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LEGAL POSITION OF THE EUROPEAN CENTRAL BANK IN CONTEMPORARY SOCIAL DISCOURSE

ABSTRACT: This paper analyzes the legal position of the European Central Bank (ECB) within the context of contemporary social conditions, focusing on the ECB's tendency to expand its competencies and the judicial evaluation of the current monetary legislation in the practice of the European Court of Justice (ECJ). In this sense, the paper analytically examines the concept and characteristics of monetary disputes, while exploring the ECB's contribution to democratic monetary governance through respect for the rule of law. The author pays special attention to the ECB's role in protecting human rights, specifically considering the trend towards a so-called "humane approach" to monetary management, which has significant consequences for the preservation of monetary stability as a public good. Using the dogmatic, comparative, and axiological methods, the author aims to highlight the main dilemmas in this area from the perspective of *de lege lata* and possibly offer certain guidelines for *de lege ferenda*.

Keywords*: European Central Bank, monetary law, monetary stability, rule of law, monetary disputes.*

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1. Introduction

Nowadays, the legal subjectivity of the ECB is very developed and complex, which is quite understandable considering its position and role in shaping and preserving international monetary stability and order. The ECB's institutional position has always beenormatively developed and substantially adapted to current events on the international monetary scene, which greatly influenced the evolution of its tasks and mandate. The ECB mandate was primarily based on classical monetary legal presumptions on what the tasks of the central bank are and how its operations should be organized in the monetary policy realm, but over time hybridization of classic postulates took place and brought up central banks some new tasks and activities from the field of fiscal policy and finally lead to the acceptance of its completely new legal position in society and existing normative matrix that relied on the conception of the ECB law as an independent legal discipline that is a result of monetary law disintegration process.

The contribution and the role of the ECB in the field of creation and implementation of soft legislation is of great practical importance because it represents indispensable factual material for filling legal gaps in EMU primary regulations. This research is based on the theoretical premise of the constant and continuous evolutionism of the supreme EU monetary institution competence, which not only becomes complex and heterogeneous due to contemporary social and economic circumstances, but is also recognized (in the author's opinion) as an example of good practice of the managing internal organization, mandate and actions of public law subject with a very specific mandate in such a way that not only contributes to the goals implementation of the sub-system for which that subject is responsible (here the central bank and the area of monetary policy), but also reimagines it, socially valorizes it and justifies it to the point of making it important in the eyes of the people (so we can speak about monetary stability as a public good that generates benefit to all members of society). Following these short findings, the first chapter outlines a judicial assessment of monetary legislation, while the second offers a brief review of monetary disputes, and the third chapter analyses the ECB mandate and rule of law, where the author finds that, nowadays, the ECB position seems quite complex and often ambiguous considering many different task and subtasks. The author hopes that the finding will help to better understand the ECB that determines its role and contribution to public order.

2. Judicial Assessment of Contemporary Monetary Legislation

In monetary law theory, the standard of review is the core legal concept for the legality check and control of monetary legislation effects (Zilioli, 2019, p. 23). Standard of review can be best understood as a legal standard which specific content and meaning depend on the situational framework and current circumstances, but in most cases, it will refer to the judicial readiness degree to consider the substance of the decision brought by public administration bodies as well as central banks.

In the judicial assessment of monetary legal acts, the concept of review can be used in the form of an *intrusive* model and *differential* model (Eskridge & Baer, 2019, p. 1082). Under the intrusive model, there is a very extensive and comprehensive review of decisions and their compliance with higher legal acts (so, profound control in the procedural and material sense). In the case of the differential method, the court control is less detailed and free of in-depth legal analysis and it is more implemented from procedural aspects and requirements. Of course, even in the case of a differential approach, the court must take into account the legality of the decision, and its compliance with the principle of legal continuity (retention) and protection of already acquired rights (but the intensity of the revision is present at a lower level than in the case of the intrusive model application). This is very important to point out because the meaning of the term differential in the case of judicial review of the central bank acts cannot be brought under the umbrella of simple linguistic interpretation. What's more, *we believe* that this approach is quite useful, because due to the nature of its work, the court cannot (always) delve into the merits of every ECB decision (nor is it necessary). Consequently, the differential approach can simultaneously be used as an *ex-ante* filtering function of the central bank's decisions to classify them, conditionally speaking, into those that are undisputed in terms of their legal nature and legal basis, or more or less disputed viewed from certain formal or material monetary legal benchmark (Dimitrijević, 2024, pp. 10–12).

Also, it is important to emphasize that judicial review of central bank legislation inevitably intersects with the concept of the central bank's discretionary rights where those rights are the consequences of its position of monetary sovereignty custodian (as the only institution with the capacity and knowledge to preserve it optimally in challenging time). Also, we must be aware that the nature and severity of circumstances behind monetary legislation can influence practice on choosing a concrete type of review standard. In that sense, the very purpose, scope, and emergence of judicial

review are diametrically different when the central bank act is a direct reaction to an event in the monetary system that needs to be controlled – such as inflation or the collapse of a monetary system. The court review will have different characteristics when it comes to central bank acts enacted in regular circumstances free of economic and financial crises.

3. A brief overview of the monetary disputes (concept and characteristics)

Monetary disputes represent a special category of administrative disputes in which the courts or arbiters decide about the administrative and legal nature of the supreme independent monetary institution acts (Dimitrijević, 2018; Zilioli & Beck, 2022, p. 2). In contemporary monetary law, central banks increasingly resemble independent agencies that enjoy a significant place in the country's constitutional order and whose decisions have important implications for the budget and public finances (where their competences are elaborated by special laws and by-laws). Generally speaking in the review of administrative disputes in which the court decides about the legality of decisions of state regulatory agencies results are almost always in favor of state agencies. Nowadays, that organization represents an example of the so-called smart organizations that evoke wisdom from their own mistakes in the field of public management and somehow have become reputed in their work compared to other public authorities (Bajakić & Kos, 2016, pp. 22–23). Considering that the administrative disputes in the EU area have become very specific there is the need for the formation of a special European Administrative Court that would deal with the mentioned issue more adequately.

4. ECB and the rule of law

The rule of law is tremendously significant for the work of all national and international monetary institutions, which with their acts strive to carefully shape the relationship between law and economic development, because the clear application of regulations, the predictability and enforceability of laws, the key factors of investment risk and the availability of capital, have great importance for economic growth and stability. This principle finds its place in the work of the International Monetary Fund (IMF), the World Bank, the European Bank for Reconstruction and Development, and central banks all over the world (Menkes, 2020, pp. 341–342). Any change in the understanding of the principle of the rule of law must be conditioned by

socio-economic events (in the case of EMU noticeable for quite some time in the last decade) but even so, in contemporary let called its sustainable law, there is always a certain common denominator, what should be covered under this principle (and it refers to the protection already acquired rights, which is the basis of legal certainty). The rule of law is inseparable from the legal definition of the concept of money and its economic functions (Kempf, 2020, pp. 387–388). Namely, considering its function as a means of calculation, we can notice that money has the characteristics of pure public good while considering the function of payment, but it also has the characteristics of a club public good that produces effects within the monetary zone in which it is accepted (this was also the case with the euro as a single currency in the beginning, but considering the external effects of the *lex monetae* principle and the euroization regime, this emphasis on the differences between public goods categories slowly loses its importance).

The EMU institutional structure, thanks to the monetary disputes in which the ECJ arranged in favor of the ECB, got a solid new dimension concerning the protection of human rights, which at first sight is not compatible with the economic criteria of convergence. Of course, with the more "humane" actions of the ECB, which implies that monetary measure has an impact on the scope of human rights, the transformation of the monetary union from a purely economic one to a more "humane" one had to happen, which *in our opinion* represents a significant a value-qualitative step forward, i.e., towards entrenched traditional understandings of why countries create and access monetary unions and how they should act in practice (Dimitrijević, 2024, pp. 7–24). Never before in monetary history has there been an example of a monetary union in which a permanent and unbreakable connection between monetary (general financial stability) and human rights was made through such a rational and above all smart approach? The EMU is an example of a modern monetary union that has an incredible ability (due to the monetary legislator wisdom) to adapt to challenging and sometimes difficult economic and social conditions (thanks to secondary legislation created by the ECB) which, regardless of evident omissions and legal gaps (with the inevitable time-lag) in the implementation of monetary-fiscal policy actions) must be emphasized. In this regard, *we must point out* that monetary unions cannot and do not have to function perfectly, because they are burdened by the problem of limited rationality of the subjects who created it (let's keep in mind that every monetary union is primarily a people creation and as such imperfect as its creator).

The aforementioned tendency is well illustrated by the significant monetary dispute in the case of *Ledra Advertising v Commission and ECB*,[1] where during the crisis (2012) a group of banks based in Cyprus faced serious financial difficulties the government turned to the Eurogroup for financial support, which resulted in negotiations between potential lenders (ECB, European Commission, and IMF) and representatives of the Cypriot government, as borrowers. The negotiations ended with the drafting of a memorandum of understanding (as a form of financial support program) which, among other things, provided for the restructuring of banks, for which disgruntled citizens, as well as the aforementioned marketing agency Ledra Advertising, submitted a request for the annulment of such a decision and demanded compensation before the General Court. The Court considered that the request was unfounded, that there was not enough clear evidence that the damage was caused by the actions of the Commission, and that (generally speaking, because it does not have jurisdiction) it could not decide on requests for compensation arising from the memorandum of understanding (Case T/289 /13). In the appeal procedure, the ECJ found that the EU institutions participating in the drafting of the memorandum of understanding (which activates financial assistance from the European Stability Mechanism-ESM) must comply with the provisions of the EU Charter on Fundamental Rights (which is why it examined in detail whether there was a violation of the complainant's property rights in this dispute and found that as a result of ensuring the stability and smooth functioning of the banking system as a general interest, there was only a minimal but unavoidable financial loss of the real value of the deposits of some bank clients (Lenaerts, 2019, pp. 420–421). In the specific case, the Court (for the first time) established a significant (new) constitutional principle that by Article 17 of the EU Treaty, the European Commission must take care that any future memorandum of understanding is consistent with the provisions of EU law and especially the Charter of Human Rights which marks it as an important turning point in considering the previous relationship between EU Law and EMU Law.

Another significant monetary dispute related to the ECB's concern for human rights concerns the judgment in the case of *Malis and Malis and Others v Commission and ECB*,[2] where a group of citizens (also from Cyprus) initiated proceedings before the General Court to annul the Eurogroup statement (from March 25, 2013). On this occasion, the Court rejected the

[1] Case T-289/13 *Ledra Advertising v Commission and ECB*, EU: T: 2014:981.
[2] Case T 327/13, *Malis and Mali v Commission and ECB*.

request for annulment, because the European Stability Mechanism is not an EU institution but a *sui generis* intergovernmental agreement that *de facto* establishes collective responsibility for the public debt of the Eurozone member states (which is certainly true, but at the same time the provisions of the same agreement provide ECB certain new powers that it did not have before (Case T 327/13). In practice, eurozone member states can count on the financial support provided by the ESM, while EU members who have not introduced the euro as their official currency cannot apply for the same.

In the case of *Florescu and Others*,[3] five Romanian citizens (retired judges with a university career and a distinguished legislative practice) who were now prohibited by the stipulated conditions coupled with the implementation of the financial support program from simultaneously receiving a pension based on service in the private-public sector with income generated from the performance of certain project and other tasks in public institutions (Case C-258/14). The provision of financial support has always been linked to the fulfillment of certain economic and financial conditions, which often entailed (un)popular reforms of existing regulations on tax, labor, social, and budget legislation. The ECJ acted very pragmatically in this dispute as well as in the previous ones and justified the mentioned prohibitions with the request for more rational public spending (which today in many European and non-European countries is oversized to personal and investment spending, which harms the overall aggregate demand and the level of budgetary deficit). *We can see* that the ECJ's current position is very unenviable because there is a duality of public opinion demands, which is reflected in the need to preserve the legacy of primary law (which must not be relativized and selectively applied) supporting the legal mechanisms of monetary coordination and fiscal policies that consolidate the EMU in a comprehensive and unified way (and which are largely embodied in the provisions of secondary monetary legislation).

Namely, in EU law, changes can be observed regarding the scope of application, the entities that apply it, and the very pattern of implementation (Scholten, 2021, p. 21). This means that the field of changes is constantly expanding (especially in the area of national fiscal policies on a gradual but persistent way) with the increasingly pronounced role of the ECB who initiated new very complex procedures of quantitative and qualitative financial sanctioning for non-compliance with established rules of monetary conduct. The ECB has (relatively) new powers in the field of the banking union, with which it supplements the existing ones (it is interesting that in

[3] Case C-258/14, *Florescu and Others*, EU: C:2017:448.

the period between 1999-2013, the total amount of fines reached the value of seven million euros, while in the period from 2017-2019, the total value of fines imposed in the financial supervision procedure reached the amount of 21 million euros (Allemand, 2021, pp. 162–163).

Active involvement of the ECB in the implementation of the rule of law concept was emphasized in practice and during 2019 at the initiative of the European Commission, where the ECB in its official announcements supported the Commission's position that "the principle of the rule of law skilfully avoids being molded into complete definitions that would sublimate all its meaning and indicated its importance in the implementation of legal norms, which is more significant than the function of preserving and protecting general law – and where the segment of arbitrary actions of public administration bodies is undoubtedly significant, but not dominant (European Commission, 2019). In this report, the Commission particularly focused on the domestic (national) interpretation and dimensions of the rule of law principle in the practice of the member states, considering the existing differences in approach, interpretation, and decision-making *vis-à-vis* the ECJ and other EU institutions, as well as the bodies of the member states. At the same time, these differences point to conceptual deficiencies in the application and understanding of principles between different organizations.

The scope and reach of the principle on the development of ECB law appears in practice as indirect and immediate. Indirect influence is expressed through the work of national central banks that are members of the ESCB and that must respect this principle, which is explicitly guaranteed by Art. 2 of the EU Treaty, but also the obligation to respect the principles at the national level, which derives from the rights created by central bank governors, because then it is manifested through the basic principle of organizing and dividing work in public administration bodies. An indirect influence is also observed because the elements of the principle of the rule of law are contained in the structure of the principle of legal security, which is a condition of economic stability. After all, it allows citizens to organize their life activities in such a way that they can foresee the consequences of their actions while protecting already-acquired rights. Therefore, the Commission highlights the importance of the work of anti-corruption agencies and authorities in the fight against various forms of the gray economy and economic and financial crime, as this has an impact on the conditions in which the ECB must maintain price stability as its primary task. The immediate impact is observed in cases where, due to the insufficient content of the principle, domestic (national) courts cannot sanction the central bank due to the existence of presumptions of immunity

or similar privileges, which directly reflects on the legality and legitimacy of the actions of the ESCB, i.e. the ECB. However, the exclusion of the actions of the highest monetary authorities from the principle of tort law has been abandoned in all monetary legislation today, differences are observed only in terms of determining the model (subjective or objective responsibility) for the resulting damage (Golubović & Dimitrijević, 2022, pp. 100–113).

Systemic challenges related to the application of the rule of law can potentially threaten the independent position of national central banks and erode the objectives of the ESCB. What's more, in today's circumstances, these systemic challenges are becoming related to central banking, which is why the Commission states that they have a more concrete character of "direct threats" to (independent) central banking. The independent position of central banks corresponds to the constitutional paradigm that recognizes and guarantees the existence of independent monetary institutions that are (not) accountable to the executive and legislative authorities. Recently, populist and above all secular approaches to this issue point out in a sensationalistic way "the absence of a sufficiently direct connection in the work of central banks with the will of their people", which, *we can note*, is one of the causes of strengthening of distrust towards their work. *We believe* that such statements, which are usually used in the period of pre-election campaigns or in circumstances that deviate from normal economic conditions, are not appropriate if there is no clear justification and logical explanation for such statements (which is bad and ignorant monetary legal management). No central bank in the world (not even the EBC) is a *panacea* for all economic troubles. *In our opinion*, the unreasonably high and unfounded expectations of citizens about central bank duties not only in the economy but also in society can be the source of negative populism. Such expectations led to the emergence of the phenomenon of the multifunctional jurisdiction of the central bank (which was initially an exception, but slowly became a monetary law imperative) not only in European monetary law but also in monetary jurisdictions around the world. The willingness and readiness of the central bank to expand its competencies represent solid proof that the bank "listens, hears and respects the will of the people" because if it did not listen, it would never have agreed to practice all those very different from each other (sometimes mutually conflicting) tasks (Dimitrijević, 2023, pp. 300–303).

The reason for guaranteeing the independent position of the central bank is similar to the recognition and respect of the independent position of national courts by the European Court of Justice, which, according to the ECJ judges, is necessary to protect against external factors (the Union) when resolving

disputes in the internal legal order.[4] At the beginning of 2014, the Commission established additional instruments for ensuring the rule of law, in a separate manual (which EU bodies must adhere to in their work) which also applies to the ECB. This manual is significant for ECB law for reasons that include ensuring and guaranteeing its functional independence, providing adequate protection instruments against the influence of Union law, and promoting compatibility in the work of the ECB with requirements that inter alia keep the principle of the rule of law safe in the concept of *acquis communiataire* (European Commission, 2014).

Rule of law compliance is, also, observed in the structure of all acts and actions of the ECB, through giving opinions, recommendations, and implementation of monetary measures (programs) to reports on the fulfillment of legal and economic convergence criteria. Opinions that rely on the exercise of an advisory function are also in the function of early warning of potential threats to legal certainty (especially when addressed to the governments of member states in connection with specific actions), while on the other hand, ECB measures to annul national measures that can be thwarted by the independent position of the ECB is a very important instrument for ensuring the consistency of the single monetary strategy. In addition to the aforementioned guidelines of the Commission, it is very important to add to the existing instrument the possibility of judicial and administrative control of ECB acts and enable the open attitude of accountability. Judicial and administrative control of the ECB's acts can help ensure that its actions are aligned with the highest and strictest standards of public administration. Independent external control performed by authorities acting *de lege artis* is a prerequisite for work in which there is no place for conformity, which reduces the possibility of mistakes. In practice, three areas can be identified where the ECB's measures influence the lives of individuals, namely: the area related to decisions arising from the original mandate of its jurisdiction; role in the remediation of the consequences of financial and economic (debt) crises, and; areas of prudential supervision of commercial banks (Smits, 2019, pp. 356–357). Perhaps, the most direct impact of the ECB on the lives of citizens can be recognized through its determination and control of the flows and direction of economic flows through the definition of interest rates, the exchange rate policy of the payment system, and other traditional tasks of monetary policy. Although at first glance these are generic goals (defined by the general decisions of the ECB), for which in the event of a dispute the individual who files a claim must

[4] Judgment of 24 June 2019, *Commission v Poland*, case C-619/18m EU: C:2019:531.

prove that he is affected by the decision and that he has suffered some damage. This means that primarily all measures of the ECB (either standard or non-standard) are applied based on the powers given to the ECB by the founding agreements, the provisions of the Statute of the ECB (ESCB), and General Documentation of the Eurosystem, checks do not have inter partes effect, nor is any individual their addressee (Guideline EU 2015/10).

5. Conclusion

The actual legal position of the ECB in the current normative ambient was created as a result not only of the synergy of primary and secondary monetary legislation, but also of greater transparency and credibility in its work which had its verification nor in the jurisprudence of the European Court of Justice, but also in better communication with citizens to bring its work and actions closer to their needs and desires. In the recent analysis of the ECJ's actions in assessing the legality of the ECB's measures, we can note that in addition to the undoubted use of all standard means for elucidating the monetary legal factual situation, a significant factor (let's call it symbolically a special type of evidence) is the economic and political moment in which the measure in question is adopted and applies. Also, the technique of drawing up the ECB measure itself is based on macroeconomic models, econometric functions, and similar economic tools, placing the monetary disputes in which the ECB is sued into a complex and multidisciplinary realm that presents a great challenge to judges because it is diametrically and qualitatively different from the environment and the atmosphere in which most legal disputes start and end. Considering ECB's current legal position, it is evident that is very developed and heterogenous, which is why the concept of defining threshold of minimal and maximal levels of responsibility and its polarization (in the sense of primary and secondary ones) can put functional clearances in its mandate. The implications of the complex legal position of central banks show all their effects not only in the field of monetary policy but also in other areas of general economic policy, today especially fiscal and environmental policy, which can represent a significant moment for public policymakers for a more consistent inclusion of the central bank in the wider social dialogue with other public and private actors responsible for preservation of the public order value and humankind concerns generally speaking but with respecting some limitations that imply that central bank contribution in this field is limited but that does not diminish its endowment.

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PRAVNI POLOŽAJ EVROPSKE CENTRALNE BANKE U SAVREMENIM DRUŠTVENIM PRILIKAMA

APSTRAKT: Predmet analize u radu jeste sagledavanje pravnog položaja Evropske centralne banke (ECB) u savremenim društvenim prilikama uzimajući u obzir tendenciju širenja njene nadležnosti, kao i sudsku ocenu njene legislative u praksi Evropskog suda pravde. U tom smislu, u radu se analitično ukazuje na pojam i obeležja monetarnih sporova, dok se u nastavku teksta sagledava doprinos rada ECB demokratskom monetarnom upravljanju kroz poštovanje principa vladavine prava u njenom radu. Predmet posebne pažnje autora jeste doprinos ECB u zaštiti ljudskih prava, tačnije, razmatranje tendencije tzv. humanijeg pristupa u monetarnom upravljanju koja ima značajne konsekvence na očuvanje monetarne stabilnosti kao javnog dobra. Primenom dogmatskog, uporednog i aksiološkog metoda, autor nastoji ukazati na najveće dileme u toj oblasti na način *de lege lata* i eventualno ponuditi određene smernice *de lege ferenda.*

Ključne reči: *Evropska centralna banka, monetarno pravo, monetarna stabilnost, vladavina prava, monetarni sporovi.*

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