

## Nature and characteristics of Bank Deposits and their function

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- **Introduction:** The nature and the function of Bank deposits became an attractive issue, due to the recent decisions, adopted by Eurogroup and implemented in Cyprus, regarding the bail in (hair cut) of the deposits, kept in some Cypriot Banks, located in Cyprus. These decisions have broken the trust of the customers, in the efficiency of the European guarantee system, and in the safety of the deposits. Additionally the case for the deposits, is constantly gaining interest, since becoming in Greece a main tool for the collection of debts (especially by the state), or a mechanism for implementing the anti laundering money provisions.
- **Definition:** A deposit, is a contract between the customer and the Bank. The Bank Institutions are solely entitled to conclude deposit contracts, as provided by the Law 3601/2007 (Art. 4) *“individuals or legal entities which are not founded as Bank Institutions are not permitted to accept, by the customers, deposits, or any other capital”* (and previously by the Art. 10 of the law 5076/1931) and supplementary by Art 2 and 3 of the decree 17/1923, as well by the law 5638/1932 and the Introduction Law to the Civil Code, Art. 117. The most typical definition of the bank deposits is included in the European Line, and adopted in Greece by the Law 2832/2000: *“deposit means any credit balance which results from the funds left in an account or from temporary situations deriving from normal banking transactions and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.*

**The substantial and minimum elements of the bank deposit** It is difficult to define in a uniform way the legal nature and the function of the Bank deposits, or bank accounts. But there are indeed some main elements, which are common in all kinds of bank accounts. And these are: The transfer of a quantity of money, by the customer, to the bank. Further the protection of the customer, through the banking secrecy provisions, and the law for the personal data and third the right of the customer to demand the return, or the submission of a detailed analysis by the bank. But it cannot be argued that in all kinds of bank accounts the customer enjoys the protection of the consumer, as provided in Greece by the law 2251/1994, or that all bank accounts are

protected. Another common element is that only Bank Institutions are entitled to accept bank deposits. The "deposit" itself is a liability owed by the bank to the depositor (the person or entity that made the deposit), and refers to this obligation of the Bank.

- **The main groups and the function of the bank deposits.** The primary and minimum context for having a deposit is that the account holder deposits a quantity of money and has a tantamount claim against the bank for its partial, or one off return. The deposits are then recorded as a liability in the negative of the balance sheet of the bank. A deposit is created in a way that is similar to the loan and it is subject only on the real transfer (in rem) of a money quantity, without any other formalities, i.e. the issuance of the saving book. The issuance of any documentation does not serve constitutive purpose, but just provides proof for the contract. The primary form of the bank account, i.e. a contract, which includes just the transfer of the money, is either of limited or non limited duration. The prevalent legal theory and the jurisprudence on deposits consider the initial provision of Art. 830 of the Greek Civil Code applicable, which provides that *"the deposit of money or any other replacable items ..... is in doubt a loan agreement, if the bank is entitled to use them. Regarding the time and the place of the return, if not otherwise agreed, the provisions of the consignement are applied"*. So far they consider the bank accounts to be a kind of a non genuine consignment, since the Bank accepts a specific quantity of money, obtains the ownership of it and is obligated to return the amount deposited, plus the agreed interest on it. Some, more recent court decisions, consider that the deposits are submitted to both legal provisions. Not only for the provisions regarding non genuine consignment but the provisions regulating loan contracts, since the bank obtains the ownership of the amount. Only this interpretation enables the application of Art. 806, and Art. 827 for the return of the amount, on first demand (see Supreme Court 356/2013, 1402/2012, Supreme Court 844/2006). The Bank, which declines the return of the deposit is not submitted to the sanctions envisioned in tort provisions, but rather the sanctions available in cases of breaches of a contractual obligations (see Supreme Court 356/2013, Supreme Court 357/2013, Supr. Court 1402/2012, 1625/2012, Supreme Court 378/2011, Appeal Court of Athens 5020/2010). It is itself the wording of Art. 830 of Civil Code, which enables the application of both legal provisions. The deposit book is not constitutive of the claim, but a tool for the evidence of the contract and the transactions, included in it. During these transactions, the bank bears the responsibility of Art. 3, of the decree 17/1923, i.e. its liability is limited in cases of fraud or heavy

negligence by its employees, for instance, because they have omitted to certify the identity of the person (see Supreme Court 844/2006, Appeal Court of Athens 690/2006, Appeal Court of Larissa 917/2006, Supreme Court 93/2005). Part of the jurisprudence underlines the main character of the non regular consignment, the purpose being the safe surveillance of the amount, even if the parties agree on a certain interest amount (see Supreme Court 1001/2012, see also Supreme Court 844/2006). The mutual obligations of the contracting parties, vary, according to forthcoming events, which may regard the status of the Credit Institution, or the status of the customer. Thus the bank becomes the owner of the amount, in case of fraud, the bank, is obligated to compensate the customer and not the perpetrator of the fraud, i.e. the customer has a direct claim against the bank, an element, which occurs by the nature of the deposit contract as a non regular consignment (see Supreme Court 378/2011, Appeal Court of Dodecanese 117/2012, Appeal Court of Thessaloniki 74/2011, Appeal Court of Piraeus 83/2011, Appeal Court of Thessaloniki 1877/2010. Supreme Court 929/2009, First Instance Court of Athens 4408/2007).

**Issues about the nature of the bank deposits.** The double definition, included already in Art. 830 of the Civil Code justifies the interpretation issues that have arisen as well as the dispute about the legal nature of the deposit. Is the bank deposit a type of loan? Is that solely a non regular consignment?. The recent legal framework regarding the protection of the deposits up to the amount of 100.000€, in European level, gives priority to the treatment of the deposit as a special contract, which includes both the elements of loan, regarding the obligation of the bank to return not only the amount of the deposit but the agreed interest as well. On the other hand the main characteristic of the contract is the obligation of the bank to return the equal quantity of the deposited amounts. The core of the contract is this latter obligation, and not the payment of the agreed interest. That seems to be the ratio of the law as well. This legal approach enhances also the application of the consumer protection to the bank account holders. It is true, that through the deposits the Banks gain liquidity lending all or most of the money out to other clients,-a aprocess known as [fractional-reserve banking](#), succeeding in this way to pay to their customers the interest on deposits. That should mean that the customers lend the bank and the bank lends other persons, thus there is always the provision of the appropriate range between the loan portofolio (positive part of the balance sheet) and the deposits to be returned (negative part of the balance sheet). The argument of the most modern opinion considers the deposit to be a loan contract, where the lender is the customer, and the lending party (borrower)

the bank, a consideration, is strengthened by the fact, that each Bank has to include its deposits in the negative of the balance sheet. The Bank of Greece regulatory liquidity ratios which currently apply to the Greek banking system are the "Liquid Assets Ratio" and "Maturity Mismatch Ratio". These ratios determine the required short term liquidity and the long term funding position of a bank, with ratio limits standing at +20% and -20% respectively.

Of course under distressed market conditions the above mentioned limits are not achievable and realistic. This is particularly so, mainly because of the outflow of deposits from the Greek Banking Systems as well as the fact that facilities provided by the Eurosystem for the provision of liquidity to banks, are not taken into consideration in the calculation of the ratios.

Two new global liquidity ratios, namely LCR (Liquidity Coverage Ratio) and NSFR (Net Stable Funding Ratio) are the new measures that have been introduced through the Basel III framework. They are currently being calculated and reported for information purposes, but will come into force, through respective regulatory limits, that will be applied gradually, starting in January 2016.

Personally I see no practical result to the one or the other interpretation. The nature has to be definite in reference to the main purpose of the contract. And that is the obligation of the bank to ensure the safekeeping and the return of the funds, and not the willingness of the party to gain a profit, which would also reverse the bank account to an investment, if the tax interest rate is extremely high.

**Special types of deposits: a) joint accounts.** The joint accounts are regulated specially by the provisions of art. 1 and 2 of the law 5638/1932, as amended by the law 951/1971, and additionally by the special decree 17/1923 (Art. 2).. If that is the case we have to make the difference between the relationship of both beneficiaries against the bank (they are regarded as one joint beneficiary) and the internal relationship between them. The internal cause of the joint accounts doesn't affect their relationship against the bank (Supreme Court 1001/2012, Supreme Court 378/2011), and in doubt each beneficiary is entitled on the half of the amount (Supreme Court 1800/2012). According to the provision of Art. 4, against the creditor it is supposed that all the account holders, are equal beneficiaries. In cases where one account holder withdraws the entirety of the accounts' available funds, without the other account holder's permission or knowledge, criminal charges for embezzlement cannot be filed by the other party (Supreme Court

1345/1996). An interesting legal question arises in the case when a beneficiary's deposits are transferred to a "shadow" account, i.e. an account kept in his name but unbeknownst to him. Such cases facilitate the embezzlement as the perpetrator may withdraw funds at his discretion while simultaneously avoiding detection by the central management as it appears that the beneficiary is in fact withdrawing from his own funds. The issue here is the relevant time the fraud/embezzlement has been committed. Was it at the time when the beneficiary had an account opened in his name without his permission or was it at the actual time of the withdrawal when he lost all possibility of claiming the monies? B) **Term deposits.** Another form of deposit is the term deposit (Monetary Committee Decisions 1138/1960, 1218/1961, as amended Decree BoG 1181/1987) . Essentially the term deposits work in the same way as a regular deposit with the fundamental difference that the beneficiary agrees not to claim the funds for a certain period of time. Precisely because he is deprived of the ready availability of his money, the depositor is rewarded with a higher interest (usually 3-3,5% higher than the standard savings account interest) as the Bank can rely on the fact that it can use the funds for the agreed period of time. Interest rates on term deposits are freely negotiated between the Bank and the depositor and depend on a variety of factors (e.g the Banks' access to liquidity).

C) Deposits in foreign currency (e.g. GBP, JPY, USD, CHF). Permissible under Greek Legislation (Presidential Decree number 96/1993, law 2076/1992, decrees number 2199/1993, 2344/1994 and 2345/1994, and more recently Decree of the BoG 2416/28.7.1997 and order Number 92/16.1.2001). They are governed by the same legislation, regarding the legal framework, and additionally and overall by the Greek Civil Code (art. 291-292) that permits foreign currency transactions

- **Events, which may affect the claim of the customer for the return of money.Reasons, regarding the Credit Institution.** The insolvency proceedings, against Credit Institution affect the normal return process of the deposits. In Greece the law 3061/2012, as amended, foresees as an insolvency measure the transfer of separate or specific assets from the one Credit Institution to another. Recently and during the crisis BoG has applied in more cases this law provision and has ordered after short, but transparent proceedings the transfer of loan portfolio and the deposits to a third Institution, or the transfer of the license to a new one (bridge Bank), according to Art. 63E. These insolvency measures, lead the transfer of the deposits to another Bank Institution, which replaces the initial one and in this way the activation of the Protection of the Deposits Framework by the Fund for the Protection of Deposits and Investments is prevented. If

the insolvency measures fail (i.e the transfer of assets or the creation of a bridge bank), then the license of the Bank Institution is revoked, and the Institution proceeds with special liquidation measures. The bank deposits in such a case, are partially protected up to the amount of 100.000 Euro (a. 9 Law 3746/2009), by the Fund for the Protection of Deposits and Investments and partially are to be paid by the Bank Institution itself, but the range of the account holders, is low. In reality the account holders have a small chance of having their deposits fully repaid in case of the liquidation of the Bank Institution. **Offset with other mature claims of the Bank against the account holder.** The Bank is the debtor, against the customer regarding the deposit. If in turn the Bank has a claim against the account holder, even if there is no pledge, the Bank is entitled either to offset the deposit to eventual obligations of the customer, or if the claim is not mature to abstain temporary from the returning the funds (retention right) These legal possibilities are based on Art. 440 and 325 of the Greek Civil Code. **Reasons regarding the person of the customer. Prescription.** The non active accounts, after the completion of 20 years, become an ownership of the Greek State (see art 3, of the law 1995/1942 and Appeal Court of Thessaloniki 1083/2010), a provision compatible to Art. 6 of the First Protocol to the Human Rights Convention (see Supreme Court 50/2009)

- **Heritage. The Bank** account is an asset and can be, after the death of the initial beneficiary transferred to his beneficiaries, provided that they prove their legitimate claim on the heritage in general, or on the specific asset (art. 2,3 Law 5638/1932 and art. 117 Int.Law to the Civil Code).

**The seizure of the bank accounts.** Bank accounts are covered by the bank secrecy, as provided in the law 1059/1971, which forbids the provision of any information about the bank contracts in general (including loans and bank deposits). For a very long time the Greek Courts (see mainly Supreme Court in Plenum), applied the bank secrecy restrictions and considered, that bank accounts cannot be seized in the hand of the bank, as third party, because, after the seizure the bank has to deliver information, about the existence and the amount of the account. Such a legal declaration should be considered to be in breach of the bank secrecy. Some special provisions referred at that time in Art. 87 -92 of the special Law 17/1923. In the year 2001 and after an extended reform of the Civil Procedure Law, the seizure of the Bank accounts was permitted (Law 2915/2001, Art. 24). This new provision has enhanced the effectiveness of the enforcement of court decisions, but has on the other hand, limited the trust to the bank accounts. Nowadays the seizure of bank accounts is the most favored tool in the hands of debt collections by private persons and

the State as well (see mainly Art. 982 of the Greek Civil Procedure Code). The procedure is very short and the creditor can succeed in obtaining the available funds in less than a month, unless either the bank or the debtor contests the seizure. If the bank account is seized the amount is transferred ex lege to the creditor and upon the payment the bank is released against the initial beneficiary. The deposit of the customer can be seized in the hands of the Bank, which is considered to be a third party. Taking into account, that according to the law, the assets of the debtor can be seized at the hand of a third party, the opinion, which considers the deposit to be a special contract seems to be correct. The nature of the deposit as an asset explains the imposition of taxes on the amount of the payable interests on an annual basis.

The allowance of seizure on the deposits, includes the deposits to the assets of the customer. Since he is entitled to ask for the return of the initial amount it is not considered be an investment, as each investment includes the element of uncertainty and the willingness of the investor to proceed with it, even if he suffers a loss. That is not the case in the deposits.

**The bank accounts as an instrument of payments.** A bank account can be also used as a tool of payment, or for other public interest. For instance a bank account held by the company and used for the ordinary payment of salaries, or for a consumer for the payment of its monthly bill and other invoices. In such the case the bank account is accompanied by a continuous mandate for the benefit of a third party.

**Bank secrecy and seizures in the context of criminal investigations.** The bank accounts are submitted to investigations ordered and conducted by the competent authorities of the State, which is allowed to seek information from the banks for the accounts of the beneficiary and to seize, also, by e-media the deposits (art. 260 Code Criminal Procedure). Within that context, the authorities may request and review all relevant documentation in order to track the asset in question.

**Anti laundering money restrictions and bank accounts** (Law 3691/2008 as amended). The provisions of this specific legislation (a. 48).may affect both aspects of the deposit First of all the freedom of the Parties, i.e. the bank and its client to open an account, and the free use of the asset. Two bodies are competent to seize, or to restrict the free movements of the accounts. The special independent Authority, as Supervised by a Prosecutor and the Court, during the investigation period of a penal activity. As long as these restrictions exist the beneficiary has no claim against the bank for the free withdrawal on his accounts and halts his claim against the Bank. Similarly, the restrictions imposed are not seen as seizure, but as freezing by the state, of the 50% of the available accounts of its debtors.

**Account holders as consumers.** The consideration, that the main element of the bank contract is to grant a loan by the holder to the bank, limits the protection of the holder as consumer. But the right approach is that the account holder is indeed a consumer and so far is protected by the special provisions of the law (2251/1994) and is also protected by all these procedural provisions, which protect his person (Decree of BoG 2501/2002). We have a number of court decisions, which regard, that even the account holder is the lending party, nevertheless since he has to accept the terms as drafted and imposed by the bank, he should have the protection afforded to the consumer, against unjustified debits of expenses, for the service of the accounts, or of a minimum required. That regards mainly, the amount and the fees for the service of the payment, unless the parties have concluded in advance a service agreement, which justifies all these costs. Even the charges imposed on the account, when the transfer of the money is implemented by a third party is considered to be an abuse of right. Nevertheless, for expenses reasons the decree of Bank of Greece, accepts the payment of fees, if the consumer **uses more than 5 times the physical service of the bank at the cashier.**

We should also note the difference between the account and the safe boxes, kept at the banks. The contract is considered to be a lease contract. The difference is that the bank is not aware of the items, included in it and thus the customer can not prove that these items, are included in it. Funds that may be deposited in safe boxes do not belong to the bank but to the person/entity leasing the safety box.

**Accounts for payments.** A special kind of accounts it this one, which enables the customer a) to proceed with withdraws on a regular basis, or to use the services of the bank, as payment instrument (see 234/2006) and Law **3862/2010**), or the overdraft (Ministerial Decree Z1-699/2010). These are not real types of deposits, and they have the character of a special contract. The treatment of these accounts is of importance, in cases of seizure, or other kind of state restrictions, since mostly they are accounts, which serve the interest of a third party. In this last case, potential disputes between the parties (i.e. Bank and the consumer) have to be solved on the normal court proceedings.

**Accounts created by loans.** The account, which is attached to another loan contract. That is the case in the open account and the lending contracts. In Greece we have the special loan form of the open credit contract (Civil Code art. 873,874 and IntrLaw to the Civil Code art 112). The parties agree at the beginning a maximum of the available funds, that the bank, is willing or is committed to lend, and the customer is intending to use. The debits and the credits in this account, may be carried through a deposit account, which has a secondary function, because the main contract of the parties is to conclude a loan contract and not an account. These kind of accounts



may be crucial, regarding the provisions of the anti launder money legislation, thus the bank, who has credited the accounts of the customer with the amount of a loan, can prove the sources of the funding. In this latter case the customer cannot make use of consumer protection legislation, because the account has but a secondary function. If the Bank knows that the account of the debtor is credited only with these particular funds, coming from the loan agreement then it is obliged to set off its claims against the amount of the deposit, and the rights of the customer, are limited by the similar rights of the bank.

**Accounts as pledge** The customer can also open an account and grant a pledge on it. If that is the case, then he can not demand the return of the funds. This form of contract is not governed by Art. 827 and 806 of the Civil Code, but it is considered to be a secondary contract, related to the main obligation of the party against the Bank. The issue in such a case, is whether this is considered to be an asset of the customer and is subjected to a line of restrictions as imposed by a third creditor, or by the state. The asset is not subjected to the free disposition of the customer. The account, which is pledged as safety of a loan contract, is called a cash collateral. The customer remains the owner of the account, but he is limited to make use of the money, as long as it is pledged as safety of a loan agreement. This kind of pledge, is simultaneously provided, by the Civil Code, as well be the special law 17/1923. If that is the case we have too separate contracts, which are connected. As security the cash collateral follows the treatment of the secured loan contract, and is ex lege transferred with it (see Art. 458 of the Greek Civil Code). In the praxis the cash collaterals have the absolute priority against any other kind of pledge, hence the bank becomes the beneficiary of it. In cases of loan transfer the initial beneficiary, who is at the same time the beneficiary of the deposit can offset the cash to the claim and no other creditor is entitled to seize the asset (account). In case of insolvency of the bank institution the two varying contracts, between the same persons can be offset. The anti money laundering restrictions cannot limit the guarantees against set up in favor bank, unless the authorities can prove, that it was created by the illegally obtained money.

#### Conclusive Remarks

It is obvious, mainly for the Greek participants of this session, that my report refers to well known issues. But I just tried to file the variety of the Bank deposits. Bank deposits are not at all, as they considered to be an untouchable value. They are running all the kinds of risks: The risk of the national economy (any liquidity restriction affect them), the risk of the Bank viability , the risk of the creditor, the risk of the penal punishment. All these risks may affect our trust, but are normal. Because bank deposits are just assets.