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THE IMPORTANCE OF TRANSPARENCY IN CENTRAL BANKS LEGISLATION

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Abstract. *The subject matter of analysis in this paper is the importance of the transparency principle in the central bank's legislation, as a significant determinant of the effectiveness and efficiency of adopted solutions for achieving monetary stability as a public good. In this context, the first part of the paper examines the importance and functions of transparency of acts and actions of the central bank in contemporary monetary law. The second part discusses various theoretical assumptions in the regulation conception of the highest monetary authority in comparative legislation. The third part focuses on the contribution of the ombudsman in framing democratic monetary governance based on credibility in the visibility of the central bank actions, which has significant implications in the field of human rights protection. In this regard, the author refers to the Law of the European Central Bank, which has a great impact on the formation of monetary jurisdictions in the international context. By applying dogmatic, axiological, and comparative law methods, the author seeks to contribute to a functional and essential understanding of the importance and place of the transparency principle in positioning monetary legislation in the function of achieving personal and social well-being. The author also endeavours to identify the domains and limits of transparency in the work of the central bank in dynamic and complex social circumstances.*

Key words: *monetary law, central bank, rule of law, transparency, ombudsman*.

1. INTRODUCTION

Transparency of regulations that determine the direction and purpose of the central bank's activities as supreme monetary institutions is a necessary condition for the credible acceptance of the central bank acts in society, which has proven to be a significant determinant of the effectiveness and efficiency of monetary measures in the context of various crises in the international monetary order. Transparency in this context becomes an inseparable element of

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credibility in the work of central banks, with which it is often equated in practice because without previously timely announced and publicly discussed (future planned) actions of the central bank and the adoption of any act from the domain of soft monetary legislation, the central bank cannot fulfill its role in preserving monetary stability as a public good. Of course, monetary regulations cannot be *lex certa* in the true sense of the word, but by informing the public promptly about the reasons and benefits (as well as the costs of undertaking them) understanding and support for taking measures can be ensured even when that measures do not always generate benefits in the short term. Still, in the long term, it contributes to the realization of both personal and general social well-being (because every action of the central bank affects the life of the individual in a more or less direct way).

Credibility in public monetary operations has had an important place since the establishment of central banks, the definition of their primary mandate in the field of price stability, and the subsequent definition of the secondary mandate in the context of maintaining general financial stability. In effect, credibility remains the key value of the central bank legislation. The possible expansion of the field of competence to new sectors of public policy, where the central bank is not the primary subject but a secondary participant that can undertake a smaller or larger number of activities, depends on the scope of achieved macroeconomic dialogue with other competent institutions of primary authority (which typically occurs in the context of cohesion policy, protection of natural resources and human rights). In this regard, it is worth remembering that the government, in the process of developing a public policy agenda and framework, uses impact assessments to determine the appropriate solution with the least negative effects in achieving a specific public policy goal (Mihajlović, 2024:48). In that context, monetary policy is not an exemption. The regulatory competence of central banks comes to the fore in times of crises, when its position as the main monetary legislator is confirmed by the adoption of appropriate provisions from the domain of secondary law in cases where credibility and transparency are particularly important. After all, credibility and transparency are a barrier against subsequent negative consequences, in case it turns out that the legal basis of such measures was unclearly defined but the specific situation calls for an urgent normative reaction of the central bank to preserve the assets of the monetary order and protect the rights of monetary users (participants). Transparency entails approximating the reasons and the purpose of planned measures although such activities may take some time given the need to explain such measures *ex-ante* (or *ex-post* in exceptional cases after implementation).

Transparency strengthens the citizens' faith in the reasons for the existence of their national central bank, which purposefully protects its monetary jurisdiction and the interests of financial service users. Hence, while the implementation of monetary legislation is rigid and mostly requires a complicated derogation or abrogation procedure, the author posits that the transparency and flexibility of the central bank legislation must be even more prominent than the primary monetary legislation because the central bank adopts its legislation on the basis of constitutional guarantees concerning its institutional and functional independence. In the current circumstances of information revolution, the communication between the central bank and its citizens may be more diverse and effective than ever before in monetary history; thus, various means of communication and technological devices may be used for the purpose of strengthening the "visibility" of central bank operations.

As one of the elements of credibility, transparency in the operation of central banks is a valuable axiological plane tool both in classical and contemporary monetary legislation; namely, contradictory requirements for creating innovative, modern and contemporary

solutions aligned with the spirit of the legal profession and the specialization of knowledge which is prominent in modern legislation have to be reconciled with fundamental social values of universal nature which have always been the prerequisites for establishing a well-regulated, secure and purposeful social system. In the context of transparency, the European Central Bank (ECB) provides an example of good practice in bringing the central bank activities closer to citizens. The actions of the ECB strongly support the connection between public transparency and accountability in its work, thus demystifying its position in society (i.e. a specific institutional position conditioned by the field of activity). As early as 2004, the ECB granted access to its decisions to the interested public without any special restrictions, which actually entailed much more than simple technical access to information of public importance guaranteed by Article 15 of the Treaty on the Functioning of the EU, as it might seem at first glance. Article 15 TFEU envisages that any interested EU citizen, and any natural and legal persons residing or having a registered office in a Member State, shall have the right of access to official documents of the EU institutions, bodies, offices, in whatever form or medium, subject to the principles and conditions laid down in the founding act, which the ECB has fully complied with. The real effect is certainly much greater than the mere nomotechnical implementation of the founding act (TFEU); it is embodied in changing the acquired beliefs on the inviolability, abstractness and independence of central banks in the public administration system, which has resulted in the adoption of completely indifferent or even neutral judgments about what the task of central banks in modern society is (Dimitrijević, 2022:110).

2. A Bref Review of Various Theoretical Assumptions on Regulating the Central Bank Activities, as a Cause for Legislation (Non) Transparency

In academic and professional debates about the insufficient degree of transparency of central banks legislation, it must be taken into account that the lack of transparency was the result of the disintegration of general monetary legislation at the moment when central banks, as the highest monetary authorities and bearers of monetary sovereignty, began to create their own law (to some extent). Today, the central bank *modus operandi* is highly specific and calls for the specialization (upgrading) of general legal competencies. Given that the central bank basically deals with the issue of legal regulation of monetary flows in the domestic and international environment, there is a need to clarify its powers, projected goals and specific proposed measures, in order to understand its functions in a legally valid manner. Due to the hybridity of this branch of law and the high degree of its synthetic-dialectical connection with the economic disciplines of monetary finance, the legislator should exert greater efforts to correlate the central bank activities with the lives of ordinary citizens, who largely do not have sufficient knowledge about the scope of the central bank activities.

Although there are essential differences between the European-continental and Anglo-American systems in terms of normative regulation of the jurisdiction and institutional status of central banks as the highest monetary authority, it may be useful to look at certain factors and features of their work because, in the circumstances of the expansion of categories and institutes of international monetary law, certain differences can be an advantage in gaining experience for creating a sustainable monetary *instrumentarium* that is appealing and acceptable to citizens. Regardless of territorial, historical and political differences, the specificity of the central bank operations has a common denominator,

reflected in the complex scope of the central bank activities and the dynamic relations in the monetary process, which often calls for the legislator's timely intervention that cannot always be accompanied by sufficient transparency. Here, we must bear in mind that full transparency of monetary regulations (at least in the domain of their comprehensibility to citizens) can never be accomplished because it entails the presence of a minimum level of specialized knowledge about monetary conduct among citizens.

The tendency to expand the authorities of central banks has become noticeable on all continents, regardless of the greater or lesser differences in the acquired monetary tradition. For example, the US Federal Reserve System (FED) enjoys a significant degree of functional independence but, unlike the independence of the ECB, its budgetary and personal independence is much greater. A particularly interesting question in US monetary law is whether and how a court (as an independent institution) can control the work of another independent institution, such as the FED, which is not an ordinary independent administrative body but the bearer of monetary sovereignty (Egidy, 2019:53). The origin of the legal basis for independence in the work of the FED and the ECB is diametrically different; the independent status of the ECB is guaranteed by Article 130 of the Treaty on the Functioning of the EU, while the status of the FED was regulated by the Federal Reserve Act (1913), which was amended several times and has now taken the form of a doctrine of American monetary law, popularly called the "central bank super statute" (Eskridge, Ferejohn, 2010:10-19).

Theoretically speaking, the FED competencies may be narrowed by US Congress but it has never happened in practice, which is a positive example of the separation of the highest monetary authority from the executive branch in the true sense of the word. Namely, although monetary power is derived from the executive power, the specialization in the field of work and competences imply prior action *de lege artis* which, in most cases, is not a typical activity of congressmen. In addition, the full financial independence of the FED from Congress is a barrier against possible financial sanctions by the holders of the executive power, which is not present to that extent in the case of the ECB. Like the ECB, over time, the FED started dealing with the issue of preserving financial stability, which eventually developed into a new jurisdiction, the so-called *monetary emergence authority*, which was the subject of several court proceedings initiated against the FED, but the US Supreme Court supported the actions taken in all of these proceedings both formally and substantively.[1] Notably, in the Anglo-American legal system, decisions rendered by the US Supreme Court and other courts have the characteristics of the so-called judge-made law (Shultz, 2024:122). Yet, it should be noted that the legal reasoning of the US Supreme Court in resolving such cases closely resembles the legal logic of the European Court of Justice (ECJ), as both courts justify such actions by monetary authorities in times of crisis. Although the author of this paper agrees with the general explanations that circumstances justify certain actions, it is necessary to constantly emphasize the fact that such dry and somewhat impersonal explanations cause a certain aversion among citizens. Thus, courts must provide clear, layered and in-depth explanations, written in a clear language with a concrete message on the benefits in the legal system. The elements of self-awareness and relevance of such instruments may significantly contribute to citizens' acceptance of such court decisions. For, we must not forget that state monetary sovereignty arises from the

[1] See: US Supreme Court case *Starr International Co. v. Federal Reserve Bank of New York, 906 F.Supp d 202, 237*. https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=2346&context=ypfs-documents

accumulation of personal monetary sovereignty that is immanent in the nature of *homoeconomicus* (Dimitrijević, 2023: 295).

On the other hand, it should be noted that the FED has the status of an independent agency in American law, while the ECB enjoys the status of a special EU institution, which is established by the provisions of the Treaty of Lisbon (2007). In addition to monetary stability, the FED also has a (non)monetary task related to ensuring full employment, which must be addressed with equal intensity as monetary stability. This duality of tasks makes the FED more susceptible to the activation of passive procedural legitimacy in monetary disputes because the FED partly appears as an entity responsible for the entire economic policy and not exclusively for the area of monetary policy, which is the case with the ECB. Another significant similarity with the ECB work is the FED's jurisdiction in the field of financial auditing, which was established in a similar period as a result of the debt crisis (2008). The US federal courts have the subject matter jurisdiction to decide on complaints related to the work of the Federal Open Market Committee and the decisions issued by governors. In the period from 2010-2018, 85 cases were brought before the federal courts, including about 30% of complaints concerning (inadequate or denied) access to information and 25% of complaints against decisions on the results of supervision (Egidy, 2019:55-56). In practice, there are very few records on initiated proceedings related to the review of monetary policy; namely, in some proceedings, the primary issue was the protection of consumers and their rights, while the monetary effects of rendered decisions were of secondary and sporadic importance in the proceedings. An insight into the US judicial practice (Della Negra, Smits, 2022)[2] shows that FED decisions have never been substantially reviewed and the instituted proceedings have never sufficiently resounded in public, unlike the cases involving the ECB decisions in the EU member states. Similar to the practice of the ECJ, three types of monetary disputes can be identified in the US judicial practice: disputes concerning the decisions of the highest monetary authority (FED); disputes challenging the institutional position of the central bank (precisely, its consequences in practice); and disputes concerning requests for access to and dissemination of information of public importance from the domain of public monetary operations (Dimitrijević, 2023: 102).

By analyzing the practice of American courts, we may identify some useful *guidelines* for the proceedings before the ECJ. First, based on the "deliberate deference of US courts to review monetary policy decisions, except in extreme circumstances", we may identify the "unreviewable core" of monetary policy that cannot be subject to judicial review, not for some ideological but for practical reasons that justify the substantive presence of that segment of public policy and essentially imply knowledge for taking certain actions. Moreover, "judicial clarity on the nonjusticiability of certain decisions" may encourage productive normative debates on the efficiency of the judicial system (Egidy, 2019:68). Judicial non-interferene in certain aspects of state management and law does not reflect the weakness of the judicial instances but a clear expression of the aspiration of society to constantly improve the accountability, conditions and methods of their operation by expanding the field of their actual and territorial jurisdiction. Second, the literature emphasizes that the ECJ, following the example of the US practice, should make a clear

[2] See: Della Negra F., Smits R. (2022).The Banking Union and Union Courts: an overview of cases as of 20 April 2022 Court judgments, the European Banking Institute (EBI), Frankfurt am Main, Germany.

distinction between the judicial review of implied *"penumbra"*[3] *rights* derived from the US Consitution (in the context of monetary policy, it refers to the preservation of monetary stability and guaranteeing the functional independence of the central bank) and a more rigorous review of compliance with the "outer" (statutory) limits of the central bank authority (e.g. the TFEU) (Egidy, 2019:70). The author of this paper fully agrees with the aforesaid statement because it concerns an issue of deferential judicial review: in the first case, it involves reviewing the independence of the central bank as the highest monetary authority, which must remain intact, but without reviewing the *modus operandi* of the central bank in practice, which may be problematic in terms of practical manifestations (e.g. in the purchase and sale of various securities). Third, the judicial review in transparency claims concerning access to information and non-disclosure of information should be guided by "a high evidentiary standard" (burden of proof), which would enhance the central bank accountability (Egidy, 2019:70,72). In order to strengthen the credibility and legitimacy of the taken measures, another suggestion may be to relax the requirements for submitting requests for access to information.

In order to bring the object of protection of monetary regulations closer to citizens, it is highly desirable to relax the request-submission requirements, particularly in terms of persons who have active procedural legitimacy (*locus standi*) to submit complaints and in terms of simplifying the administrative procedure for obtaining legal standing. It also enables the citizens' (indirect) participation in the monetary management process: if citizens understand the process, they support it; ultimately, it generates a relationship of trust between monetary users and the central bank. It is evident that both the European-continental system and the Anglo-American system pay great attention to monetary finance, which implies the legal regime of financial support to the public sector guaranteed by the central bank (Bateman, 2021:1-5). By applying a multi-jurisdictional approach to the analysis of the competencies of the highest monetary institutions, both systems recognize the importance of legal norms in a way that respects the established identities of central banks and their differences but also approaches the emerging challenges in the field of monetary finance and innovation in a similar manner.

Until the outbreak of the debt crisis (2008), it was common in the theory of monetary law to make a distinction between conventional and unconventional monetary finance (Bateman, 2021:4). Conventional monetary finance is aimed at attaining price stability and inflation control in shorter time intervals. In achieving this goal, central banks relied on the commercial banking sector, i.e. commercial bank lending to the population and the economy, which meant that capital on the banking financial market was highly liquid and safe (Bateman, 2021:5). Unconventional monetary policy measures are adopted by central banks to ease the consequences encountered in times of financial crisis. They imply conferring discretionary powers on central banks to fund public expenditure (via unsecured loans, mandatory 'profit transfer' laws, reinvestment in government debt securities, etc.) (Bateman, 2021:1,3).In such circumstances, the central bank purchases bonds on the primary and secondary financial markets to contribute to sustainable public finances. These transactions entail an insufficient degree of transparency, which may explain the citizens' dissatisfaction with the application of these measures and the initiated court proceedings. The central banks' decisions are based on their statutory authority to purchase securities (bonds). The main source of financing for these purchases

[3] This metaphor refers to implied rights derived from the explicitly guaranteed rights in the US Constitution.

are the required reserves, which commercial banks must hold in their central bank accounts at all times (Bateman, 2021:6; Bateman, Allen, 2021: 403).[4]

In terms of the previously discussed legal regime of monetary finance, it is essential to highlight the fact that monetary finance can also be defined in budgetary terms, which is very often overlooked in the debates about the (in)permissibility of central bank interventions. The budgetary definition refers to the influence of the central bank on the state budget and provides a *sui generis* institutional justification why the central bank should be involved in the management of public finances at all (given that it is the primary responsibility of the government, as the executive branch). However, the reason for the central bank intervention lies in providing additional money for public expenditures that are increasing each fiscal year. This understanding of monetary finance is not a "monetary sacrilege" because incompetence and ignorance in managing public finances require "monetary assistance" from the central bank to the representatives of the executive branch and the tax administration (Dimitrijević, 2023:210). Ultimately, it is just a common example of a classic state agency that takes care of fiscal sovereignty together with the government, frequently without sufficient results. Hence, it may be difficult to understand the motives of states to so easily limit the components of monetary sovereignty, which is much older and more important than fiscal and financial sovereignty, and whose components are so eagerly guard the EMU member states. In crisis circumstances, central banks may be subject to additional pressure to urgently and without hesitation preserve the stability of not only the currency but also of the entire economic and financial system, which may be done at the detriment of transparency but certainly not at the expense of exceeding the statutory mandate and constitutionally granted powers. The central bank may be later exposed to criticism for insufficient transparency, just as it would have been criticized if it had not taken any measures.

3. The Contribution of the Institution of the Ombudsman to the Concept of Democratic Monetary Governance

Judicial review of the legality of the central banks activities is very important for establishing a reliable, safe, and stable monetary system with a good reputation among monetary jurisdictions (in case such a system is perceived as an example of good practice in the normative regulation of monetary flows). The ECB is a subject of not only European monetary law but also international monetary law. Thus, the rich and complex regulatory competence and innovative legislation of the EBC has a significant impact on other monetary jurisdictions and the creation of their primary and secondary sources of monetary law. In addition to the contribution of the European Court of Justice (ECJ) in assessing the legality of the ECB acts, in line with the principles of a democratic society, the European Ombudsman has significantly contributed to promoting the concept of democratic monetary governance. In the first years after the global financial crisis (2008), European institutions paid considerable attention to improving the conditions for the operation of the European Ombudsman. New models of economic governance, embodied in new intergovernmental agreements aimed at improving macroeconomic performance,

[4] For more, see: Bateman, Allen, 2021: 401-434

brought new powers for the ECB. It generated the Ombudsman interest in the implementation of the ECB's tasks in the single market.

The institution of the European Ombudsman is to act as a protector of citizens when they file complaints about the work of the EU administrative bodies. Although its jurisdiction originates in soft law provisions, the factual scope and weight of its decisions correspond to the effects of hard law. Although the Ombudsman's statements are legally non-binding in terms of their legal nature (unlike court decisions), the investigations conducted by the European Ombudsman based on complaints filed against the ECB activities have substantially and qualitatively expanded the legal physiognomy of transparency and the logic of monetary and financial management in the Eurozone (Villard Duran, Steinberg, 2019: 2-29).

In assessing the European Central Bank activities, the Ombudsman "tends to adopt distinctive legal reasoning" approach to determine the degree of transparency on the spectrum from the "optimum" to the "maximum" levels of transparency. In monetary governance investigations, the Ombudsman relies on legal principles (principles-based arguments rather than formal rule-based reasoning), which is a unique way of advocating for more transparent governance of European monetary affairs. In the content of legal principles, the Ombudsman finds the necessary driving force for measuring and analyzing monetary transparency, thus "creating space to move from optimum to maximum degrees in the transparency spectrum" (Villard Duran, Steinberg, 2019:1) and to ensure the monetary policy implementation. In terms of subtle ties between transparency and accountability, it should be noted that transparency is a prerequisite of accountability. From the legal policy perspective,_transparency can be understood as "a precondition for a legitimate monetary policy implemented by *de facto* or *de iure* independent central bank", and a precondition for establishing "the accountability of these institutions" as "it enables social forums and political institutions to monitor and evaluate their operation" in the open market (Villard Duran, 2015: 101, 121).

In EU law, the Ombudsman has a prominent "political" and "critical-dialogue" role in shaping EU governance. He/she seeks to establish a constructive dialogue between the European institutions and all interested parties without exception. The Ombudsman has the power to conduct strategic and complaint-based inquiries (acting on complaint or his/her own initiative), using both oral and written inquiry. He/she may forward the complaint to the institution and request information, opinion or access to documents; commission reports and consult the public; interview officials/civil servants; etc. (EU Ombudsman, 2011;[5] Lee, 2015:8).The Ombudsman's inquiry includes several stages. The *first* stage is the search for the so-called "pragmatic friendly solution", which is the best solution in terms of costs but not necessarily in normative terms; the major advantage of this solution are the valuable features of peaceful dispute resolution: reducing the parties' antagonism and ensuring equal respect for the needs of all participants involved in the procedure. In the *second* stage, if the Ombudsman is dissatisfied with the response provided by the European institution, the Ombudsman may draw up a special report and send it to the European Parliament (EP). The Ombudsman does not have formal coercive powers and cannot force the institution to change the manner of performing the entrusted tasks but he/she can exert certain political pressure through "flexible" intervention methods: publicity, informal and indirect sanctions, reports to the EP (Lee, 2015:9). In the *third* stage, there

[5] EU Ombudsman (2011). The Europan Ombudsman's guide to complaints, 1 Oct. 2011, https://www.ombudsman.europa.eu/en/publication/en/11469

are different outcomes: a) EO finds no maladministration and settles the case; b) EO finds maladministration, makes solution proposal or recommendations, and settles the case if recommendations are accepted; b) EO finds maladministration, recommends improvements and, if they are rejected, prepares a report (to EP) with recommendations for further action (EU Ombudsman, 2011).

In terms of cases pertaining to the evaluation of the ECB activities, the literature reports that the Ombudsman has managed to achieve full transparency, create procedural legitimacy and acquire the status of "the most independent of all independent institutions" in the EU. By 2015, the Ombudsman had resolved a total of 15 cases concerning the ECB monetary governance and transparency, including complaints on the management of monetary policy, financial regulation, and broader institutional issues. Interestingly, the majority of cases (11 out of 15) were initiated by EU citizens, which indicates a high and satisfactory level of access to protection provided by the Ombudsman. The other cases include complaints from Members of the European Parliament (1 case) and NGOs (2 cases), as well as proceedings initiated *ex officio* by the Ombudsman (Lee, 2015: 7-8).

In all these cases (except for the first one), the Ombudsman found that there was no maladministration and mismanagement by the ECB in performing the entrusted tasks, which had a significant impact in public. Moreover, in 9 cases, the Ombudsman confirmed the clear and recognizable contribution of the ECB's transparency to the democratic values and principles that the EU rests on. The real significance of the initiated proceedings is not limited to the results of the investigation (i.e. identification of maladministration, if any); it is also embodied in the phenomenon of the conversion (enhancement) of competencies from almost informal to strictly authoritative ones. In fact, it is a masterful manipulation (not in pejorative terms) of the origin of jurisdiction which is derived from soft law provisions but with the force of hard law, which has contributed to establishing a much-needed institutional forum for a dialogue between the EU institution and the complainant against the ECB work. After undertaking the requisite inquiry proceedings, the Ombudsman concluded that the European Central Bank made qualitative progress in the field of visibility of its work in response to the Ombudsman's previously submitted objections. In particular, the Ombudsman dealt with the most challenging cases related to the policy of the financial crisis in the euro area and made relevant decisions affecting the transparency of the ECB.

In 2011, the European Central Bank (ECB) launched a very ambitious project called *AnaCredit* ("analytical credit datasets") aimed at establishing an official database containing detailed information on individual bank loans in the euro area, harmonized across all EU Member States. Thus, the ECB attempted to create a useful analytical dataset on loans that would facilitate its work in the field of implementing the single currency. In the significant *AnaCredit* case, a member of the European Parliament (MEP) raised concerns about establishing the Analytical Credit Dataset (*AnaCredit*) envisaged in the EBC Draft Regulation on the collection of granular credit and credit risk data[6] (ECB, 2015).[7] The MEP was concerned that the Draft Regulation (2015) could violate the object of protection of very sensitive regulations (the so-called higher-ranking EU laws),

[6] ECB (2015). Draft ECB Regulation on the collection of granular credit and credit risk data, the European Central Bank, https://www.ecb.europa.eu/stats/money/aggregates/anacredit/shared/pdf/draft_regulation_granular_and_credit_risk_data.en.pdf

[7] ECB (2015). What is AnaCredit? European Central Bank, 11.11.2015, https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me-more/html/anacredit.en.html;
https://www.ecb.europa.eu/stats/ecb_statistics/anacredit/html/index.en.html

particularly the proportionality principle and the rules governing personal data protection and the right to privacy. Given that the scope of this regulation would cover several million EU residents, he considered that the ECB should institute a mandatory public consultation with the EU authorities before the adoption of this act (EU Ombudsman, 2015).[8] It should be noted that the importance of the procedure carried out by the Ombudsman lies in the fact that it ensures respect for the voice of the people in the creation of monetary policy; namely, by initiating the procedure and, more importantly, by respecting the guidelines of the ECB, the people's voice is included in the will of the highest European monetary institution. Thus, the aforesaid regulation is about the ECB hearing the voices of the interested stakeholders and several million banking clients (both actual and potential), which is the highest expression of respect for monetary users. Very shortly after the Ombudsman's action, the ECB began a public consultation process on the AnaCredit project, which lasted 50 days, thus enabling all interested citizens to directly and openly get involved in the process of adopting monetary legislation and jointly regulate monetary policy and legislation[9], for the first time the ECB was conferred the monetary sovereignty and embarked on shaping the supranational *lex monetae* within the framework of citizens' original sovereignty.

By analyzing the monetary procedures conducted by the European Ombudsman (EO) to date, we can see that the procedures are usually concluded by adopting two types of reasoning. The first category of reasoning is based on classical legal rules that regulate certain desired patterns of behaviour and principles, which in turn regulate more closely the content of unclear standards and values that are not uncommon in good monetary management. The second category of reasoning is provided in the form of formal interpretations of rules and already established case law, which limit the analysis to the optimal level of transparency in policies designed to deal with financial crises in the euro area. The theory of EU monetary law emphasizes that, in the future, the Ombudsman can be expected to conduct the proceedings *ratione materiae* of the ECB law on a smart strategic basis, by using different approaches for stronger effects on the current monetary management. Such action certainly implies having specialized knowledge in the field of monetary law, which is a weakness of judicial and arbitration resolution of monetary disputes. After the outbreak of the financial crisis (2008), the scope of activities of the European Ombudsman has included the assessment of monetary policy and actions of EU institutions, just like the judicial reviews of monetary policy matters by the constitutional courts of the EU member states expanded the scope of activities of the European Court of Justice (ECJ).

In theory, there are strikingly different opinions on this increasingly intensive reaction of courts to the single monetary policy in the circumstances of the financial crisis. One group of theorists emphasizes that it dramatically increases the powers of judicial authorities to decide on adopted public policies (including monetary policy), thus "judicializing" the economic and monetary affairs in Europe even more than it is the case in hyper-judicialized systems (such as the US system). Another group of theorists ironically notes that the relatively large number of cases dealing with the financial crisis

[8] EU Ombudsman (2015). The Ombudsman asks the ECB about AnaCredit, Decision case 1693/2015/PD, 20.11.2015, EU Ombudsman, Frankfurt am Main, Germany; https://www.ombudsman.europa.eu/en/decision/en/62903

[9] Regulation (EU) 2016/867 of the European Central Bank of 18 May 2016 on the collection of granular credit and credit risk data (ECB/2016/13)m *OJ L 144, 1.6.2016,* https://eur-lex.europa.eu/eli/reg/2016/867/oj/eng

measures can be explained by the uncertain legal nature of some of these measures. A third group of theorists points to the risk of the so-called "de-judicialization" of the EU's institutional assessment, which is present insofar as the primacy of discretionary policy measures in crisis management is (automatically) accepted and no criteria are developed for assessing and determining the possible (il)legitimacy of these practices (Belov, 2019:110-112).

Starting from the "dramatic increase" of judicial power to the "de-judicialization" of the system, the above assumptions open up a range of possibilities regarding the well-known dichotomy between judicial activism and judicial self-restraint. Yet, it is assumed that the courts can express a common position towards legislative bodies (including those responsible for creating monetary legislation), either in terms of respect or interventionism. Taking common positions on the nature of certain court cases is pertinent to the logic of the so-called "judicial dialogue". The establishment of this form of dialogue presupposes mutual recognition of the same judicial functions, regardless of differences in the legal order (Costa, 2017:122-123). Yet, such dialogue seems *prima facie* more difficult when it comes to financial and monetary issues, given their high political implications. Hence, there is a need to examine how courts have managed this issue as well as the related changes that affect their role in the monetary order.

4. CONCLUSION

Clarifying the meaning of monetary legislation and the central bank legislation to citizens is useful and necessary both for the citizens who live in the territory of the state whose central bank creates and applies these regulations and for the central bank as the supreme monetary institution because it additionally confirms its position in society and manifests concern for the good life of citizens as the ultimate reason for its existence. Broadly speaking, central banking *per se* is of little use if it does not contribute to increasing social welfare by adopting and implementing regulations where social welfare is emphasized as the *ultima ratio.* When this is not clear at first reading of monetary laws (which may occur in case of highly specific monetary relations), the legislator must exert additional efforts to make such legislation closer to the everyday life of its citizens. In practice, it may be achieved by facilitating citizens' access to information about the activities of central banks by storing and publishing information on the official websites of central banks, enabling their simple search, providing opportunities to ask question and submit requests, organizing public forums, thematic workshops and round tables. All these activities aim to bring the field of work of the central bank closer to the citizens and demonstrate that all its actions are actually in the service of citizens' interests. In the current social circumstances, the author believes that it is necessary to carefully delineate the lower and upper threshold of responsibility in the work of the central bank and clearly define the boundaries of its competence because the constant accumulation of new activities has an aggravating effect on the perception of credibility in the work of the ECB. Thus, it is essential to ensure the credibility of the primary ECB goals first, and only then embark on promoting new competences. Yet, we must be aware that the complexity of monetary flows sometimes requires central banks to act quickly and simultaneously in several different directions. For this reason, ensuring transparency is a long-term but certainly attainable goal of every monetary jurisdiction.

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REFERENCES

Bateman, W. (2021). The Law of Monetary Finance under Unconventional Monetary Policy, *Oxford Journal of Legal Studies*, Vol. 00, No. 0, pp. 1-36.

Bateman, W., Allen, J. (2021). The Law of Central Bank Reserve Creation, *Modern Law Review*, Vol. 85, No. 2, pp. 401-434.

Belov, M. (2019). (ed). *Judicial Dialogue*. The Hague, Eleven International Publishing.

Costa, P. J. (2017). *La Cour Européenne des Droits de L'homme*, *Des juges pour la liberté*, Paris, Dalloz.

Dimitrijević, M. (2022). Monetarni kredibilitet kao društvena vrednost u savremenom monetarnom pravu i pravu centralnih banaka (Monetary Credibility as Social Value in the Contemporary Monetary Law and Law of the Central Bank), *Zbornik radova Pravnog fakulteta u Nišu*, br, 99, str. 97-118.

Dimitrijević, M. (2023). *Pravo Evropske centralne banke* (Law of the European Central Bank), Grafika Galeb, Niš.

Egidy, S. (2019). Judicial Review of Central Bank Actions: Can Europe Learn from the United States? In *Building Bridges: Central Banking Law in an Interconnected World*, ECB Legal Conference 2019, ECB, Frankfurt am Mein, pp. 53-76. https://www.ecb.europa.eu/press/legconf/pdf/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf

Eskridge, W. N., Ferejohn, J. (2010). *A Republic of Statutes: The New American Constitution*, Yale University Press.

Lee, M. (2015). Accountability and Co-Production Beyond Courts: The Role of the European Ombudsman (June 24, 2015), In: Weimer and de Ruijter (eds), *Regulating Risks in the European Union: The co-production of expert and executive pow*er, pp.1-23, SSRN:http://dx.doi.org/10.2139/ssrn.2866466.

Mihajlović, A. (2024). Public Policy and Regulatory Impact Assessment in the Serbian Legal Framework, *Facta Universitatis, Series: Law and Politics*, Vol. 22. No. 1, pp. 47-55.

Shultz, D. (2024). Constitutional Precedent in the US Supreme Court Reasoning, *Facta Universitatis, Series: Law and Politics*, Vol 22. No. 2, pp. 119-129.

Villard Duran, C., Steinberg, D. F. (2019). *Guarding the Money Guardian: How the Ombudsman is enhancing the legal framework for European Central Bank transparency*, GEG Working Paper, No. 140, The Global Economic Governance Programme, University of Oxford, pp. 1-29, https://www.econstor.eu/bitstream/10419/224116/1/1666222747.pdf

Villard Duran, C. (2015). The Framework for the Social Accountability of Central Banks: The Growing Relevance of the Soft Law in Central Banking, *European Journal of Legal Studies*, Vol. 8, pp. 120-122.

Legal Documents

ECB/2014/6: ECB Decision on the organization of preparatory measures for AnaCredit.

ECB/2014/7: ECB Recommendation on the organization of preparatory measures for AnaCredit.

ECB/2015: Draft ECB Regulation on the collection of granular credit and credit risk data, the European Central Bank, https://www.ecb.europa.eu/stats/money/aggregates/anacredit/shared/pdf/draft_regulation_granular_and_credit_risk_data.en.pdf

ECB/2016/14: ECB Decision amending ECB/2014/6 on the organization of preparatory measures for AnaCredit.

ECB Regulation (EU) 2016/867 of the European Central Bank of 18 May 2016 on the collection of granular credit and credit risk data (ECB/2016/13), *Official Journal of the* EU L 144, 1.6.2016. https://eur-lex.europa.eu/eli/reg/2016/867/oj/eng

Explanatory note on the draft ECB Regulation on the collection of granular credit and credit risk data; https://www.ecb.europa.eu/stats/money/aggregates/anacredit/shared/pdf/explanatory_note.en.pdf

ECB/2017/38: ECB Guideline on the procedures for the collection of AnaCredit data from NCBs, as amended by Guideline (EU) 2020/381 of the European Central Bank of 21 February 2020 and Guideline (EU) 2021/1829 of the European Central Bank of 7 October 2021.

Explanatory note on the ECB Regulation ECB/2017/38. https://www.ecb.europa.eu/stats/ecb_statistics/anacredit/html/index.en.html

ECB/2019/20: ECB Decision on the procedure for non-euro area MSs to report under the AnaCredit regulation, the European Central Bank, https://www.ecb.europa.eu/stats/ecb_statistics/anacredit/html/index.en.html
European Central Bank (2015). What is AnaCredit? 1 November 2015 (updated on 20 Nov. 2020), https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me-more/html/anacredit.en.html; https://www.ecb.europa.eu/stats/ecb_statistics/anacredit/html/index.en.html
EU Ombudsman (2011). The Europan Ombudsman's guide to complaints, 1 Oct. 2011, https://www.ombudsman.europa.eu/en/publication/en/11469
EU Ombudsman (2015). The Ombudsman asks the ECB about AnaCredit, Decision case 1693/2015/PD, 20.11.2015, EU Ombudsman, Frankfurt am Main, Germany; https://www.ombudsman.europa.eu/en/decision/en/62903

Case Law

Starr International Co. v. Federal Reserve Bank of New York, 906 F. Supp d 202, 237,US Supreme Court, https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=2346&context=ypfs-documents
Della Negra F., Smits R. (2022).The Banking Union and Union Courts: an overview of cases as of 20 April 2022 Court judgments, the European Banking Institute (EBI), Frankfurt am Main, Germany; https://ebi-europa.eu/wp-content/uploads/2022/05/The-Banking-Union-and-Union-Courts-20-April-200-_-final-1.pdf

O ZNAČAJU TRANSPARENTNOSTI U LEGISLATIVI CENTRALNIH BANAKA

Predmet analize u radu jeste utvrđivanje značaja principa transparentnosti u legislativi centralnih banaka koji predstavlja značajnu odrednicu efektivnosti i efikasnosti usvojenih rešenja za postizanje monetarne stabilnosti kao javnog dobra. U tom kontekstu se u prvom delu rada ukazuje na značaj i funkcije transparentnosti akata i postupanja centralne banke u savremenom monetarnom pravu i razmatraju različite teorijske postavke u koncipiranju regulisanja najviše monetarne vlasti u uporednom zakonodavstvu, dok se u daljem tekstu pažnja posvećuje doprinosu institucije ombudsmana u koncipiranju demokratskog monetarnog upravljanja zasnovanog na kredibilitetu i vidljivosti akcija centralne banke što ima značajne implikacije i na terenu zaštite ljudskih prava (prevashodno na primeru prava Evropske centralne banke koja ima veliki uticaj na oblikovanje monetarnih jurisdikcija u međunarodnom kontekstu). Primenom dogmatskog, aksiološkog i uporednopravnog metoda, autor nastoji da doprinese funkcionalnom i suštinskom razumevanju značaja i mesta transparentnosti u pozicioniranju monetarne legislative u funkciji ostvarivanja ličnog i društvenog blagostanja, uz eventualno identifikovanje domena i granica transparentnosti u radu centralne banke u dinamičnim i kompleksnim društvenim zbivanjima.

Ključne reči: *monetarno pravo, centralna banka, vladavina prava, ombudsman.*