GITC | ARTICLES

# The freezing of consumer bank accounts

## Introduction

1. Consumers are increasingly finding that their bank accounts have been frozen without explanation or warning. This can be worrying time, as they are left trying to work out why they cannot access their money, and how the situation can be rectified. It can also have serious financial consequences for those left suddenly unable to pay their bills or other basic outgoings.

2. This article examines when financial institutions are permitted to freeze customer accounts, and what action can be taken by those customers to speed up the process and recover their money. The scope of the article encompasses both traditional bank accounts and newer offerings (such as e-money accounts and crypto services).

3. If you have been affected by the issues in this article, you should consider seeking legal advice. Other people may be in the same situation, and group litigation can ease the financial burden and risk.

**The customer relationship with a traditional bank**

4. When a customer holds money with a bank, there is no pot of money or banknotes that the bank is physically holding for the customer. Rather, the amount standing to the customer's credit in the account is a debt owing from the bank to the customer. That debt is payable in accordance with the terms and conditions of the account, which in a standard personal bank account is usually "on demand".

5. For this reason, if a bank refuses to pay money out to the customer on demand, the primary claim will be in debt rather than a proprietary claim for the return of any specific pot of money.

6. There may also be a claim for breach of contract. It will be an express or implied term of the agreement that the bank will allow the customer to withdraw their funds and make payments to others. For example, Revolut's Terms and Conditions state that, once there is money in the customer's account, they will be able to (amongst other things) (a) send and receive money, (b) withdraw cash, and (c) manage your account (see clauses 3 and 14, available at https://www.revolut.com/legal/terms) **(Revolut T&Cs)**.

7. There will be an exception to the bank's obligation to pay money on demand where there is a legal or regulatory requirement which prevents it from complying from the customer's instructions (see, for example, Revolut T&Cs, clause 27). Even if this is not set out expressly in the relevant terms and conditions, a court may imply such a term: see *Shah v HSBC Private Bank (UK) Limited* [2012] WHC 1293 (QB).

8. It is therefore of vital importance to consider the bank's regulatory requirements in order to determine when it might be justified in preventing an customer from accessing their funds.

9. As a general point, consumers should be aware of their rights to challenge unfair terms in consumer contracts under the Consumer Rights Act 2015 **(CRA 2015)**. Clauses which seek to significantly restrict the bank's liability for a breach of contract, or which place draconian penalties on a consumer for any breach, are particularly susceptible to challenge (see CRA 2015, Schedule 2, paragraph 2).

**"E-money" accounts**

10. Not all bank accounts are created equally. Revolut, for example, is not a traditional bank but an *"electronic money institution"*. It does not have a UK banking license and funds are not protected under the Financial Services Compensation Scheme. They are however regulated, for some activities, by the Financial Conduct Authority **(FCA)** under the Electronic Money Regulations 2011.

11. A claim against an "e-money institution" does create some additional complexities, but it does not change the essential analysis set out above. Such institutions owe its customers a debt according the amount standing to customer's credit in the account at any time. A failure to pay that money out could ground a claim in debt and/or for breach of contract.

**Multiple currency accounts**

12. Some e-money institutions also allow customers to hold funds in multiple currencies at the same time (see, for example, Revolut T&Cs, clause 2).

The institution will owe the customer a debt according to the amounts standing in each currency, although there may be particular terms relating to the date of currency conversion. They may also be fees for any such conversion on the closure of an account.

13. But this does not give the institution free reign on the date of conversion. The terms and conditions will generally set the date at which conversion takes place (if at all), and any clause which purported to give the institution free reign as to the date of conversion could be challenged as unfair under the CRA 2015.

**Cryptocurrencies**

14. Some institutions also offer cryptocurrency services, allowing customers to trade in such currencies. Cryptocurrencies are particularly volatile, which can make the date of conversion particularly crucial.

15. An institution may have separate terms for their crypto services. Revolut, for example, do not mention cryptocurrencies in their T&Cs, but do in a separate document (https://www.revolut.com/legal/cryptocurrency-terms). Advisers should always check whether any such additional terms have been validly incorporated into the contract between the institution and consumer.

16. Like foreign currencies, an institution should be clear about the date on which they have converted your cryptocurrency into their £ or € value, and the basis for doing so. Any attempt to arbitrarily set a date of conversion is likely to be contrary to the terms of the contract, or susceptible to challenge under the CRA 2015.

**On what basis might a bank freeze a consumer account?**

17. Banks are now subject to a significant amount of regulation which requires action to be taken where there is a suspicion of criminal activity. The key provisions are set out in the Proceeds of Crime Act 2002 **(POCA 2002)**, Part 7. They are designed to ensure that banks have sufficient systems in place to identify possible money laundering, and take report any suspicions to the appropriate authority.

18. POCA 2002, Part 7 does this by creating three types of criminal offence for which a bank (or e-money institution) might be liable:

    a. **The principal offences** (POCA 2002, sections 327-329) are when the bank has taken an active role in criminal conduct, or what it *suspects* to be criminal conduct.

    b. **The disclosure offences** (POCA 2002, sections 330-332) cover situations where the bank fails to disclose the suspected criminal activity to the relevant authority. In practice, disclosure is done by way of a Suspicious Activity Report **(SAR)** to the National Crime Agency **(NCA)**.

    c. **The tipping-off offences** (POCA 2002, section 333A, see also section 342) apply when the bank alerts the customer that they are under suspicion of criminal activity without authority to do so from an appropriate law enforcement agency.

19. In practice, this means that a consumer's bank account may be frozen if the institution's risk algorithm marks a transaction as suspicious as otherwise the institution may be liable for one of the principal offences. The matter

will then be disclosed to the NCA, without the customer being told what is happening.

**Limitations on the bank's powers to freeze an account**

20. This can be extremely distressing for the institution's customers, as they are left in the dark as to what is happening and why. Legislators should not be so quick to forget the torment of Joseph K in Kafka's *THE TRIAL* next time.

21. There are some limits on the bank's ability to freeze an account, and it is vitally important that the courts astutely guard these powers to ensure their broad limits are not overstepped.

22. In particular, once the matter has been disclosed, the NCA has seven working days in which to determine whether or not the transaction can go ahead: POCA 2002, s.335(2), (3), (5). If no response is received by the bank within this time frame, the matter is treated as if the NCA had given consent for the transaction to proceed.

23. If the NCA refuses to give the appropriate consent, there is a further "moratorium period" of 31 days, starting with the date on which consent was denied: POCA 2002, s.335(4), (5). In practice, this means that the consumer remains without his money, and without an explanation, for this further time frame.

24. Once this time frame has expired, the bank is treated as having received the appropriate consent and account should be unblocked. But an application can be made to the Crown Court for the moratorium period to be extended, if certain conditions are met: POCA 2002, s.336A. These extensions are not

sought by the financial institution but by senior officer of the appropriate law enforcement agencies: POCA 2002, s.336A(2), s.336D(7).

25. The Court can grant an extension only if it is satisfied that certain conditions are met. These are, in summary, that the investigation is being carried out diligently and expeditiously, and that more time is necessary: POCA 2002, s.336A. The extension can be granted only for a further 31 days, although multiple extensions can be sought up to a total limit of 186 days from the date on which the original 31 day period would have expired.

26. There is at least a fig leaf of protection for consumers faced with a potential extension, in that they must be served with a notice that the application has been lodged: see Crim PR 47.64(2)(d), 47.62(2). Notice must be given to any respondent or interested party, and the holder of the account would be an interested party: POCA 2002, s.336D(3)(b). This does, at least, mean that the consumer becomes broadly aware of the legal battlefield in which they have been dropped. There is no "tipping-off" liability where a customer is told about the investigation as part of an application to extend: POCA 2002, s.333D(1)(aa).

27. There are powers of the court to exclude the interested party, and their legal representatives, from any hearing under s.336A and to prevent any such person from seeing the documentation relied upon: POCA 2002, s.336B(3), (4). These powers do not extend to denying the interested party knowledge that the application has been made.

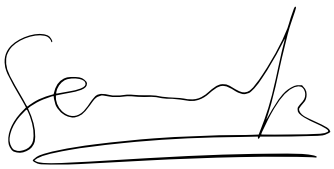
28. Information on the NCA's practices in making these applications can be found in Home Office Circular 008/2018, and further detail on POCA 2002, Part 7 can be found in Circulars 29/2008 and 22/2015.

**Conclusions**

29. Banks and other financial institutions must have procedures in place which enable them to deal adequately with any compliance issues which arise. Regulatory requirements should not be used as a *carte blanche* to block accounts and consumers may have to take legal action if they are unjustifiably kept from their money.

30. Policy makers should also think carefully about a regime which allows individuals to be kept from their money without reasonable grounds, explanation or due process. This course of action can be immensely distressing, and have serious financial consequences, for those affected. Our judiciary must guard jealously the limited rights of due process which remain.

*This article is not legal advice, but if you have been affected by the issues in this article please contact me at sam.brodsky@taxbar.com.*



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