**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 2.1.2.6 of the Law of the Republic of Azerbaijan “On Insurance of Deposits” in terms of Articles 47 and 48 of the Law of the Republic of Azerbaijan “On Banks”*

**10 August, 2020 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Mahir Muradov, Isa Najafov and Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk Faraid Aliyev,

in accordance with part IV of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 27.2 and 32 of the Law of the Republic of Azerbaijan “On Constitutional Court” and Article 39 of the Internal Charter of the Constitutional Court of the Republic of Azerbaijan at the request of the Cabinet of Ministers of the Republic of Azerbaijan, examined in via the written procedure of special constitutional proceedings the case on interpretation of Article 2.1.2.6 of the Law of the Republic of Azerbaijan “On insurance of deposits” in terms of Articles 47 and 48 of the Law of the Republic of Azerbaijan “On Banks”.

having heard the report of Judge K.Shafiyev, studied and discussed written judgments of representatives of interested parties - Chairman of the Central Bank of the Republic of Azerbaijan E. Rustamov, Executive Director of the Deposit Insurance Fund T. Piriyev, Head of the Department of Economic and Social Legislation of the Milli Majlis of the Republic of Azerbaijan M. Bazygov and specialist - President of the Association of Banks of Azerbaijan Z. Nuriev, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Cabinet of Ministers of the Republic of Azerbaijan has applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court”) with request for interpretation of Article 2.1.2.6 of the Law of the Republic of Azerbaijan “On insurance of deposits” (hereinafter referred to as the Law “On insurance of deposits”) in connection with consideration as protected deposits of the deposits belonging to the status of non-protected deposits by means of changing the date of involvement of the protected deposits and, the deposits accepted in the period of prohibition of acceptance of deposits from individuals after application of the corrective actions by the Central Bank of the Republic of Azerbaijan (hereinafter referred to as CBA) and the Financial Markets’ Supervision Authority of the Republic of Azerbaijan (hereinafter referred to as FMSA) as well as the deposits belonging to the status of non-protected deposits by means of increasing the amount of the protected deposits and implementation of operations connected to change of the terms of the existing deposits and conclusion of acts.

It is shown in the request that according to the CBA’s letter of April 29, 2020, an insured occurrence happened in the “Atabank” Opened Joint-Stock Company (hereinafter referred to as “Atabank” OJSC), “NBCBank” Opened Joint-Stock Company (hereinafter referred to as “NBCBank” OJSC) and “AGBank” Opened Joint-Stock Company (hereinafter referred to as “AGBank” OJSC) and, basing upon the Decision of the Administrative Colleague of the Baku Court of Appeal of April 30 the “Atabank” OJSC, “NBC Bank” OJSC and “AGBank**”** OJSC were declared as bankrupt and the Deposits Insurance Fund (hereinafter referred to as “the Fund”) was assigned as liquidator of these banks.

During the acceptance of the register of the bank’s liabilities before the depositors implemented for the purpose of payment of compensation to the depositors in connection with the insured occurrence in “Atabank” OJSC it was discovered that although the deposit dossiers upon 283 clients were protected deposits they were wrongly expressed as non-protected ones. Thus, during migration of the “Atabank” OJSC’s branches the migration dates were wrongly expressed instead of the dates shown in the deposit agreements. Subsequently, these deposits were expressed as non-protected deposits in the “register of accounting the obligations of “Atabank” OJSC being in the liquidation process before the depositors”.

The requester also notes that despite of application of the aforesaid corrective actions in “Atabank” OJSC, “NBCBank” OJSC and “AGBank” OJSC, these banks accepted deposits from clients in the period of prohibition of acceptance of term deposits from individuals and, there were discovered the cases of deposits’ belonging to the status of non-protected deposits by means of increasing the amount of the protected deposits and implementation of operations connected to change of the terms of the existing deposits and conclusion of acts.

In the register data submitted to the Fund for the purpose of payment of compensations these deposits with status changed after application of corrective actions were shown as protected deposits.

Regarding the request, the Plenum of Constitutional Court notes the following:

According to Article 12.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), the State’s supreme target is provision of human and civil rights and freedoms and high level of life for the citizens of the Republic of Azerbaijan.

Basing upon the aforesaid Article of the Constitution, the Plenum of Constitutional Court deems as purposeful clarification of some paras of the Law of the Republic of Azerbaijan “On Banks” (hereinafter referred to as the Law “On Banks”) and the Law “On insurance of deposits” for complete and thorough analysis of the issue risen in the request.

The target of establishment of the system of deposits insurance is prevention of the risk of loss of the funds accepted as deposits from individuals in case of the deprivation of solvency by the banks and the local branches of foreign banks as well as ensuring stability and development of the financial and banking system.

In order to provide repayment of the legislative banking deposits, there was accepted the Law “On insurance of deposits” of December 29, 2006 envisaging payment of compensation for deposits in case of insured occurrence. The Deposits Insurance Fund was established upon the Decree by the President of the Republic of Azerbaijan of February 9, 2007 in order to protect the rights and legal interests of the Bank’s depositors, stimulate involvement of the inhabitants’ deposits to the banking system and strengthen the reliance on it and provide activity of the system of mandatory insurance of individuals’ deposits.

According to the decision of the Plenum of Constitutional Court of July 6, 2017 “On verification of conformity of Article 27.3 of the Law of the Republic of Azerbaijan “On insurance of deposits” with the para 1 of Article 13, the paras 1, 2 and 3 of Article 29 and the paras 1 and 3 of Article 149 of the Constitution of the Republic of Azerbaijan”, in case of insured occurrence, payment of compensation upon any insured deposit in the bank shall be considered as neither repayment of the bank deposit nor the Fund’s undertaking the Bank’s obligation. The Fund pays compensation as reimbursement of the possible restrictions directed to prevention of the risk of funds loss. Thus, the Fund’s principal target is not repayment of the deposits as a property but supporting the development of the country’s financial and banking system by means of insuring the depositors’ deposits in the banks and consequently compensating the alleged material and moral damage in a brief time in conformity with the legislation.

The Law “On insurance of deposits” determines the orders of establishment and activity of the system of collective mandatory insurance of individuals’ deposits in the banks functioning in the Republic of Azerbaijan including payment of compensations for deposits.

According to Article 2.1.2.6 of the aforesaid Law, the deposits accepted with an annual interest rate beyond the boundary determined in conformity with Article 8.1.20 of the Law on the day of involvement belong to non-protected deposits. The Article 8.1.20 of the Law shows that the Council of Trustees of the Fund fixes the upper boundary of the annual interest rate upon the protected deposits coordinating it with FMSA and CBA.

According to Article 47.1 of the Law “On Banks”, in case of discovery of violation of the prudential normatives and requirements by the Bank, implementation of the Bank’s activity with violation of this Law as well as the Law of the Republic of Azerbaijan “On fighting against legalization of the criminally acquired funds or other property and financing of terrorism” and the normative acts of FMSA and, violation of the restrictions stipulated in the licenses and permissions issued by FMSA or, any grounds causing such violations, FMSA is entitled to apply influential actions against the Bank.

According to Article 47.4 of the aforesaid Law, the FMSA’s disposal envisaging mandatory fulfillment by bank contains written recommendations regarding the terms of implementation of the corrective actions shown in the Article 48 of the present Law and removal of the deficiencies. In case of application of the corrective actions directed to improvement of bank’s financial state, the bank shall submit to FMSA within two weeks the action plan in conformity with the disposal.

“Corrective actions” envisage removal of errors. Corrective actions are a package of measurements directed to the bank’s restructuring and rehabilitation and, their main target is improvement of the banks’ financial state. Thus, the corrective actions implemented by FMSA in relation with banks are directed to principal targets like maintenance of monetary and financial stability in the banks, provision of rationality of the banking system and protection of depositors’ interests.

According to Article 48.1 of the Law “On Banks”, in order to achieve the aforesaid targets, FMSA may apply some corrective actions with regard to bank:

- implementation of banking operations with persons connected to bank and conclusion of acts;

- acceptance of deposits;

- provision of financial privileges, etc.

Besides, it is noticeable that Articles 13.2, 14.3, 21.4.4, 21.6, 22.3.2, 27.13 and 30.2 of the Law “On insurance of deposits” also envisage the FMSA’s authority of stopping the participant bank’s right of involving deposits. Hereby, the main target of the legislation is the bank’s avoiding aquisition of new obligations or increase of the amount of the existing obligations.

According to the legislative requirement, the FMSA’s function is not completed with the corrective action applied to bank and, it should control maintenance of this action by the bank.

The Plenum of Constitutional Court noted in the decision of September 5, 2018 “On interpretation of Article 2.1.2.6 of the Law of the Republic of Azerbaijan “On insurance of deposits” that according to Article 43 of the Law “On Banks”, banks have to develop reports expressing their banking activities and the financial state including the annual financial reports and submit them to FMSA and CBA. According to Article 44 of this Law, the bank’s financial activity is subject to annual inspection by external auditor. The external auditor develops a report and conclusion regarding the issue whether the bank’s financial report creates complete and objective imagination regarding its financial state and notifies the administrator’s or any bank employee’s known illegal actions causing significant damage to Bank as well as the deficiencies in management or current activity.

 According to the Article 21.5 of the Law “On insurance of deposits”, while controlling the participant banks, FMSA checks calculation of the insurance fees paid by them to the Fund and state of implementation of the depositors’ generalized accounting and, in case of discovery of failure of the participant banks’ obligations before the Fund within this Law, recommends the Bank to remove the violations and pay the precisely calculated insurance fees and, appropriately notifies the Fund.

The Plenum of Constitutional Court notes that the corrective actions applied to banks are subject to disclosure to community and, the depositors have to be able to acquire information on these actions.

According to Article 30.2 of the Law “On insurance of deposits”, if FMSA stops the participant bank’s right of involving deposits from individuals, it shall publish an announcement in mass-media on it not later than the business day following the day of taking appropriate decision and, publish a notification within 3 business days.

According to Article 5.3 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), the subject of the civil law relations are liable to fairly implement own rights and obligations.

Providing freedom of agreement to the participants of civil turnover, the civil legislation is basing upon assumption of their fairness in conformity with the general legal principles (decision of the Plenum of Constitutional Court of March 12, 2012 “On interpretation of Article 14 of the Tax Code of the Republic of Azerbaijan and Article 390 of the Civil Code of the Republic of Azerbaijan”).

The Plenum of Constitutional Court notes that if the banks continue accepting individuals’ deposits put in banks or bank’s branches subsequently to failure of maintenance of the corrective actions violating the requirements of Articles 47 and 48 of the Law “On Banks”, it should not negatively impact on the quite fair depositors’ interests and legal expectations protected with the Constitution and legislation.

Considering the above-mentioned, the Plenum of Constitutional Court basing upon the existing legislation considers that in the present situation, the deposits accepted after application of the corrective action, those with increased amount and changed terms shall be deemed as protected deposits.

Another issue included to request is connected with expression of the migration dates instead of the dates of conclusion of deposit agreements.

In this regard, the Plenum of Constitutional Court notes that everyone is free in concluding an agreement and the freedom of agreement is one of the main principles of the civil legislation (Article 6 of the Civil Code). This principle allows the subjects of civil law freely conclude agreement considering their interests upon own assumptions and desires regardless of anybody’s will.

The freedom of agreement deemed as one of the fundamental principles of the civil legislation and the legal equality of the parties of agreement does not exclude provision of certain guarantees to the economically weak party (depositor) and allows provide real legal equality of the parties of agreement.

The relations between bank and depositors are regulated upon the norms of Article 51 of the Civil Code and the Law “On Banks”.

According to Article 944.1 of the Civil Code, within the frames of a bank deposit agreement one of the parties (bank) undertakes acceptance of the funds (deposit) from other party (depositor) or sent for other party (depositor) and repayment of the deposit to the depositor in the order and terms envisaged in the agreement with accrued interests.

A bank deposit agreement shall be concluded in written form. The written form of the bank deposit agreement shall be deemed as maintained if the deposit settlement is certified basing upon the banking book, the banking or deposit certificate or another document issued by the bank to depositor. Hereby, these documents should comply with the legislative requirements and banking rules as well as the business turnover traditions applied in the banking practice (Article 946.1 of the Civil Code).

Precise clarification of the moment of conclusion of agreement has great significance for accurate regulation of the civil right relations of the parties of the agreement. The parties’ concrete rights and obligations occur namely since the moment of conclusion of agreement. The agreement comes to force since the moment of conclusion and gets deemed as mandatory for the parties.

The bank deposit agreement shall be deemed as concluded since the depositor’s giving the deposit to the bank and, the depositor gets entitled to acquire interests for the deposit. The bank determines the interest rates upon the deposit operation and the amount of interest, as a rule, is shown in the bank deposit agreement. Thus, according to Article 948.1 of the Civil Code, the bank pays to the depositor the interests in amount stipulated in the bank deposit agreement.

One of the bank’s obligations within the bank deposit agreement is repayment of deposits. According to Article 950.1 of the Civil Code, banks shall provide repayment of individuals’ deposits by means of mandatory insurance and, in conformity with the legislation, another way.

As we see from the meaning of the aforesaid norms, conclusion of deposit agreement requires signing of this agreement by individual and the bank’s authorized representative (in case of the bank’s branch, the branch manager signs basing upon power of attorney issued by the bank). The bank’s obligation of repaying the deposit in conformity with Article 947.2 of the Civil Code occurs since the moment of preparation of the income cheque regarding acceptance of deposit from the individual and its certification with the bank’s seal.

It is noticeable that the parties in the contractual relations have equal rights and obligations and act basing upon balanced mutual interest. Since the moment of the agreement’s coming to force, it becomes mandatory for the parties and its terms. Simultaneously, the civil legislation envisages possibility of change and liquidation of the agreement within the validity term. The basements for change or liquidation of agreement are regulated in conformity with Articles 421-424 of the Civil Code. According to Article 421.1 of the aforesaid Code, an agreement may be changed or liquidated upon the parties’ consent, unless otherwise is stipulated in the Code or agreement.

Settlement of the deposits provided by individuals to banks or bank’s branch to the account opened for the individual and insertion into the bank’s automatized banking information system and the bank’s balance is not the obligation of individuals but of the banks and, the bank is not entitled to transfer the responsibility for violation of own obligation to individuals and reject repayment of the deposits.

Reference to the date of migration (transfer to another bank or branch) instead of the date of the first deposit agreement subsequently to violation of the banking rules during acceptance of deposit by the bank’s or branch’s officer and misuse of own authorities, failure of inserting the deposit to the bank’s balance and noting the individual’s banking account in the deposit agreement and belonging of the banking account shown in the income cheque to another person certifies that the officers of the bank or the bank’s branch failed due fulfillment of own obligations and, the bank is responsible for violation of own obligations in conformity with Article 1.0.1. of the Law “On Banks”.

According to the Article 945.2 of the Civil Code, in case of acceptance of deposit from individual by any unauthorized person or, by means of violation of the legislative or due banking rules, the depositor is entitled to require repayment of the deposit and payment of the accrued interests as well as reimbursement of the damages caused to the depositor.

Taking into consideration the above-mentioned, the Plenum of Constitutional Court considers that according to the above-mentioned norms of the civil legislation, the moment of conclusion of a deposit agreement shall not be deemed as the date of migration of the deposit.

Basing upon the above-mentioned, the Plenum of Constitutional Court makes the following conclusions:

- According to Article 12 of the Constitution, the deposits accepted, increased in amount and changed in terms after application of corrective acts basing upon the para 2.1.2.6 of the Law “On insurance of deposits” as well as the Articles 47 and 48 of the Law “On Banks” shall be considered as protected deposits;

- According to Article 944.1 of the Civil Code, a bank deposit agreement is considered concluded since the moment of the deposit’s being given to the bank by the depositor and shall be deemed as initial (principal) agreement. The date of migration of the deposit agreement shall not be considered the date of conclusion of the bank deposit agreement.

Being guided by para IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to Article 12 of the Constitution of the Republic of Azerbaijan, the deposits accepted, increased in amount and changed in terms after application of corrective acts basing upon the para 2.1.2.6 of the Law of the Republic of Azerbaijan “On insurance of deposits” as well as the Articles 47 and 48 of the Law of the Republic of Azerbaijan «On Banks” shall be considered as protected deposits.

2. According to Article 944.1 of the Civil Code of the Republic of Azerbaijan, a bank deposit agreement is considered concluded since the moment of the deposit’s being given to the bank by the depositor and shall be deemed as initial (principal) agreement. The date of migration of the deposit agreement shall not be considered the date of conclusion of the bank deposit agreement.

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

4. 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”.

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