

Questions regarding the frozen foreign currency savings concerning the Case No. CH-98-420

LEGAL QUESTIONS

The Chamber:

What happened to the claims against the bank in the Federation and against the Federation?

1. Some of these questions have their origin in the fact that in most of the cases before the Chamber the applicants opened savings accounts with branch offices located in what is now the Republika Srpska of banks headquartered in Sarajevo. One applicant, for example, deposited funds in two foreign currency savings accounts with the Gradiška branch office of Privredna Banka d.d. Sarajevo between 1984 and 1991. In the Republika Srpska, Privredna Banka d.d. Sarajevo no longer exists, and it appears that several banks have succeeded it: pre-war accounts opened with the Bijeljina branch office of Privredna Banka d.d. Sarajevo are now with Semberska Banka (headquartered in Bijeljina); pre-war accounts opened with the Zvornik branch office of Privredna Banka d.d. Sarajevo are now with the Zvornik branch office of Invest Banka. Apparently, the debtor bank against which the applicants have their claim for the money deposited has changed, but the exact legal basis for this may be considered less clear.

OHR:

Before the war there were not that many banks originally from Bosnia and Herzegovina, most of the banks operating in Bosnia and Herzegovina were banks from other Republics of the former SFRY such as: Jugobanka – Belgrade, Ljubljanska banka – Ljubljana, Investa bank – Belgrade etc.

Following the dissolution of SFRY most of the branch offices in order to continue to operate in a respective Republics were registered or reregistered as new banks in respective registration courts. These courts as well as some other institutions such as National Bank and Institute for Statistics keep records on these changes.

The same happened in all republics but in BH it was complicated because of the 1992 events and the Republika Srpska refusal to be a part of the newly established State, Republic of Bosnia and Herzegovina. The Republika Srpska enacted a number of laws, which enabled it to establish an independent banking system in a part of the territory of SR Bosnia and Herzegovina, which is recognized as the Republika Srpska, one of the two Entities of Bosnia and Herzegovina.

- 1. Law on National Bank of the Serb Republic of Bosnia and Herzegovina (Official Gazette of Serb People in Bosnia and Herzegovina No. 4/92 of 23 March 1992), which was superseded by*
- 2. Law on National Bank (Official Gazette of the RS No. 15/92 of 29 September 1992), which was amended by*
- 3. Law on Amendments of the Law on National Bank (Official Gazette of the RS No. 4/93 of 28 April 1993),*
- 4. Law on Banking and other Financial Organizations (Official Gazette of the RS No. 17/92 of 9 November 1992), which was superseded by a new*
- 5. Law on Banking and other Financial Organizations (Official Gazette of the RS No. 8/94 of 20 May 1994), then again a new*
- 6. Law on Banking and other Financial Organization (Official Gazette of the RS No. 15/96 of 8 July 1996),*
- 7. The Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina, issued by the High Representative on 22 July 1998;*
- 8. Law on Banks (Official Gazette of the RS No. 18/99 of 16 July 1999);*

These laws were actually the legal framework that recognized and established banking system of the Republika Srpska independently of banks in the rest of Bosnia and Herzegovina. We assume that by registering, prior to the

privatization, as a new legal entity, a new bank undertook as a legal successor all rights and obligations (liabilities) of its predecessor, the former branch office, but this should be checked on a case-to-case basis.

The Chamber:

2. The Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina, issued by the High Representative on 22 July 1998, and later adopted by the Assembly of Bosnia and Herzegovina, appears to be relevant to the issue of what bank the applicants have a claim against. It provides as follows:

Article 2, paragraph 1:

“In accordance with the {General Framework Agreement}, this law expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territory....

Article 3, paragraph 2:

“The laws of the privatizing Entity will cover only those assets and related liabilities located on its territory.

Article 4, paragraph 2:

“Claims against enterprises and banks to be privatized shall be deemed as a liability of the privatizing Entity.”

3. The following questions arise:

- Are these provisions sufficient to clarify why the applicant described in paragraph 1 above no longer has a claim against Privredna Banka d.d. Sarajevo (or its successor in the Federation of BiH)?

OHR:

As it was pointed out in the answer to the previous question, the branch office of Privredna banka d.d. Sarajevo in which the applicant had her account does not exist as such anymore, but that bank became a new bank that apparently undertook liabilities of its predecessor in accordance with relevant legislation.

The preamble of the Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina, in its relevant part, reads as follows:

*«Therefore, the Parliamentary Assembly of Bosnia and Herzegovina passes this Law **expressly recognizing the right of the Entities to privatize non-privately owned enterprises and banks located on their territories** and to receive the proceeds therefore according to legislation adopted by their respective Parliaments.*

The Chamber:

- Are these provisions sufficient to clarify why the same applicant never had a claim against the Federation of BiH, although she opened a savings account with the same legal entity (bank) as applicants who now have a “Federation foreign currency savings account”?

OHR:

*It seems that the law is quite clear, Article 2 para 2, «Claims against enterprises and banks to be privatized shall be deemed as a liability of the privatizing Entity”, read together with Article 3, para 2, clearly established liability of the Entity in the **territory of which the respective bank is physically located**.*

The Chamber:

II. Do the applicants have a claim against the State of Bosnia and Herzegovina?

4. Article 9 of the Decree with Force of Law on Foreign Exchange Transactions (OG RBiH no. 2/92) provides, in relevant part:

“The foreign currency on foreign currency savings accounts and foreign currency savings deposits is guaranteed by the Republic.”

5. A Decision on Aims and Objectives of the Monetary Credit Policy, promulgated on 9 April 1995 (OG RBiH no. 11/95), provides, in relevant part:

“Foreign currency savings of individuals deposited with the National Bank of Yugoslavia shall be permanently resolved by the enactment of a law on the public debt of the Republic by the end of the first half of the year 1995.”

OHR:

Law on National Bank (Official Gazette of the RS No. 15/92 of 29 September 1992), which was amended by Law on Amendments to the Law on National Bank (Official Gazette of the RS No. 4/93 of 28 April 1993), envisaged the following:

Article 84b

“The National Bank of Republika Srpska shall guarantee citizens’ savings deposits and current accounts with banks and post-office savings banks when the banks apply the statutory interest rates and other statutory requirements.”

The above Article does not make distinction between different types of accounts, but sets guarantee of the National Bank of the RS for all of them.

Article 4 of the same Law envisaged the following:

Article 4

“Republika Srpska is guarantee for the obligations of the National Bank.”

The Chamber:

6. In the *Poropat & Others* decision, the Chamber declared the applications admissible against Bosnia and Herzegovina reasoning along the following lines:

“(i) Responsibility of Bosnia and Herzegovina

“141. The Chamber recalls that, pursuant to Article I of the Constitution, Bosnia and Herzegovina has continued its legal existence under international law as a state and has thus inherited the status of the former Republic of Bosnia and Herzegovina. It is in this capacity that Bosnia and Herzegovina takes part in the negotiations regarding the succession to the assets of the SFRY. However, this status alone cannot be understood as creating a responsibility for the former internal obligations of the SFRY, including those stemming from the depositing of foreign currency with the National Bank of Yugoslavia and the guarantees afforded by the SFRY with respect to the savings.

“142. However, the Republic of Bosnia and Herzegovina adopted laws and regulations addressing the issue of foreign currency savings (see paragraphs 88-91 above). Article 9 of the 1992 Decree provided that the Republic guaranteed for foreign currency savings, and Article 12 of the 1994 Decree stated that people could use their savings freely. Noting that Article 144 of the 1992 Decree specified that the reimbursement of individuals’ foreign currency savings that had been deposited with the National Bank of Yugoslavia was to be determined by separate regulation, the Chamber finds it established that the express guarantee and the permission to use savings freely did not apply to the old foreign currency savings but only to those “new” savings that people had started to deposit at the time when the legislation of the Republic was enacted. Nevertheless, by reserving the settlement of the old foreign currency savings for separate regulation, the Republic implicitly recognized responsibility for these savings. The 1995 and 1996 Decisions not only reiterated this implicit recognition but specifically stated

that the issue of the old savings was to be resolved by the enactment of a state law on public debt or in another way within the overall consolidation of the public debt of the state. In this connection, the Chamber recalls that, under Article III(1)(d) of the Constitution, the responsibility for monetary policy rests with the institutions of Bosnia and Herzegovina. As the 1995 Decision concerns issues relating to the monetary policy, it remained in effect as the law of Bosnia and Herzegovina according to the transitional arrangements contained in Annex II to the Constitution. The 1996 Decision, issued by the Republic after the entry into force of the Agreement, is to be considered as having been issued on behalf of the State of Bosnia and Herzegovina, and thus applied as State law.

“143. Moreover, Article VII of the Constitution designates the Central Bank of Bosnia and Herzegovina as the sole authority for monetary policy throughout the country. It is true that the Central Bank has not been given the authority to regulate the operation of banks in general or the foreign currency savings in particular. However, the disbursement of savings from the bank accounts in question has repercussions on the circulation of foreign currency and thus affects the monetary policy, for which the Central Bank, as a State institution, is responsible.

“144. The Chamber further notes that the Framework Law on Privatization of Enterprises and Banks (see paragraph 93 above), which recognizes the right of the Entities to privatize non-private owned enterprises and banks located on their territory and provides that the Entities shall adopt legislation to that effect covering the assets and liabilities thus located, was adopted by the Parliamentary Assembly of Bosnia and Herzegovina on 19 July 1999 following the issuance of the law on an interim basis by the High Representative on 22 July 1998. In the Chamber’s opinion, the fact that the Parliamentary Assembly adopted this legislation – which indirectly concerns also the old foreign currency savings – is an indication of the competence of the State to regulate these matters, at least in setting out the general principles to be applied.

“145. The Chamber thus finds that it is competent *ratione personae* to consider the applications in regard to Bosnia and Herzegovina.”

7. The Following question arises:

- Is there any doubt that this reasoning applies to old foreign currency savings accounts opened with banks or branch offices opened before the armed conflict in what is now the Republika Srpska in the same way as it applies to accounts opened in what is now the Federation? Or could it be argued that the guarantee expressed in the 1992 Decree of the Republic of Bosnia and Herzegovina does not apply to bank accounts opened on the territory of what is now the Republika Srpska?

OHR:

The said 1992 Decree is not applicable to what is today Republika Srpska since the Republika Srpska enacted a series of laws in order to establish its own legal and banking system. However, the obligation of Bosnia and Herzegovina exists, but under Article III(1)(d) of the Constitution, under which the responsibility for monetary policy rests with the institutions of Bosnia and Herzegovina. The explanation from paras 141, 143 and 144 of the Poropat and others apply to Republika Srpska as well.

Furthermore, the transitional provisions of the BH Constitution in its Annex II Transitional Agreements provide for the following:

‘Continuation of Laws.

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

The Chamber:

III. Do the applicants have a claim against the Republika Srpska?

8. As recalled above, the Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina, issued by the High Representative on 22 July 1998, and later adopted by the Assembly of Bosnia and Herzegovina, provides as follows:

Article 4, paragraph 2:

“Claims against enterprises and banks to be privatized shall be deemed as a liability of the privatizing Entity.”

9. The Law on Postponement of Enforcement of Court Decisions on Payment of Compensation for Pecuniary and Non-Pecuniary Damages resulting from War Activities and Non-Payment of Old Foreign Currency Savings Deposits, Payable from the Republika Srpska Budget (Official Gazette of the Republika Srpska no. 25/02 of 20 May 2002) (the “Law on Postponement”) entered into force on 28 May 2002.

10. The basic provision of the Law on Postponement is provided in Article 1, as follows:

“This Law shall postpone the enforcement of court decisions on the payment of compensation for pecuniary and non-pecuniary damages sustained due to war activities and due to the payment of old foreign currency savings deposits, payable from the budget of the Republika Srpska and made prior to the day this Law entered into force.”

11. Article 2 contains definitions, as follows:

“The pecuniary and non-pecuniary damages sustained due to war activities refers to the damage that occurred due to the war activities on the territory of the Republika Srpska from 20 May 1992 through 19 June 1996.

“The old foreign currency savings deposits refers to savings deposits of physical and legal persons at banks having their seat on the territory of the Republika Srpska that were deposited in those banks on 21 December 1991.”

12. The following questions arise:

- Does Article 4, paragraph 2 of the Framework Law on Privatisation establish a claim of the applicants against the Republika Srpska, in addition to the claim against the bank?
- Does this provision establish a claim of the applicants against the Republika Srpska, in substitution of the claim against the bank?

OHR:

The Law on Opening Balance Sheets in the Process of Privatization of the State Capital in Banks, hereinafter the “OBS”, (Official Gazette of the Republika Srpska no. 24/98, 70/01), provides as follows:

Article 6

The bank’s passive sub-balance shall show the following values

...

3. Payables against citizens’ foreign currency savings as of December 31, 1991;

...

Article 8

Payables against citizens’ foreign currency savings from Article 6 item 3 of this Law shall be taken out of the bank’s books debiting receivables against deposited foreign currency citizens’ savings, i.e. placements on this basis.

Article 20

Objects, rights, capital and payables shown in the bank’s passive sub-balance from Article 6 of this Law, shall be transferred to the Ministry upon the approval of the privatization program.

The above provisions clearly show that the all items presented under passive sub-balance of the OBS of the respective banks would be transferred to the Ministry of Finance upon approval of the privatization program.

The Chamber:

- Does the Law on Postponement constitute recognition by the Republika Srpska that the applicants have a claim against it?

OHR:

Law on Postponement does not contain any provision of substantial law. It only defines the postponement of execution of court decisions, and it is of procedural nature.

The Law on OBS clearly constitutes recognition by the Republika Srpska of all liabilities showed in passive sub-balance of the respective banks, and transferred them to the Ministry of Finance.

The Chamber:

- Is this claim in addition or in substitution of the claim against the bank?

OHR:

This claim against Republika Srpska is substitution of the claim against the bank; since the Law on OBS has clearly prescribed that the citizens' foreign currency savings as of December 31, 1991 shall be transferred to the Ministry of Finance.

The Chamber:

IV. Do the applicants still have a claim against the (Republika Srpska) successor bank of the bank where they deposited foreign currency?

13. Article 19 of the Law on Privatization of State Capital in Enterprises (OG RS no. 24/98) refers to savings in banks "located in the territory of the Republika Srpska":

"A person holding foreign currency savings at a bank seated in the Republika Srpska and who is a citizen of the Republika Srpska on the day of this Law's entry into force shall have the right to:

"1. Coupons for purchase of shares according to this Law;

"2. Certificates for purchase of apartments and other state-owned property, not subject to privatization pursuant to this Law."

14. The following questions arise:

- Is there any doubt that in the Republika Srpska the conversion of foreign currency savings into coupons or certificates is on an entirely voluntary basis?

OHR:

It was on a voluntary basis.

The Chamber:

- Do the applicants still have a claim against the Republika Srpska successor of the bank they deposited their foreign currency savings with, or has this claim been substituted by a claim against the Republika Srpska budget?

OHR:

The claim is substituted by a claim against the Republika Srpska in accordance with the Law on OBS.

ECONOMIC QUESTIONS

The Chamber:

1. What laws and/or regulations have been enacted to govern “old” (before 31 December 1991) foreign currency savings (ffca) in the Republika Srpska?

OHR:

Law on Foreign Currency Operations (“Official Gazette of the Republika Srpska” No 15/96 and 10/97)

Law on Opening Balance Sheets in the Process of Privatization of the State Capital in Banks (Official Gazette of the Republika Srpska no. 24/98, 70/01)

The Law on Privatization of State Capital in Enterprises (Official Gazette of the Republika Srpska no. 24/98) Chapter IV: Means of Payment in Course of Privatization and V Chapter: Eligibility for Vouchers.

Law on Privatization of Socially-Owned Apartments (Official Gazette of the Republika Srpska no.11/00)

Law on Amendments to the Law on Privatization of Socially owned Apartments (OG 18/01)

Decision on Further Changes and Amendments to the Law on Privatization of Socially owned Apartments by HR (Official Gazette of the Republika Srpska no.35/01)

Decree on Utilization of FFCS to Purchase Socially Owned Apartments (Official Gazette of the Republika Srpska no. 67/01)

Instruction on Application of the Decree on Utilization of FFCA to Purchase Socially Owned Apartments (Official Gazette of the Republika Srpska no. 70/01)

Law on Postponement of Enforcement of Court Decisions on Payment of Compensation for Pecuniary and Non-Pecuniary Damages resulting from War Activities and Non-Payment of Old Foreign Currency Savings Deposits, Payable from the Republika Srpska Budget (Official Gazette of the Republika Srpska no. 25/02 of 20 May 2002) – the “Law on Postponement” entered into force on 28 May 2002.

The Chamber:

2. How can a depositor of old foreign currency savings in the Republika Srpska currently dispose of those savings?

OHR:

In addition to use of the ffca based coupons in privatization of state-owned enterprises and state-owned apartments it seems that the ffca cases can still be brought to a court. The Republika Srpska Government adopted the Law on Postponement of Enforcement of Court Decisions on Payment of Compensation for Pecuniary and Non-Pecuniary Damages resulting from War Activities and Non-Payment of Old Foreign Currency Savings Deposits, Payable from the Republika Srpska Budget but has never adopted any legislation that would prevent citizens going to courts and seek the recognition of their claims against the banks or tRepublika Srpska itself (see. CH/99/1859, Ru`a Jeli~i} against the RS). Of course the possibility to bring the case to a court seems to be an illusory right, since such court decision could not be enforced so far (see. CH/01/8110 D.R. v. Bosnia and Herzegovina and the Republika Srpska)

The Chamber:

3. What is the nature of the coupons or certificates into which foreign currency savings may be converted in the Republika Srpska?

OHR:

The coupons would be used in the course of privatization of the state-owned enterprises and state-owned apartments and could be traded; their current value on the secondary market is some 40% of their nominal value.

The Chamber:

4. What is the nominal value of these coupons or certificates relative to the foreign currency savings they replace?

OHR:

Coupon's value is of the same value as ffca i.e. 4,000 KM coupon's value = 4,000 KM foreign currency saving

The Chamber:

5. What is the actual value of these coupons or certificates?

OHR:

Actual value of coupons if used in privatization of state-owned enterprises and apartments is equal to their nominal value. If traded, ffca can be sold at around 40% of their nominal value

The Chamber:

6. What risk factors are involved in converting one's old foreign currency savings into coupons or certificates? Can this conversion be undone? What risk factors are involved in *not* converting one's old foreign currency savings in coupons or certificates? Is there a time limit on electing to convert?

OHR:

The risk in converting the ffca in coupons is the biggest when citizens decide to invest their coupons; of course the safest way to use the coupons is in privatization of apartments. Another risk is that the coupons would expire. Furthermore, individuals with small savings could not reasonably be expected to buy items offered in the privatisation process or to afford these items. So far the conversion could not have been undone and after the expire of the two years deadline, unless extended, the coupons will be canceled and unused ffca in coupons would be irrevocably lost.

The Chamber:

7. What are the chances that the Republika Srpska or Bosnia and Herzegovina will develop other arrangements, outside of the coupon/certificate system, to compensate holders of old foreign currency savings in the Republika Srpska? What are the prospects for savers who elect to hold on to their old foreign currency savings in their current form?

OHR:

Payment of liabilities based on ffca should be addressed under the internal debt reduction strategy including in addition to ffca, pension and other budgetary arrears (IMF recommendation). The amount of ffca in the RS is roughly a half of the RS GDP and higher than one and a half annual RS budget. Authorities should proceed cautiously and realistically with the timing and amount of budget subsidies needed to solve the ffca. Anyhow, it will be a long-term payment period.

The Chamber:

8. In what way(s) can coupons or certificates ultimately be used, i.e. what can realistically be purchased, invested in, or otherwise realized from the redemption of coupons or certificates?

OHR:

In privatization of the State-owned apartments up to 60% of the purchasing price can be paid in coupons and small and medium size enterprises (hereinafter the "SMEs") privatization valued up to 300,000 KM can be paid in coupons. As well as it was stated above the coupons could be traded for the reduced value.

The Chamber:

9. In what time period can they be used? How far along is the privatization process in the Republika Srpska, and is

it still possible for holders of old foreign currency savings to meaningfully participate in that process? What potential exists for holders of old foreign currency savings to use certificates in the future to purchase apartments or other state property that is not currently being privatized? What other state property will conceivably be privatized?

OHR:

RS Privatisation update

Nr.	Value of company	Nr. Of companies	Total revenue in KM	Paid in FFCS	KM	Ongoing
	Auction	100	11.052.867	9.389.710	1.663.157	
	Direct sale	34	1.153.984	905.737	248.247	
1.	TOTAL up to 300.000 KM	134	12.206.851	10.295.447	1.911.404	
	Auction	250	118.026.148	106.599.132	11.427.016	
	Direct sale	5	661.450	506.450	155.000	
	Tender with fixed conditions	9	6.189.850	5.661.295	528.555	
2.	TOTAL over 300.000 KM	264	124.877.448	112.766.877	12.110.571	
3.	Strategic	34	13.466.078	936.922	5.290.156	7.239.000
	TOTAL in KM	432	150.550.377	123.999.246	19.312.131	

57% of state-owned apartments were privatized as of mid-April 2003. Roughly 50% of the SMEs have been privatized by now.

Business premises and garages privatization is expected to start soon and ffca could be used in privatization of business premises and garages as well.

The Chamber:

10. Is there a secondary market for coupons or certificates? If so, what is their value on that market?

OHR:

Secondary market value up of the ffca coupons is some 40% of the ffca nominal value

The Chamber:

11. What is the total amount of old foreign currency savings in the Republika Srpska? How are these savings distributed across the various banks?

OHR:

The total ffca amounted roughly to KM 1.7 Billion as of end of 2002 (roughly a half of the RS GDP and higher than annual RS budget).

Banjalucka Banka and Kristal Banka (354 Million KM each), Privredna banka, Doboj KM 275 Million, Privredna banka Prijedor KM 173 Million, Privredna banka Sarajevo Pale KM 114 Million, etc.)

The Chamber:

12. What portion of these total savings has been converted to coupons or certificates thus far?

OHR:

Roughly KM 200 Million

The Chamber:

12. Does the Republika Srpska have the economic potential to pay back the old foreign currency savings of people, in whole or in part?

OHR:

The amount of ffca is roughly a half of the RS GDP and higher than 1 and a half annual RS budget. Authorities should proceed cautiously and realistically with the timing and amount of budget subsidies needed to solve the ffca. Anyhow, it will be a long-term payment period.

The law on ffca should be passed by the end of the first half of 2003.