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THE ROLE OF THE CENTRAL BANK IN NORMATIVE RISK REGULATION IN THE CONTEMPORARY MONETARY LAW[**]

Abstract: *The paper analyzes the reasons for normative risk regulation in monetary legislation and central bank legislation to understand the axiological matrix of the concept, principles, and purpose of risk regulation. In the circumstances of dynamic and complex monetary flows, the monetary legislator (central bank) must pay special attention to this matrix in order to protect monetary stability as a global public good. In this context, the paper starts from the basic hypothesis that the mechanisms of optimal legal regulation of risks in monetary law are in the function of protecting the interests of bank clients (and users of financial services in general).To this effect, it is necessary to identify, determine and logical interprete relevant provisions of both primary monetary legislation (in the current circumstances of various crisis scenarios) and secondary monetary legislation (which is especially noticeable in EU monetary law where secondary legislation, due to its flexibility and effectiveness, is a significant instrument for filling legal gaps in primary monetary legal acts). In particular, the paper focuses on the functional analysis of relevant provisions of Serbian monetary legislation and practice. In the author's opinion, given the fact that the law of the European Central Bank (ECB) is not only the actor primus of European Monetary Law but also of international monetary order, the solutions from the domain of ECB law must be adopted and applied (with adequate adjustments) in Serbian monetary law and practice to form optimal normative models for regulating financial risk for the purpose of sustainable public monetary management and providing economic stability of the banking sector.*

Keywords**:** *financial risk, monetary law, EU, central bank, monetary stability, public monetary management.*

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1. A Brief Theoretical Overview of Financial Risk Regulation in Public Monetary Management

Today, risk in monetary flows is an unavoidable factor that influences the decisions of entities operating in a regulated monetary reality. Risk is most commonly defined as the recognition of a state (action) where a series of different results may appear as a consequence of a decision, and where the probability of achieving each result is quite known to the issuer (Orsag, 2002: 194). Timely recognition of financial risk is particularly important in the context of corporate financial law, where risk appears as the possibility of quantifying the probability of achieving certain results, such as profitability of investments in securities (i.e., the degree of profitability prediction that can be expected from a specific type and form of investment, including deviation from the expected return rate). The risk of investing in securities refers to the portfolio risk that represents a combination of assets owned by an individual or a company and the sole purpose of generating income. Generally speaking, the main reasons of the legislator's endeavours in the sphere of regulating the banking business include: protection of the goals and objectives of monetary policy, prudential reasons, prevention of financial crime, consumer protection, and investor protection (Cranston, 2005: 63). In the circumstances of globalization of international monetary and financial flows, it is precisely for these reasons that the existing rules for the implementation of monetary and corporate finances have been tightened, which is contrary to the principles of free market economy and free movement of capital. In the era of extensive liberalization of financial flows, banks face significant risks in their operations, for which reason imperative (*ius cogens*) legal norms dominate the legal regulation of bank finance. Although countries shape regulations for limiting risks in bank operations according to their national needs and current global circumstances, there is a tendency towards convergence of legal standards and techniques for preventing risks (primarily in prudential control). This tendency can be explained by the fact that banks are financial intermediaries which, in their operations, cross the borders of the national monetary jurisdiction and establish their branches in a large number of countries worldwide.

The monetary law science has identified the legislators' motives that justify the need for comprehensive regulation of financial risks, including the so-called historical reasons (which justify state intervention based on the principles of orthodox monetary law) and contemporary reasons (which generate the need to redefine the role of central banks and humanize monetary policy in the circumstances of financial, economic and pandemic crises). Historical reasons follow the development path of banks as standard financial intermediary, starting from their first establishment and subrogation of laws and sub-

laws that regulate their conduct (which often occurred after financial crises and the emergence of new economic doctrine). For example, the *Banking Act of Great Britain* (1979) was passed after the banking crisis in the early 1970s to strengthen prudential control. The same act was repealed after the collapse of the Bank of England (1987). Practice shows that the existence of legal gaps inevitably results in amending and supplementing the legislation with new solutions. On the other hand, contemporary reasons arise from the specific form and organizational structure of banks, where we must emphasize that the legislator's motives and reasons for regulating financial risk may differ from the original motives of the framers of such regulations. Thus, regulations may remain legally or economically inefficient even though they were originally adopted to eliminate inefficiency and uncertainty in banking finances in modern cash flows.

2. Regulation of Systemic Risk in Central Banking Today

The risk faced by central banks is similar to that faced by traditional financial institutions. It includes market risk, credit risk, operational risk, liquidity risk, and credibility risk. The last one is particularly important, taking into account that the central bank is the *actor primus* in the protection and implementation of monetary sovereignty as an integral part of political sovereignty (Fabris, 2006: 63-64). However, the literature on monetary law and central bank law clearly emphasizes that, unlike other traditional financial institutions, central banks are less prone to risk in their actions and their portfolios contain high-security investments. The reasons for their risk-free behavior lie in the fact that central banks are non-profit institutions and need to protect public funds. Certainly, this does not mean that risk management is being neglected in central banks' strategies; in the past period, there has been a general tendency towards risk management, manifested through the identification of the risk to which the central bank is exposed, as well as the development of instruments for timely measuring risk exposure, its monitoring, and management.

Effective risk management is a comparative advantage, while poor risk management leads to significant financial and non-financial losses, as well as missed opportunities. For the aforesaid reasons, central bank management pays special attention to strategies for avoiding, reducing, and sharing risks in its soft legislation. Avoiding risks involves ceasing to perform the activity that causes the risk; for example, cash from the central bank's vault is taken over by a commercial bank, thus eliminating the risk of transporting money. Reducing risks involves taking a series of actions that minimize either the occurrence of risk or the potential loss in the event of its occurrence. Sharing risks involves sharing the risk with another institution, such as an insurance company. As

a rule, the risks that are very unlikely to occur, those that carry a potentially small loss, and those where the cost of protection against risk is higher than the potential loss caused by the risk in question are considered acceptable.

The central bank plays an important role in determining the goals and instruments of economic security policies that are shaped by various factors, for which reason certain guiding principles must be applied in the process of achieving these security goals. The application of economic security principles should ensure that the state as an economic law participant and its security system are stable, which means that they do not introduce disturbances into its economic processes (Milošević, Stajić, 2021: 11-12). The principles of economic security should not be set in abstract terms, outside a given social, economic, political, security, legal, and social environment. National security policy should be designed so that all the requirements set in the principles of economic security are implemented as fully as possible, but it must be borne in mind that certain deviations may occur in practice due to several factors. Systemic risk should not be equated with very similar credit risk, political risk, market risk and other risks that banks encounter in their operations. The experiences of countries where systemic risk emerged during the financial crisis show that systemic risk can significantly reduce gross domestic product, in the range of 15-20%. Limiting and eliminating systemic risk is a very serious issue because it is easily transferred from the affected bank to other banks due to the single payment system. For example, if one of the banks in the system does not act on payment orders by the end of the business day, a build-up of due obligations occurs, which also endangers other entities. For this reason, the general rule of business is that payment orders must be executed immediately in order to avoid the congestion effect.

Notably, the emergence of complex economic problems throughout economic history has provided a good basis for reexamining the established conceptions on the role of the central bank, and has thus contributed to the development of some new theories. In this sense, rapid changes in the strategic environment have fundamental implications for the theories underlying the creation of central bank policy. Moreover, the existing established practices in the selection of central bank measures and instruments have changed in different monetary jurisdictions that require the adaptation of the principles and postulates of basic economic theories. As observed in academic circles, the evolution of the central bank mandate is influenced by the reciprocity between the development of monetary economics and financial theory with the ideas and concepts underlying the creation of policy and practices in the central bank (Warjiyo, Solikin, 2020: 278-279). Thus, in order to explain or offer solutions to specific economic problems, the academy provides an irreplaceable contribution to the abundance of conceptual and theoretical ideas related to various

economic phenomena and behaviors in society. Yet, theoretical considerations must be supported by the use of advanced quantitative methods and empirical studies that are not ideal because they are often based on certain assumptions that simplify complex economic behaviors and flows in the real world. Although the central bank is expected to lead a policy of monetary and financial innovations, and simultaneously take measures aimed at ensuring both economic growth and economic stability (which is sometimes contradictory), today it is believed that a strong central bank must offer the interested public (and especially representatives of the executive branch) a strong response to potential citizens' dilemmas in the field of monetary policies because this is a confirmation of the central bank's independence in performing its activities.

These assumptions may be best illustrated by the example of the European Central Bank (ECB), including its communication with other community and national institutions, its behavior in monetary disputes, its relations with the public, and its correlations with other subjects of international monetary law, such as the IMF and the World Bank. In that regard, another consequence of the global financial crisis is the strengthening of the macroprudential function of the ECB, as the supreme European monetary institution which has to look after and ensure the sound operation of the entire financial system, not just financial entities at the micro level. This role is not new; it was shaped by establishing the European Systemic Risk Board and further developed by the concept of the EU banking union (more precisely, by the adoption of the Single Resolution Mechanism Agreement). However, the problem with its action in the field of early risk detection in the financial market was related to the absence of legal subjectivity and non-binding decisions. The ECB's influence on the Board was twofold and can be understood as formal and substantive (Zilioli, Athanassiou, 2020, 667-678; Gortsos, 2020, 11-13). Formal influence is reflected in its support in human resources and performance of analytical tasks, while substantive influence is more intense and is reflected in two facts: the President of the ECB also chairs the Board, and the highest body of the Board (in addition to national auditors) includes the President and Vice-President of the ECB. As an example of a successful prudential policy in monetary literature, we may refer to the prudential policy of the Bank of Japan, which had an unusual development path. Namely, in the 1990s, prudential control in Japanese monetary law was carried out under the watchful eye of the Ministry of Finance, which had a great influence on the operations of banks. Interestingly, the legal effect of the guidelines, manuals, and guides issued by the Ministry had a strong effect in practice on the process of consolidation of the banking system and preservation of monetary stability. When prudential control finally became the responsibility of the central bank, in conjunction with other applied credit and tax policy measures, it yielded good results in controlling the emerging shocks

in the real estate market. For this reason, it is noted that Japan's monetary and fiscal policy from that period is very similar to events in the USA banking market before the beginning of the mortgage crisis (Ryozo, 2021: 28-33).

The importance of financial risk in banking finance can best be seen in the example of once widespread EU practice of concluding credit agreements denominated in Swiss francs (which is also present in the practice of the Serbian banking sector). Namely, the warning of the IMF (2007) states that trading, which involves borrowing in low-interest currencies, such as the Swiss franc, to raise funds for investment in high-interest currencies, could temporarily weaken the franc and cause it to fall below its equilibrium level. In this way, the IMF warned the central banks of Eastern European countries, and the banks operating in those countries, of the possible risks of borrowing in Swiss francs. In this statement, the IMF warns that such developments may lead to risk spillover to other countries, especially Eastern European countries, where the Swiss franc, thanks to small exchange rate changes and low interest rates in Switzerland, has become the main currency for loans that have greatly contributed to the rapid credit expansion. It also contains a recommendation from the Fund's director to carefully monitor these types of loans in order to limit risks.

As the central national institution responsible for the stability of the financial system and the protection of financial service users, the NBS adopted a Decision on measures for preserving the stability of the financial system concerning loans indexed in foreign currency (2015).[1] The Decision was made to preserve and strengthen the stability of the financial system of the Republic of Serbia, more adequately manage bank risks, and better protect financial service users, who are primarily affected by the negative consequences of current developments in international foreign exchange markets. Under paragrsph 1 (point 3) of the Decision, banks were obliged to offer four models for concluding an annex to the agreement on changing the loan payment term for users of housing loans indexed in Swiss francs:

• *Model 1*: a loan indexed in Swiss francs shall be converted into a loan indexed in euros at an exchange rate that is 5% lower than the average exchange rate of the euro (EUR) against the Swiss franc (CHF), calculated on the basis of official average exhange rate of the Serbian dinar (RSD) against the Swiss franc (CHF) valid on the date of conclusion of the annex to the agreement,, with further application of the interest rate that the bank applies to loans indexed in euros, and with the additional possibility of extending the loan repayment period, upon the user's request, for a maximum of 5 years;

1 Odluka o merama za očuvanje stabilnosti finansijskog sistema u vezi s kreditima indeksiranim u stranoj valuti (Decision on measures for preserving the stability of the financial system concerning loans indexed in foreign currency),"*Službeni glasnik RS*", br. 21 od 25. februara 2015 i 51 od 12. juna 2015.

• *Model 2*: a loan indexed in Swiss francs (CHF) shall be converted into a loan indexed in euros (EUR) at the exchange rate calculated on the basis of the official average exhange rates valid on the date of concluding the annex to the agreement, with a reduction in the interest rate that the bank applies to loans indexed in EUR on an annual basis by 1 percentage point, which does not have to be lower than 3%, and with the additional possibility of extending the loan repayment period, upon the user's request, for a maximum of 5 years;

• *Model 3*: the loan remains indexed in Swiss francs (CHF), the interest rate is reduced by 1 percentage point per year but it does not have to be lower than 3%, with the additional possibility of extending the loan repayment period, upon request, for a maximum of 5 years;

• *Model 4*: the loan remains indexed in Swiss francs (CHF) but the amount of the monthly installment expressed in Swiss francs is reduced by 20% of the contracted amount for 36 months from the date of concluding the annex to the agreement; after the expiry of that period, the total amount by which the monthly annuities are reduced is repaid in 12 equal monthly installments; After the expory of the original loan maturity, the bank would not calculate or charge interest on receivables whose collection is postponed under this model.[2]

To propose adequate and balanced solutions to the aforementioned problems, the NBS conducted a detailed analysis of data on these loans, especially in comparison with loans indexed in euros. On this occasion, all relevant social and financial components of the position of the beneficiaries of these loans were taken into account. The results of the analysis confirm that the unfavorable development of the currency relationship between the Swiss franc and the euro resulted in a situation that a certain number of citizens were unable to settle the installments on these loans on time or settle them with considerable difficulty. Considering the different modalities of approaching this problem, the NBS concluded that the appropriate solution at that moment was to recommend to banks that the beneficiaries of these loans, primarily those who were granted loans up to the amount of 80,000 EUR (in the equivalent value of the Swiss franc on the day of granting the loan), should be enabled to repay the loan in smaller amounts over a certain period compared to the originally agreed annuities. In addition, the NBS issued a recommendation on the application of undetermined elements of variable interest rates before the Act on the Protection of Financial Services Users came into effect. However, this Act did not explicitly regulate the issue of margins that banks unilaterally changed and applied to loan agreements before this Act came into effect (e.g. changing the interest rate following business policy acts, general business conditions or

2 Decision on measures to preserve the stability of the financial system concerning loans indexed in foreign currency, paragraph 1, point 3 (2015).

changed market conditions). In this regard, the clients who were dissatisfied with the behavior of banks sought the protection of their rights in court.

The Serbian Supreme Court of Cassation also provided an interpretation of the currency clause and its purpose, emphasizing that a currency clause can be agreed in a legally valid manner in order to preserve the equality of mutual benefits: the market value of the dinar (RSD) amount of the placed and returned credit funds, which is determined by indexing the euro exchange rate. In the Supreme Court opinion, a provision in a loan agreement on indexing dinar (RSD) debt by using the CHF exchange rate is null and void if it is not based on reliable written evidence that the bank acquired the placed credit funds in dinars (RSD) through its borrowing in that currency and that, before agreeing, the bank provided the loan beneficiary with complete written information about all business risks and economic and financial consequences that will arise from the application of such a clause. It is clearly emphasized that the loan agreement produces a legal effect even after the nullity of the clause on indexing debt by using the CHF exchange rate is determined. In such a case, the agreement will be executed by conversion while preserving the equality of mutual benefits: the market value of the given loan determined based on the official middle exchange rate of the euro on the date of concluding the loan agreement and the payment of interest in the amount determined by loan agreements of the same type and duration, concluded with a currency clause in euros between the same lender and other loan beneficiaries whose debt is determined by using the official middle exchange rate of the euro. In civil proceedings concerning the legal validity of a loan agreement, or a contractual clause on indexation of the contract in Swiss francs, the court shall, at the request of the plaintiff, order a provisional measure prohibiting the lender from realizing the collateral for the execution of the contractual obligation of the borrower, if enforcement has not already been initiated to realize the collateral. If enforcement proceedings to realize the collateral for the debt from the loan have already been initiated, the court or the public enforcement officer shall, at the request of the enforcement debtor, postpone the enforcement.[3]

Interestingly, the Supreme Court took the position that the provision of the Loan Agreement obliging the borrower to pay the bank an insurance premium with the National Housing Loan Insurance Corporation is legally valid (provided that this obligation is clearly presented to the borrower in the pre-contractual phase by stating this type of loan costs and its percentage or nominal amount in the offer) and that, accordingly, the bank is not obliged to inform the borrower about the structure and method of calculating the

3 Pravno shvatanje usvojeno na sednici Građanskog odeljenja Vrhovnog kasacionog suda održanoj 2. aprila 2019 (Legal opinion adopted by the Civil Department of the Supreme Court of Cassation, 2 April 2019).

insurance premium.[4] In_subsequent explanations on this matter, the Court pointed out that the bank has the right to charge banking service costs and fees; thus, the provision of the loan agreement obliging the borrower to pay the bank the loan costs is not null and void, provided that the bank's offer contained unambiguous information about the loan costs. The costs of loan processing and loan disbursement, as well as other costs that the bank charges to the borrower when approving the loan, or the costs that are known on the day of calculation and the costs that the bank charges to the borrower during the implementation of the loan agreement, may be expressed in a percentage amount and charged only through the calculation of the effective interest rate. The bank is not obliged to specifically prove the structure and amount of costs included in the total amount of loan costs, which are stated in the offer accepted by the borrower by concluding the loan agreement.[5] In another SC case, considering the legal basis for the permissibility of contracting an insurance premium with the National Housing Loan Insurance Corporation as an obligation of the borrower, the Court also expressed the view that the provision of the loan agreement by which the lender obliges the borrower to pay the bank an insurance premium with the National Housing Loan Insurance Corporation is legally valid, provided that this obligation is clearly presented to the borrower in the pre-contractual phase by stating this type of loan costs and its percentage and nominal amount in the offer, and that therefore the bank is not obliged to inform the borrower of the structure and method of calculating the loan insurance premium.[6] In a subsequent position on this matter, the Supreme Court found that the bank has the right to charge costs and fees for banking services; thus, the provision of the loan agreement by which the lender obliges the borrower to pay the bank loan costs is not null and void, provided that the bank's offer contained unambiguous information on the loan costs. The costs of processing the loan and releasing the loan into circulation, as well as other costs that the bank charges the user when approving the loan or costs that are known on the day of calculation and the costs that the bank charges the user during the implementation of the loan agreement (according to this understanding), may be expressed as a percentage and charged only through the calculation of the effective interest rate. Concurrently, it is emphasized that the bank is not obliged to separately prove the structure and amount of costs

4 Pravni stav usvojen na sednici Građanskog odeljenja Vrhovnog kasacionog suda održanoj 16.09.2021. (Legal position adopted by the Civil Department of the Supreme Court of Cassation, 16 Sept.2021).

5 Legal position adopted by the Civil Department of the Supreme Court of Cassation, 16 Sept.2021..

6 Legal position adopted by the Civil Department of the Supreme Court of Cassation, 16 Sept.2021.

that are included in the total amount of loan costs, which are stated in the offer that the loan user accepted by concluding the loan agreement.

3. Some Concerns Regarding Normative Risk Regulation and the Protection of the Financial Services Users' Rights

The existence of special laws that protect the interests of users of banking services is a rare trend in the world, taking into account that they represent users of financial services, i.e., consumers whose protection is provided in a conventional (general) manner through the application of laws on the protection of (all) categories of consumers regardless of the types of goods and services they express preferences for. In addition to shelling out harmonized banking operations (paying a specified unexpected/excessive amount of money), prudential control contributes to the protection of the interests of consumers of banking services. The deposit insurance system provides consumers with a certain form of security if a bank ceases to operate. Corporate financial law, in synergy with banking law, central bank law and competition law, places special emphasis on the protection of consumer interests, particularly in the circumstances of the global financial crisis. In practice, various deposit insurance systems can be classified as follows: a state insurance system, an insurance system based on the so-called guarantee schemes, and a system of prior insurance for depositors over other banking users. The first approach is usually applied when it comes to securing smaller amounts of money, while the system of prior insurance often appears in practice in case there is a special interest of the bank to protect the interests of its depositors which, in the long term, contributes to increasing its reputation and credibility in business. In this context, priority groups can be established among the depositors themselves according to the size of their insured amount and the term of deposit (Golubović, Dimitrijević, 2022: 10-12).

In today's economic and financial circumstances, the system based on guarantee schemes has the character of a universal principle in comparative jurisdictions. According to the EU Deposit-Guarantee Schemes Directive (1994),[7] all member states must impose an obligation on registered banks to issue and participate in the deposit guarantee schemes system (Art. 3 of the DGS Directive). Member states are free to determine by national regulations which branches of their banks (operating outside their territory, in other member states) must join the guarantee schemes system (Art. 6 of the DGS Directive). Thus, guarantees cover not only depositors of bank branches on their territory but also depositors of all branches of the specific bank, regardless of which

7 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on Deposit-Guarantee Schemes (DGS), OJ L 135, 31.5.1994, https://eur-lex.europa.eu/eli/dir/1994/19/oj/eng

member state they are located in. The DGS Directive establishes the necessary minimums of deposit insurance that all member states must implement, while other differences are the result of solutions contained in national monetary regulations. Notably, as a leading EU member state, Germany was against the implementation of the DGS Directive as it considered that national measures for deposit insurance were sufficient and that there was no need for the implementation of community measures. However, the Court of Justice of the EU rejected Germany's objections, as a result of which the Directive became fully effective in monetary and banking finance.[8]

Although the provisions of primary monetary legislation prohibited the rescue of financially troubled Member States, in the circumstances of the global financial crisis, a step was taken by establishing the European Stability Mechanism (ESM). The conditions for granting assistance refer to: an assessment of the existence of a risk to the financial stability of the euro area as a whole or of the Member States, and an assessment of the sustainability of public debt and an assessment of the actual or potential financing needs of a specific Member State. If these conditions are cumulatively met, the Commission may start negotiations with the State to conclude a Memorandum of Understanding (MoU). This document sets out in detail all the shortcomings in the sphere of public finances that should be addressed by financial support. The MoU cannot be placed in the typical classification of legal acts because it represents an atypical legal act (*hors nomenclature*) that cannot be placed in the classification of legal categories established by Article 288 of the Treaty on the Functioning of the EU and other sources of public international law. The reason for the wide application of the MoU is reflected in its flexibility and the absence of strict formalism. Precisely because of these features, the EU has been practicing them since 2007 in the areas of protection of fundamental rights, environmental policy, and coordination of national budgetary policies, which has become particularly relevant in the years after the establishment of the ESM (de Gregorio Marina, 2020: 253, 254, 258). A major challenge related to the implementation of the MoU is related to confidentiality clauses on the exhange of supervisory information, particularly given the absence of a universally accepted definition of confidential information in the area of financial supervision in EU monetary law (Ugena, 2019: 249), which should be emphasized because the definition of confidential information in the area of business and antitrust law of the EU is generally known and accepted. The European legislator has also imposed the obligation on the ECB to maintain the confidentiality of sensitive financial data which is quite expected, but the problem arises when fulfilling such a

8 C-15/16 – *Baumeister*, Judgment ECLI:EU:C:2018:464, Court of Justice of the EU, 2018, https://curia.europa.eu/juris/liste.jsf?language=en&num=C-15/16

requirement conflicts with the requirement for transparency and which is very difficult to fulfill.

Otherwise, modern models of financial supervision establish the obligation to keep data concerning the operations of banks that are the subject of examination and control in a specific procedure, which follows from the EU Capital Requirements Directive and the adopted Basel Core Principles for Effective Banking Supervision. In addition, banks that are the subject of control often require additional guarantees that the information obtained by the supervisor remains an official secret, where any relativization of such guarantees would seriously undermine the relationship of trust that must exist at all times in the audit procedure (Ugena, 2019:249-250). The Capital Requirements Directive (CRD) provides more precise explanations about what information must be kept. Thus, Article 53 of the CRD clearly defines that information exchanged between entities participating in the supervision/audit procedure must be strictly confidential. However, it does not refer to any information which is not obtained from entities directly involved in the procedure but indirectly from other entities or institutions (e.g. general monetary policy, statistics, etc.). Article 53 of the CRD also stablishes the permission to disclose information in summary or aggregate form, but in such a way that the identity of the individual entity (bank) participating in the procedure cannot be revealed, which provides some guidelines for an appropriate and desirable way of processing information in the procedure (Ugena, 2019:250), which simultaneously protects the interests of both partiesa and of the general public. In these provisions, we may recognize a negative definition of which information is not subject to the obligation to maintain confidentiality. Thus, *argumentum a contrario*, we can conclude which information would then be treated as confidential. This issue has also been tackled by the judiciary, which was less or more demanding in some cases, but there is some case law that casts more light on the issue.

In the *Baumeister case* (2018),[9] the ECJ established certain standards for determining the confidentiality of information, by relying on the consequentialist approach which starts from the possible consequences of disclosing data on the interests of the protected parties in the procedure or the monitoring system for banks or companies in the financial system. In this case, it was a request from a private party for access to information concerning the established results of financial supervision, which means that there was no question of classic disclosure and dissemination of information.

9 C-15/16 – *Baumeister*, Judgment ECLI:EU:C:2018:464 Court of Justice of the EU, 2018.

4. The Importance of the concept of Financial Risks Regulation in the context of preventing Economic Crimes

In the broadest sense, effective monetary legislation for the prevention of financial fraud places all banks in the banking system in the function of entities that rigorously, reliably, and legitimately check and establish the identity of their clients when carrying out certain transactions according to their clients' orders, where in case of certain suspicions they must report on time to carry out the necessary checks and initiate security procedures. In the European Union, the new competencies of the European Central Bank are a significant step forward in combating financial crime. The legal basis for the new role of the ECB in the policy of combating financial crime was established by establishing the second pillar of the banking union, i.e. by the Regulation EU/1024/2013 on establishing the Single Supervisory Mechanism (SSM).[10] Articles 28 and 29 of this Regulation establish the obligation of central banks to contribute to the fight against money laundering and to prohibit terrorist financing as the basic objectives of the national security policy. However, in the EU context, such duties also have a supranational dimension, as the supervision of the monetary jurisdiction of national central banks is carried out by the ECB. In circumstances where the ECB considers that national central banks have not achieved these objectives (to the necessary extent), it may sanction them by withdrawing their operating licenses (Article 20 of the Regulation).

Although it is clear that the ECB's jurisdiction in this matter is derivative, rather than original, it is necessary to establish clear parameters for the separation of the jurisdictions of national central banks and the ECB in this segment of internal security policy to increase the effectiveness of their scope of work in this area. In this context, the institute of close cooperation is a condition for optimal regulation of financial risk. Incidentally, we can note that the coincidence of the jurisdictional domain of centralized monetary policy and the jurisdictional domain of banking supervision provided the Single Supervisory Board with an atypical evolutionary step forward in the field of ECB law, enabling membership to all potentially interested member states regardless of whether they have adopted the euro or not. In practice, cooperation is established by a request from an EU Member State to specify close monetary cooperation between the ECB and its national agency, which is specialized in the field of financial supervision. The legal basis for this cooperation was set out in

10 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, *Official Journal of the EU,* L 287/6329,10.2013.

Article 7 of the SSM Regulation[11] and the ECB Decision on close cooperation.[12] After the request is submitted, amendments are made to the existing regulatory framework, after which it is ensured that the national regulatory body follows the ECB's guidelines and instructions, and fulfills the operating conditions based on which the ECB can conduct evaluation. It should be noted that only national regulations on auditing are harmonized, not regulations concerning monetary management, because the specific Member State is conditionally "entering" the banking union, not the European Monetary Union.

The regulatory function of the NBS in this area entails: a) drafting or participation in drafting relevant laws and by-laws, which are *inter alia* aimed at reducing the possibility of money laundering and terrorist financing through financial institutions whose operations are controlled by the National Bank of Serbia; b) providing recommendations for improving the system for preventing money laundering and terrorist financing at the national level; c) cooperation with the Directorate for the Prevention of Money Laundering and other domestic institutions involved in the fight against money laundering and terrorist financing; d) cooperation with international institutions to prevent money laundering and terrorist financing, and active participation in the work of international bodies and organizations dealing with the prevention of money laundering and terrorist financing, primarily in the work of the Committee of Experts for the Assessment of Measures against Money Laundering and Terrorist Financing (MANIVAL); e) maintaining regular contacts with other supervised entities); and f) organizing training for NBS employees in the field of preventing money laundering and terrorist financing (NBS, 2025).[13] The supervisory function of the NBS begins the procedure for issuing operating licenses to supervised entities within its jurisdiction, and their top management. In addition, the National Bank of Serbia monitors compliance with regulations and internal acts of the supervised entities and, among other things, assesses the adequacy of the system for preventing money laundering and terrorist financing in

11 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), ECB/2014/17 *Official Journal EU* L 141/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0468

12 ECB Decision 2014/434/EU of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5) *Official Journal of the EU,* L 198, 5.7.2014,, https://eur-lex.europa.eu/eli/dec/2014/434/oj/eng.

13 NBS (2025). Sprečavanje pranja novca i finansiranja terorizma (Prevention of money laundering and financing terrorism), Narodna banka Srbije, https://www.nbs.rs/sr/ciljevi-i-funkcije/nadzor-nad-finansijskim-institucijama/sprecavanje-pranja-novca, accessed 1.4. 2025

the supervised entities under its jurisdiction t to prevent them from being misused for money laundering and terrorist financing. If irregularities are identified in the supervision of the obliged entity, the National Bank takes measures in compliance with the NBS Act.

The role of the NBS as a supervisor is defined in Article 109 of the Act on Prevention of Money Laundering and Terrorism Financing,[14] under which the NBS performs the supervision of banks, voluntary pension fund management companies, financial leasing providers, insurance companies licensed to provide life insurance, insurance brokerage companies (when performing life insurance brokerage activities), insurance agency companies and insurance agents licensed to provide life insurance activities The NBS also supervises electronic money institutions, payment institutions, a public postal/payment system operator with its registered office in the Republic of Serbia, established under the law regulating postal services in the area of payment services, authorized exchange offices and business entities that perform exchange operations under a separate law, and persons engaged in the provision of services for the purchase, sale or transfer of virtual currencies or the exchange of such currencies for money or other assets via online platforms, devices in physical form or otherwise, or persons who mediate in the provision of these services, wallet custody service providers, and providers of other services related to virtual currencies. (Article 4 of the NBS Act). In the area of preventing money laundering and terrorist financing, the NBS cooperates with domestic and foreign institutions. This cooperation is most often regulated in more detail by signed agreements on supervision and various types of business and technical activities (exchange of information and experiences, employees' training, etc.). One of the most significant agreements is the Agreement on Cooperation in the field of Prevention of Money Laundering and Terrorism Financing, signed with the Directorate for the Prevention of Money Laundering (Financial Information Unit) of the Republic of Serbia which enables the exchange of operational information and thus facilitates the control process.

5. Conclusion

Limiting and controlling systemic risk is the oldest reason for normative regulation and amending the monetary and banking finances framework. The legislator is very interested in preventing the loss of public confidence in banks as financial institutions because it may spread to other financial intermediari-

14 Zakon o sprečavanju pranja novca i finansiranja terorizma (Act on Prevention of Money Laundering and Terrorism Financing), *Službeni glasnik RS*, br. 113/2017, 91/2019, 153/2020, 92/2023, 94/2024 i 19/2025.

es, i.e. the entire financial system, given the fact that all financial institutions operate in the same environment and are directly or indirectly connected to a greater or lesser extent. The general impression of the public about the operations and stability of a particular bank can also be one of the triggers for the emergence of systemic risks, especially in the circumstances when citizens believe that the bank is in an unfavorable financial position. In countries with an infamous history of hyperinflation (which was present in the Serbian monetary system in the 1990s), this psychological cause of systemic risks can be very prominent because citizens may still have reserves and distrust the bank-provided guarantees aimed at protecting their interests. This fear can be justified in the circumstances of financial and economic crises, when the bank credibility must be confirmed and reinforced to guarantee the right to solid currency and monetary stability as a public good. Today, there is a noticeable tendency of legislators in almost every monetary jurisdiction to limit the occurrence of systemic risks by using certain legal procedures and techniques that each bank must comply with in its business operations, in terms of liquidity, capital and other financial operations previously defined by the central bank as the holder of monetary sovereignty. In line with that experience and logistic, functional and technical cooperation with the European Central Bank (ECB), the International Monetrary Fund (IMF), the Bank for International Settlements (BIS), and the World Bank (WB), the National Bank of Serbia (NBS) has developed very complex instruments in domestic monetary law environment for managing the consequences of post-financial distress and prescribed many new regulatory and protectionist measures for optimal deposit insurance to prevent risks and protect the interests of citizens and the economy.

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Резиме

Предмет анализе у раду јесте сагледавање разлога за нормативним регулисањем ризика у монетарној легислативи и легислативи централних банака у циљу разумевања аксиолошке матрице концепта, принципа и сврхе регулисања ризика у монетарним и банкарским финансијама којима монетарни законодавац (централна банка) у околностима динамичних и сложених монетарних токова мора посветити посебну пажњу ради заштите монетарне стабилности као глобалног јавног добра. Ризик са којим се суочавају централне банке јесте сличан оном са којим се суочавају и традиционалне финансијске институције и укључује тржишни ризик, кредитни ризик, оперативни ризик, ризик ликвидности и ризик кредибилитета за који бисмо рекли да је веома важана узимајући у обзир чињеницу да је централна банка actor primus у имплементацији монетарног суверенитета. Ипак, у литератури монетарног права и права централних банака се децидно истиче да су за разлику од осталих традиционалних финансијских институција, централне банке у свом делању мање склоне ризику и у њиховом портфолиу се налазе пласмани високог степена сигурности. У том контексту се у раду се полази од основне хипотезе да се механизми оптималног правног регулисања ризика у монетарним финансијама праву налазе у функцији заштите интереса банкарских клијената (и генерално посматрано, корисника финансијских услуга) кроз идентификовање, утврђивање и логичко тумачење меродавних одредаба из домена не само примарне, већ, данас у околностима различитих кризних сценарија, све више и секундарне монетарне легислативе (што је посебно уочиво на примеру монетарног права ЕУ где секундарана легислативе због своје флексибилности и ефективности јесте значајан инструмент за попуњавање правних празнина у примарним монетарноправним актима). У даљем тексту, предмет посебне пажње јесте функционална анализа меродавних одредаба из домаћег монетарног законодавства и праксе, где се према мишљењу аутора, морају усвојити и (уз адекватна прилагођавања) применити решења из домена права Европске централне банке (која није само субјект европског већ и међународног монетарног права) у циљу

уобличавања оптималних нормативних модела за регулисање финансијског ризика постављених у функцији одрживог јавног монетарног пословања и привредне стабилности целокупног банкарског сектора.

Кључне речи: *финансијски ризик, монетарно право, централна банка, монетарна стабилност, јавно монетарно управљање.*