to be deposited may also be issued provided that the conditions stipulated in Articles 82(2) and 83a(1) of the CPC are met. However, a search warrant for other areas will only be directed at the credit institution which took over the item from its client on the basis of a custody contract, as it is necessary to gain access to the safe, which is typically located in areas of the premises of the credit institution that are not accessible to the public.

### 4. Conclusion

To sum up: A law enforcement authority requests the handover of documents and other media (e.g. electronic records) containing data subject to banking secrecy or a comparable confidentiality obligation using the procedure laid down in Article 8(2) of the CPC in the case of a bank and Article 8(1) of the CPC in the case of a credit union. Where the credit institution fails to comply with this request without good reason,<sup>5</sup> the handover of documents important for criminal proceedings in the custody of the credit institution may be achieved not only by imposing a procedural fine (Article 66(1) of the CPC) or requesting the handover of the item pursuant to Article 78(1) of the CPC, but also by ordering a search at the premises of the credit institution under Article 83a of the CPC, during which the credit institution may be called upon to submit or hand over items important for criminal proceedings provided that the conditions stipulated in Article 78 of the CPC are met, or, if it fails to comply with this call, such items may be seized pursuant to Article 79 of the CPC (however, this does not apply to items deposited in a safe deposit box, in which case the law enforcement authority addresses the call directly to the client).<sup>6</sup>

<sup>5</sup> Failure to comply with the request of a law enforcement authority may come into consideration only in exceptional cases, for example where the request does not comply with the requirements laid down in Article 8 of the CPC, or where requirements stipulated by the Act on Bank or the Act on Credit Unions are not met.

<sup>6</sup> For details, see the interpretative opinion of the Supreme Prosecuting Attorney's Office No. 35/2000, "Ordering a search of other areas and land pursuant to Article 83a of the CPC at a bank's premises".

Importance of the answer for those to whom it is addressed      This answer expresses the opinion of Czech National Bank staff members. The courts and the Bank Board of the Czech National Bank may be of a different opinion. When performing financial market supervision, however, the Czech National Bank will consider action that is in accordance with the answer – within the bounds of the answer and its assumptions – to be action that is in accordance with the law, unless it is apparent from the circumstances that the answer is not applicable to the case in question.

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