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MONETARY DISPUTES, THE EUROPEAN CENTRAL BANK, AND SOCIAL POPULISM

Marko Dimitrijević*

University of Niš, Faculty of Law, Niš, Serbia

ORCID iD: Marko Dimitrijević https://orcid.org/0000-0003-4406-9467

Abstract

The subject of analysis in this paper is the identification and analysis of the connection between monetary disputes in which the European Central Bank (ECB) is a participant, and the consequences of negative social populism, which, in practice, can affect the correct understanding of the responsibility and position of the ECB in the concept of monetary management in the European Economic and Monetary Union (EMU). The first part of the paper points to the concept and nature of monetary disputes as a new category of administrative disputes in EU monetary law, as their main features and legal addressees in practice, while the further text examines the advantages and disadvantages of judicial and arbitral settlement of monetary disputes, and discusses the potential legal basis of arbitration settlement in European monetary legislation. The subject of special attention is the monetary legal analysis of ongoing disputes and lawsuits initiated against the highest European monetary institution and their echo (understanding) in the general public. Transparent determination of regulatory competence within the existing organisational structure of the ECB, according to the author, is a *conditio sine qua non* of avoiding the initiation of (un)necessary monetary disputes, but also managing existing ones in a manner that is legally predictable and regulated.

Key words: European Central Bank, monetary law, monetary stability, monetary disputes, social populism.

МОНЕТАРНИ СПОРОВИ, ЕВРОПСКА ЦЕНТРАЛНА БАНКА И ДРУШТВЕНИ ПОПУЛИЗАМ

Апстракт

Предмет анализе у овом раду јесте идентификовање и анализа везе између монетарних спорова у којим учествује Европска централна банка (ЕЦБ) и последица негативног друштвеног популизма који у пракси може утицати на правилно поимање одговорности и позиције ЕЦБ у концепту монетарног управ-

* Corresponding author: Marko Dimitrijević, University of Niš, Faculty of Law, Trg kralja Aleksandra 11, 18000 Niš, Serbia, markod1985@prafak.ni.ac.rs

ња у Европској економској и монетарној унији (ЕМУ). У првом делу рада, указује се на појам и природу монетарних спорова као нове категорије управних спорова sui generis у монетарном праву ЕУ, њихова главна обележја и правне адресате у пракси, док се у даљем тесту разматрају предности и мане судског и арбитражног решавања монетарних спорова и разматра потенцијални правни основ арбитражног решавања у европскм монетарном законодавству. Предмет посебне пажње јесте монетарноправна анализа текућих спорова и тужби иницираних против највише европске монетарне институције и њиховог одјека (разумевања) у јавности. Транспарентно утврђивање регулаторне надлежности унутар постојеће организационе структуре ЕЦБ, према мишљењу аутора, јесте *conditio sine qua non* избегавања иницирања (не)потребних монетарних спорова, али и вођења постојећих на начин који је правно предбидив и јасно регулисан.

Кључне речи: Европска централна банка, монетарно право, монетарна стабилност, монетарни спорови, друштвени популизам.

INTRODUCTION

Monetary disputes represent a special category of administrative disputes in which the court decides about the administrative and legal nature of the supreme independent monetary institution acts (Hofman, 2015, pp. 2-5). The fact is that 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 competencies are elaborated by special laws and by-laws. Otherwise, in the consideration of administrative disputes in which the legality of the decisions of state regulatory agencies and bodies is resolved, in the majority of initiated cases, the court decides in favour of state agencies, which over time have become a typical example of the so-called organisations that learn (smart organisations) and that, learning from their own mistakes in the field of public management, have become superior in their work compared to other public authorities, which means that their actions represent a good example for the more successful actions of other bodies (Bajakić, Kos, 2016, pp. 22-34). However, in practice in the EU area, the need for the formation of a special European Administrative Court that would deal with the mentioned issue more adequately is visible, because the administrative disputes themselves have become very specific (especially in the circumstances of Brexit and the public debt crisis).

In considering monetary disputes settled by the court, it is necessary to point out the fact that there are certain similarities in the constitution and organisation of judicial bodies and the highest monetary institution, which are reflected in the fact that both institutions are a reflection of the credibility of the promises that the government made to its citizens, and that the ideological elements of the legislator in both institutions are present in the part that should guarantee their independence in work and

prevent the consequences of possible intimidation by the holders of other forms of government (Marciano, 2011, pp. 155-156). The essential difference concerns the status of the main goals of these two institutions because, in the case of the central bank, the realisation of monetary stability is the economic state that is pursued in general public policy, while the rule of law principle advocated by the court is the fundamental premise for building and public policy. Empirical research, which had as its subject the determination of correlations between judicial independence and independence in the work of the central bank, points to the conclusion that in countries where a higher degree of judicial independence is observed in the work, there are usually institutional solutions that guarantee a greater degree of independence in the work of the central bank. On the other hand, in the organisation of the work of the courts in all countries, there is a multi-level system of protection, regardless of whether it is about disputes from general or special court jurisdiction, while in the case of monetary policy, all decisions are made by the central bank within a single structure that is not differentiated as a judicial one. The difference also exists in the field of agency costs, because judges and the central bank implement the interests that they consider to be the best (not personal, but interests imposed on them by the profession for the sake of preserving public goods such as efficient justice and monetary stability), which does not always have to (and is not expected) to coincide with the interests of those who delegated them, that is, elected them to that position because the good for the sake of the individual (which sometimes has to be 'sacrificed') is something that is implicitly understood in the work of these bodies. When it comes to the jurisdiction of the court, this term refers to the conditions that a private agent must fulfil to access judicial protection when the enjoyment of certain constitutionally and legally guaranteed rights or legal interests are violated. As a special contribution to respect for constitutionality, the court makes *ex-post* evaluations of disputed provisions of the law with the highest legal act, which is the practice in the USA and can be done at any time, while in France there is the possibility of *a priori ax ante* constitutional evaluation of a law that has not yet been adopted, which acts preventively to preserve the principle of legal certainty, because those laws for which non-compliance is determined will never be adopted (at least not in their original form). When it comes to the central bank's jurisdiction, it refers to the already unified monetary clusters that concern price stability and borrowing (Ibid).

Today's monetary policy of the EU is not just a simple set of administrative activities that must be brought under judicial control to realise and protect individual rights but implies the use of complex techniques and models aimed at sustainable and humane economic growth. The ECB, as the main subject of such a policy, must act *pro futura* and bear responsibility for deviations from the goals set by the single mone-

tary strategy. The problem with the efficient resolution of monetary disputes stems from the fact that judges have a retrospective view of the resolution of the disputed factual situation, which is quite expected, because the court cannot guess what the future behaviour of monetary agents will be, nor can it have jurisdiction over it. It is from this that the weakness of the argument in the judgment concerns the arbitrary behaviour of the ECB during the debt crisis because such a thing cannot be determined decisively. It is interesting that the constitutional court of Germany, for the first time in its history in the case of the evaluation of the OMT program, referred the disputed issue to the European Court of Justice for resolution, which only speaks in favour of the fact that it was probably the most serious monetary dispute in the new EMU (subjective view of the author), which requires the synergy of actions of national and supranational judicial instances (Dimitrijević, Golubović, 2020, pp. 15-16).

COURT VS ARBITRATION SETTLEMENT OF MONETARY DISPUTES - AN OVERVIEW

The procedural legitimacy of the ECB gained essential elements of its manifestation during the global economic and financial crisis, which in practice coincided with the adoption of new institutional models of macroeconomic management aimed at strengthening the entire economic system of the member countries. Until the outbreak of the debt crisis, the procedural identification of the ECB had a more sporadic character and was limited to the consequences of inadequate macroeconomic dialogue with other community institutions, primarily with the European Commission.

With the adoption of new institutional mechanisms, there is also a significant redefinition of the basic principles of European monetary law (primarily in the area of the scope of the *lex monetae* in monetary traffic, the extraterritorial application of monetary sovereignty, and non-compliance with the provisions on collective responsibility for public debt, i.e. a different view of the content of the *lex contractus* principle), which caused far-reaching monetary disputes. By analysing these cases from court practice, we can observe the best confirmation of the institutional, functional, and financial independence of the supreme monetary institution of the EU and from the outcome of the disputes identify its indisputable authority in shaping and derogating the norms of monetary law, where monetary stability appears as a *conditio sine qua non* of the economic stability of the entire eurozone. As the settlement of monetary disputes in EMU law is still quite complex, in theory, the possibility of an alternative way of settlement of disputes based on practice in international monetary law is considered. When resolving monetary disputes, the arbitrator is in a position that does not differ much from the position of a judge, but by de facto validating the specific monetary choice of one par-

ty in the dispute as correct, he noticeably enjoys greater discretionary powers than the judge, whose work is determined by the existing practice in that area (Dimitrijević, Golubović, 2018, p. 10).

The role of an arbitrator in the field of monetary disputes in the EMU could have different legal and political consequences when it comes to the relationship between the ECB and Germany as the leading member of the Eurozone. The history of European monetary disputes dates back to the lawsuit that the ECB filed against Germany in 2003, considering that it has the right to a refund of the taxes that it paid on its territory for the performance of operations within its jurisdiction to purchase all necessary goods and services, especially the rental of movable and immovable property. The ECB based its claim on a rational economic assessment of the price it paid for all the mentioned activities (considering that it could easily prove it), referring to the provisions of the Statute of the ESCB and the Protocol on the Privileges and Immunities of the Institutions of the European Communities (1965). The European Court of Justice rejected the request of the ECB and ordered it to pay the costs of the procedure in full, so it is not difficult to see that the application of an out-of-court settlement would be more than desirable. At this point, we must ask whether the application of arbitration in the case of the dispute that Germany initiated against the ECB due to the application of measures on the purchase of bonds on the secondary financial market (2013) could contribute to a more efficient resolution of the dispute. Namely, this dispute lasted for three years and ended with the decision of the European Court of Justice which confirmed the institutional and functional independence of the bank in the field of monetary policy, but at the same time, such a decision threatened the success of the measures in the field of the already fragile macroeconomic management of the EU economic system. An out-of-court settlement could have avoided the deepening of antagonism in the relations between the ECB and the central banks of the ESCB members and, in the spirit of cooperation, continued the path towards protecting the values and goals of the single monetary policy (i.e. the benefits of EMU accession).

Namely, in his decision, the arbitrator recognises the legal effects of the monetary choice (by which is meant the currency in which the contractual performance will be realised) while also determining the connection with other currency clauses (for example, the use of a third currency for accounting purposes or the value currency as it once was ‘eqi’ of the European Communities or today special drawing rights of the International Monetary Fund – IMF). However, in practice, arbitrators are very careful when implementing their decisions due to the sensitive nature of monetary disputes themselves. In modern monetary law, money is not a good whose users have free will in terms of its use, but the legal concept of money is governed by national monetary regulations that have the

character of *ius cogens* norms. Monetary laws today, as we have pointed out several times, are treated as an integral element of the so-called 'lois de police' which best confirm the importance and place of monetary stability as a crucial public good of every state.

The essential difference between judicial and arbitral settlement of monetary disputes is reflected in the fact that judges are obliged to protect their national currency, while arbitrators enjoy full freedom and treat all currencies in an equal way, which, in our opinion, is very important for adequately elucidating the legal-economic of the factual situation in international monetary disputes (Dimitrijević, Golubović, 2018, p. 241).

MONETARY DISPUTES AND SOCIAL POPULISM EFFECTS

In the current practice and analysis of the settlement of monetary disputes, the following classification of lawsuits directed at the work of the ECB (i.e. central banks within the ESCB) can be made between: actiones for annulment of ECB decisions; actiones due to silence" of the monetary administration; actiones against decisions made by the ECB within the field of application of the Single Resolution Mechanism (the so-called second pillar of the banking union), within which the following are further distinguished as lawsuits for the annulment of decisions on the obligation to pay the contributions of member states for the common funds of the Single Resolution Fund, actiones related to the bankruptcy of the Spanish commercial bank Banco Popilar Espanol S.A.; actiones related to the actions of a group of commercial banks (ABLV Bank of Luxembourg), conduct due to other actions of the ECB within the field of application of banking union rights (related to inadequate implementation or complete absence thereof in the field of adopted directives), and proceedings of national courts in connection with the legislation of banking union subjects, more precisely, national assessments of their legality (Smits et Al, 2022, pp. 1-5).

The aforementioned classification of monetary disputes indicates their diversity and great practical importance. Also, there is a noticeable tendency to increase the appearance of these disputes in the overall practice of the ECJ, because by analysing the aforementioned database of completed and current court cases, we can notice that there are currently 71 court proceedings before the European Court of Justice, the basis of which is a request for the annulment of ECB decisions; two cases that were indicted by the lawsuit due to failure to take actions by the ECB; 78 cases concerning the request to cancel the decision of the Single Sanitation Board within the second pillar of the banking union; 97 cases initiated by the bankruptcy of a Spanish bank; and 4 cases related to lawsuits related to the operations of a group of banks and 11 disputes related to the so-called other procedures within the banking union (Ibid). It would be

wrong to assume and conclude based on the initial analysis of data from the database that the ECB often makes mistakes and violates someone's rights (as opposed to earlier periods when there were more cases in which the ECB was the prosecutor), but it is connected with the influence of populist thoughts on what kind of its status and obligations should be, which are generally not under the generally accepted principles of the science of monetary law, because they do not have their own legal and economic logic, but are used as an instrument of political campaigns and transfer of responsibility on the international political scene.

It is interesting that the problems that were observed during the global financial crisis, and then the crisis caused by the Covid-19 pandemic, led to a kind of monetary legal phenomenon, which is reflected in the expansion of the competencies of the ECB (Dimitrijević, Golubović, 2021, pp. 1-13), on the one hand, but also in the process of strengthening the positions of national central banks, on the other hand, which is a monetary paradox, taking into account the fact that the member states of the eurozone cannot conduct their monetary policies with discretion, that they count on the mechanism of adjusting exchange rates in circumstances of economic disturbances and somewhat reduced national monetary sovereignty because almost all components have been transferred to EU level (Athanassiou, 2014, pp. 27-46). The reason for this is the fact that although the members of the Bank's Executive Board are obliged to take into account the community interests, and not the interests of the member states that proposed them, they de facto remain functionally connected to their national central banks due to the very method of election and appointment which is determined by the provisions of the national monetary legislation (Van der Sluis, 2022, pp. 20-37). Recent events related to the actions of the German central bank best confirm this because the implementation of supranational measures of the unified monetary policy ultimately depends entirely on the readiness of national central banks to apply them (with or without restrictions) in domestic monetary traffic. The unwillingness (disobedience) of at least one national central bank (which was previously unthinkable) disrupts the balance of distribution of monetary prerogatives in the EMU and carries a latent danger of undermining the decades-long (we would add good) results in the field of monetary policy coordination. Also, we can notice that in ECJ practice, there is an increasing number of cases in which passive legitimisation of the ECB is implemented (that is, proceedings in which it is the defendant), which can be explained by the growing populism that negatively affects its independence. Thus, in monetary law pieces of literature, it is indicated that the rise of social populism against the positions of central banks, in general, indicates the dissatisfaction of citizens regarding the manifestation of its institutional independence in work because they understand it in the absolute meaning of that word (which is, admittedly, a consequence of

earlier legal decisions on the work of the central bank, which did not contain provisions on liability). Increased initiatives to initiate monetary disputes are also a direct reflection of the dissatisfaction of citizens who (especially in crisis conditions) see the central bank as the culprit on duty for all problems in the economy of a country and express opposition to its 'untouchable position' for them, which in the extreme case can be very dangerous because the question is how to build legal mechanisms that "protect the guardian of monetary stability" from the citizens themselves (Goodhart, Lastra, 2018, pp. 49-68).

In everyday life, populism is most often used in a pejorative sense and signifies an essential disagreement with the central position of the libertarian theory about the advantages of the free movement of labour, capital, goods, and services (in other words, the basic principles of the EU internal market) between nations, which is useful and desirable for their economies and society. In the context of public management (and therefore the monetary operations of the state), a subject that, after being democratically elected or appointed, tends to eliminate the mechanisms of accountability to parliament (political control), which is characteristic of all democratic states today, behaves populistically. Political and legislative control is necessary to evaluate and evaluate the achieved results against the set goals and is therefore completely opposed to the autocratic model of behaviour that is close to populist attitudes.

Populism in a pejorative sense represents a distortion of the social contract theory developed by *Jean Jacques Rousseau*, where it is clearly emphasised that sovereignty is derived from the will of the people, not the monarch because citizens are the principals of sovereignty who transfer it to the state through free and planned association as a new entity of its own free will (which is the basis of every contract). When countries find themselves in circumstances of economic crises that affect the lives of citizens in all aspects, the unequal distribution of wealth, and income and the slow (unplanned) reaction of the state always cause the "original will of the people" to be questioned (Piketty, 2013, pp. 50-55). That review concerns the legitimacy of the central bank's actions, the mandate to undertake certain measures and actions, and the issue of separating the personalities of the persons who manage the bank from the legal subjectivity of the central bank itself. The rise of populist ideas is questioning the legitimacy of the measures taken by the ECB, with the fact that it is necessary to make a distinction between the concept of legitimacy in a formal and social sense.

Legitimacy in the formal sense refers to the patterns, applied skill, and the way of the creation and formation of the central bank, which must undoubtedly be a democratic act, either by a legislator, a constitutional provision, or an international agreement (as it is in the case of the EU). Social legitimacy reflects the system of public support, which is a condi-

tion for the survival of the existing legal solution that regulates the bank's position. In circumstances where social support is declining, legal provisions must likely be changed if they do not already enjoy the trust and support of the public on how to regulate the above-mentioned issue. Although these assumptions are justified in a certain sense, the monetary legislation cannot be changed too often unless there are justified reasons for this, because central banks have never been and cannot be democratic institutions chosen by the will of citizens in the narrower sense of the word, because they are fundamentally highly technocratic institutions in which the representatives of the political authorities also have a certain position (status), although they certainly do not have the task of simply administering entrusted tasks based on predetermined schemes which, by the way, is characteristic of classic administrative bodies (Lastra, Miller, 2001, pp. 158-160).

Therefore, we believe that it is wrong to observe and analyse the actions of the central bank through the sphere of administrative procedure, which is otherwise present in the field of the domestic legal academy, where the establishment of monetary law as an independent scientific discipline happened unjustifiably late, which is confirmed by the fact that it is present in the syllabuses of legal studies at only one law school in the country.[1] Such outdated, and we would add, very backward understandings make it difficult for legal practitioners to contribute to the foundation of modern monetary legislation, as well as to effectively resolve disputes that directly or indirectly concern the implementation of the lex monetae. When it comes to the mandate to perform tasks entrusted by law, the tasks of the ECB correspond to the settings developed by theorists of German economic law, where the term 'Ordungspolitik' refers to the economic-political framework that represents the common denominator for the actions of different political parties. In the field of central banking, the term refers to the task of the central bank in maintaining price stability, which has been its basic task for a long time. Nevertheless, in the last decade, there has been an expansion of the basic tasks of the Bank and the need for purification and measurement of contributions in the realisation of other goals from the sphere of fiscal, foreign exchange, and environmental policy. The exercise of prudential control, financial audits, and crediting of government debts have led to a change in citizens' expectations, more precisely, citizens now expect much more from their central banks and closely monitor their contribution to solving all the economic problems of a country, which is completely unfounded and irrational. Taking into account the previously given explanation that the central

[1] Monetary law, as an independent branch of the legal system, is studied within the special syllabus by the Chair for Law and Economics at the Faculty of Law, University of Niš. See: www.monela.ni.ac.rs.

bank is not a democratically elected institution (like the parliament) but a narrowly specialised holder and addressee of monetary sovereignty *de lege artis*. When it comes to the responsibility of the person who manages the central bank, it is very challenging to create such a system of solutions that guarantee complete professional independence and thereby prevent the conflict of interest that occurs if the employees of the central bank are simultaneously representatives and agents of the current executive power. This means that the central banker (if for this analysis we call the person who works in it that way) cannot be a financial advisor to the government or some other private or public agency, nor should he take loans from private banks during his function in the central bank, where the only exception may be the performance of a professorship or other similar academic positions at universities.

Speaking about the aforementioned legal bridges, the well-known judge of the ECJ, *Lars Bay Larsen*, states that "the symbolism of bridges in monetary law is not accidental, because they, like real buildings, are built to last a long time and resist the test of time, where they must maintain durability during economic upheavals while emphasising that legal bridges must be built of legitimate substance where the supervision performed by the European Court is of crucial importance for the ECB's legal bridges" (Bay Larsen, 2019, pp. 47-49). Although the ECJ carries out effective and efficient (normative) supervision over the decisions of the Commission, the supervision over the decisions of the ECB is relatively recent and has become more intense after the adoption of new models of macroeconomic management in the EMU, which represent the EU's response to the consequences of the crisis and the way of filling legal gaps that were initiated on the initiative of the European Council.

In practice, a distinction can be made between *two* different procedural monetary law situations, namely when a subject is an act of secondary legislation (soft law) or the legality of an administrative act considered based on Article 263 of the EU Treaty before the General Court, with the possibility of submitting an appeal to the ECJ or the decision of a national administrative body or agency before the court of a member state, but on that occasion, it was decided based on the application of a wrong provision of EU law, which is why the ECJ must intervene based on Article 267 of the EU Treaty, which invalidates the disputed community source. Generally speaking, regardless of the aforementioned practice of the ECJ in resolving not only monetary disputes in which the actions of the ECB are considered but also all disputes in general, it should be noted that the Court is not bound by the procedural situations mentioned above and that it determines the degree of judicial exercise supervision (whether it will be more or less formal or substantive). In determining the 'lower' and 'upper' limits of the degree of supervision, the Court certainly takes into account:

(a) The degree of complexity of the disputed factual situation that is defined by the appeal (that is, the Court is guided by the concrete form of the so-called manifest error of assessments of the first-instance authority when considering the necessary degree of influence in the specific case (which, in our opinion, has sense, because monetary disputes can differ significantly in terms of their severity and topicality); and

(b) Determinism of the very facts based on which positive EU law was adopted and applied, which can very often be lost sight of (especially when ECJ decisions are discussed in public, as was the case with the OMT verdict, for example). In applying the provisions of firm law, the court can only be guided by the facts on which that law was based at the time of writing the specific norm of the primary legislation, and if the circumstances and facts on which a different decision should be formulated have changed (which has become more frequent recently takes place), it is first necessary to revise the provisions of the primary legislation, because it is the conditio sine qua non of every judicial decision (Bay Larsen, 2019). However, in the monetary law literature, one is increasingly coming across understandings according to which it is considered that the European Court of Justice is bound by certain objective factors when exercising judicial supervision in a bankruptcy case, which includes the decision and intention of the community legislator, in the sense that the linguistic and logical interpretation of the provisions of the founding agreements, which determine the jurisdiction of certain institutions, clearly indicate a certain recognition (guarantee) of freedoms in terms of decision-making within their actual jurisdiction (which we can note is the case with the attitude of the ECJ towards the work and powers of the European Central Bank). Also, it refers to the complex factual situation of the specific case, which is connected with the use of certain macro and microeconomic models, economic forecasts, and similar economic categories and institutes (which is close to the work of the ECB and the implementation of a unified monetary strategy). It includes certain political choices, in the context of the EU institution's field of action, which must take into account not only the legal, but also the political, economic, and social environment and interests (and sometimes pay attention to them more than others) because the current problem requires it (situation) on the market (of course, we mean the existential reasons for the survival and preservation of the market, i.e. the EMU, which was the case with the judgment on the ESM, because a different judgment at that moment would have been devastating for the achievements of the monetary union), And last, but not at least the impact of a third party by a potential decision, taking into account the application of Article 47 of the EU Charter on Human Rights, according to the rule that the more far-reaching the degree of impact on third parties, the ECJ will carry out supervision at a

deeper level because the decisions affect the quality of life of citizens and the possibility of enjoying guaranteed rights.

How negative social populism is counterproductive in central banking is best illustrated by the fact that the work of the ECB in the circumstances of approving financial support for Greece was at one time characterised by the public as unpopular monetary behavior (Stoffels, 2019, pp. 58-59) which is was completely unjustified and, to put it mildly, an inappropriate statement, taking into account its position and work not only in the EMU but in the entire EU since the first years of its existence (Raffert, 2017, pp. 65-66). The reluctance of politicians who approve public loans and insufficient knowledge of the work of the central bank has always been a fertile ground for the development of negative social populism, which is usually activated in periods of crisis when it is forgotten (intentionally or accidentally, everything that the previous institution whose work is the subject of criticism has done as good).

Equally dangerous attitudes such as those embodied in claims that the economic situation in the world can be improved by decentralisation and denationalisation of the achieved communitarian economic unity (even if it is not complete), there are opposing views that all barriers to full global economic integration should be (absolutely) removed, which is a reflection of the opinion of supporters of intensive globalisation, because economic theory shows that both approaches are overcome (Dombret, 2020, pp. 273-274). The only correct way of international economic coordination remains the one founded by *Deny Rodrick*, in which it is not possible to simultaneously achieve economic and foreign trade liberalisation while preserving full economic sovereignty and all democratic values (the so-called principle of the impossible trinity), but it is necessary to set priorities. The establishment of certain compromises is necessary, but at the same time, it is important to offer certain 'compensations' to those who have borne the greatest burden of economic globalisation, because it is not free either, and in the abolition of barriers to the free flow of goods, capital, services, and people, certain limitations must always exist (whether they are motivated by the protection of human rights or some other values). An indicative example from ECJ practice that confirms the aforementioned problems is the judgment in the *Weiss case*. This judgment, according to Judge Lars, indicates a clear distinction between the exercise of limited control and the absence of control where the Court in this case could pragmatically examine the ECB's motivation behind the said decision. Also, in the specific case, the Court recognised the ECB's right to extensively set and determine conditions for price stability within the framework of the entrusted mandate in the field of the inflation rate - 2% below the established original target determined by the price convergence criterion (Dombret, 2020, p. 295). The subject of the analysis in the *Weiss case* is the request for a preliminary ruling on the legality (permis-

sibility) of the ECB decision on the program to purchase public sector securities on secondary markets (ECB Decision 2015/774), which was later amended by the Bank's decision of 11 October 2017 (C-493/17, *Weiss and Others*). Namely, in 2014, the ECB's executive board decided to start the implementation of the asset bond purchasing program (ABSPP), and later add the purchase of public sector assets on the secondary financial market (public securities purchasing program - PSPP). Ratio PSPP is the reduction of financial risk to a more acceptable level, which should ease the existing monetary conditions, especially those concerning lending to non-financial economic entities and households (Decision (EU) 2015/425; Decision (EU) 2020/44; Decision (EU) 2017/1361 and Decision (EU) 2017/1361).

By adopting this program, the ECB wanted to increase aggregate investment spending (and thus total public spending) in the eurozone, achieving the first goal of keeping the inflation rate in the range of up to 2% in the medium term. The ECB considered that in the current monetary environment, where key interest rates are close to their lower limits and where the existing programs for the purchase of private sector assets have not sufficiently contributed to solving downside risks, the implementation of the program in question is of essential importance for the protection of the monetary order and this, first of all, through the function of balancing the bond portfolio (Decision EU 2015/2101). The request for an assessment of the legality of the program was sent by Heinrich Weiss and others to judicially interpret the applicability of various decisions of the ECB in the monetary jurisdiction of Germany, the contribution (obligations) of the German central bank in that field, as well as to determine the omission of the Bundesregierung (federal government) and the Bundestag (parliament) in the same context[2]. On the occasion of the verdict, the ECJ Media Office received a large number of questions from interested citizens regarding its content, as well as the NSUS verdict on the legal nature of the PSPP program. On that occasion, the office clearly emphasised that it never comments on the judgments of the national court and reminded that ollowing the established judicial practice of the ECJ, its judgment rendered in the previous proceedings binds the national court when it decides in the main proceedings.

Also, to ensure uniform application of Union law, only the Court - established by the member states for this purpose - is competent to determine that an act of a Union institution is contrary to Union law and that eventual differences between courts in member states regarding the validity of such acts could threaten the unity of the legal order of the Union and call into question legal certainty. Like other bodies of member states,

[2] See: https://cuia.europa.eu/juris/documents.jsf?num=C-493/17, last retrived 01.06.2022.

national courts are obliged to create conditions in domestic traffic for the full effect of Union law, because this is the only way to ensure the equality of member states.Although the ECJ in the specific case found that the ECB did not exceed (violate) the limits of the entrusted powers, the German Federal Constitutional Court (GFCC) refused to apply the decision of the ECJ in its territory, which, once again, became a current controversy about the so-called the theory of constitutional pluralism. There are certain similarities in the actions of the GFCC and the actions of American courts in the period before the Civil War when the national courts of the member states could choose which segments (solutions) of European continental law they wanted to respect and which they could ignore in the proceedings, which explains the so-called nullification theory (Avbelj, Komárek, 2012, pp. 1-10). Constitutional pluralism is a legal doctrine that deals with real or perceived conflicts between national constitutions and international law, as embodied in treaties, international dispute settlement mechanisms, or the European Union. The literature states that the doctrine of constitutional pluralism, in general, is very useful for understanding the legal nature of the EU because it emphasises clear distinctions between the concepts of the so-called evolutionary and revolutionary constitutionalism (Lukić, 2013, pp. 1705-1718). Nevertheless, some authors emphasise that taking into account the characteristic architecture of the EU, the applicability of the model of evolutionary constitutionalism seems more appropriate academically, because evolutionary constitutionalism at the same time tolerates divided sovereignty (which further means the conceptual separation of sovereignty from the state since the EU cannot be considered a state).

In literature so-called mutually assured discretion is a concept that proposes as suitable for understanding the operationalisation of the paradox of constitutional pluralism in the current practice of the European legal space (Goldmann, 2018, p. 339). It states that this concept is commensurate with postmodern normative epistemology (which is non-Kelsenian and accepts that constitutionality is not only what is found under the normative text) and emphasises that in EU law there is no neutral (objective) basis from which to authoritatively decide on issues of primacy, superiority or primacy in a way that is permanent and unchangeable. The ensured discretion relies on interdependent legal concepts that regulate the relationship between the legal order of the EU and the member states (vertical relations), that is, issues between the spheres of competence of different actors at the European level, such as the ECB and the ECJ (horizontal relations). The usefulness of the concept is reflected in the fact that it enables the emergence of a rational discourse between different legal orders (EMU member states) or spheres of competence, while at the same time encouraging firm self-discipline with each legal order (or actor). In a broader context, mutually assured discretion belongs to the

form of the so-called harmonised discursive constitutionalism, which has its foothold in the legal order of the Union, but also of the member states. At the EU level, it manifests itself through the application of the principle of proportionality, while at the level of the member states it corresponds to the principle of Europafreundlichkeit, which was confirmed in the so-called Maastricht judgment.

In circumstances where the national judicial authority considers that the implementation of the ECJ judgment on its territory would lead to a violation of the so-called 'eternal and untouchable constitutive elements' of national sovereignty, the Court must try to inform the representatives of the executive and legislative authorities with its position that it is necessary to work on constitutional changes (which is more difficult to achieve in practice) or to start work on an initiative to change the community norm (which led by the ECJ when making its decision). In circumstances where the previous two options are impossible, the only option left at your disposal is to initiate the procedure for leaving the membership. The very refusal to apply the ECJ ruling is in a certain sense and inadmissible, especially in the field of monetary law, because Germany, as a leading EU member state, has previously succeeded in relativising the scope of certain adopted standards (the example of non-compliance with the original fiscal rules from 1998 and the failed attempt of the Commission to consolidate the action of the Council on that plan (Commission v Council of European Union, C-176/03)[3]. It is interesting that according to the principles of constitutional monism, which has dominated academic political and legal thought for centuries, all law and political power of a territory derives "in some ultimate sense from a single and final hierarchical source of constitutional authority, such as the sovereign people of that territory and its constitution" (Jaklic, 2014, pp. 10-15). During the last twenty years, some leading European constitutionalists, however, have begun to argue that the new Europe goes beyond the monist paradigm and opens the door to an entirely new constitutional vision. According to constitutional pluralism, the constitution of national states (their peoples) and the European constitution are ultimately equally independent sources of constitutional authority that overlap hierarchically on a common part of the territory. In the EMU, during the first two decades of its existence, there were no such reviews, but the crisis circumstances and the constant evolution of the ECB's competencies greatly in-

[3] Before the outbreak of the financial crisis, the involvement of the Court in the settlement of monetary and fiscal disputes (although not so frequent) had significant implications for the normative arrangement of the EMU. The initial monetary dispute was initiated by the fiscally irresponsible behaviour of France and Germany (which are among the main members of the EMU) back in 2002-2003 when they were faced with serious problems related to the maintenance of financial and fiscal convergence criteria.

fluenced the appearance of similar reviews in EMU law as well, which, in our opinion, is not a suitable and applicable system of analogy, because the law The EMU, as well as the ECB law, is a sui generis law that took shape in 'necessity' and did not have enough time for legal-philosophical and legal-ideological tests and premises, as was the case with (general) EU law, which was formed in phases in carefully planned time stages and freed from the factors that made the right of the ECB more consistent in the period from 2010, when the (re)revolutionary path of its mandate begins.

The conclusion that has been emphasised a lot lately in the literature of monetary law points to the fact that the judicial control of the legality of ECB acts (regardless of whether it is carried out by the ECJ or the German Constitutional Court), can compensate for the lack of democratic credibility for undertaking them, because neither judges, the same as the employees of the ECB were not democratically elected by the citizens but were appointed to the aforementioned positions (therefore, a non-democratically elected institution cannot, through its control, guarantee and review the level of democracy in the acts of another similarly non-democratically elected institution (De Boer, Van T' Klooster, 2020, pp. 1689–1724). Unlike the ECJ, which practices the status quo and leaves the ECB to determine and move the upper limits of its mandate according to economic conditions, the German Constitutional Court requires detailed explanations from the ECB for specific actions, to establish whether it has considered all the negative aspects of its actions. From a formal and legal point of view, the only correct path for the ECB's future behaviour per the given powers is to revise them (change the founding acts, because the existing mandate in legal norms is written according to the monetary paradigm that was dominant in the eighties of the last century). In this period of development of monetary legal thought, monetary policy in the technical sense was often interpreted as something exceptional, untouchable, and separate from fiscal policy, which greatly influenced the (negative) attitude of citizens towards the central bank. It was a period of emphasising the importance of direct control of monetary aggregates, as opposed to the use of foreign exchange instruments, when it was considered that price stability was a sufficient condition for maintaining overall economic stability (Friedman, 1968, pp. 1-17). In this sense, the question arises why the main community institutions do not raise the issue once but leave the ECB to wander on its own on the normative terrain of jurisdiction that has not been decisively established.

CONCLUSION

Taking into account the connection between the current disputes and the reactions of citizens, it is important to point out that the legal subjectivity of the ECB is very developed and specific, which is not so sur-

prising considering its role in the international monetary order. The institutional structure of the ECB, since the initial years of its establishment, has always developed and adapted to current events on the monetary scene, both in terms of formal and essential elements, which greatly influenced the evolution of its competencies, which in the first years of the Union was built based on classic monetary positions on what the tasks of the central bank are and how its operations should be organised, through the modernisation of classic postulates with new tasks from the field of fiscal and other segments of general economic policy, to the acceptance of completely new (for some theorists somewhat radical) positions on the conception of the ECB as its legislator whose law exists outside the EU community body and exists independently of it (or at least on an equal footing with it. The jurisdiction of the ECB in the field of creating so-called soft legislation is of inestimable importance for the science of modern monetary law because their factual effect in legal traffic is far from the usual linguistic meanings of the 'soft' attribute included in the generally accepted classification of legal acts. The guidelines, instructions, measures, announcements, understandings, and programs applied by the European Central Bank represent indispensable and indispensable factual material for filling legal gaps in EMU regulations that cannot be replaced by any other type of legal action. The primary monetary legislation was not successfully implemented during the crisis due to its rigidity and excessive formalism that would allow it to change and adapt to the newly created circumstances (which did not exist at the time of writing the solution contained therein), but also the problem of harmonising the work and behaviour of the various entities participating in its adoption. The ECB, through its actions in moments of crisis management, showed its readiness to include the problem of social cost in its programs and thereby realise its operations in a 'more humane way' and the entire concept of EU monetary policy to provide the much-needed 'human component' that provides justification for the economic categories contained in legal instruments and ennobles with a kind of spirit.

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МОНЕТАРНИ СПОРОВИ, ЕВРОПСКА ЦЕНТРАЛНА БАНКА И ДРУШТВЕНИ ПОПУЛИЗАМ

Марко Димитријевић
Универзитет у Нишу, Правни факултет, Ниш, Србија

Резиме

Правни субјективитет Европске централне банке (ЕЦБ) је веома развијен и специфичан што с обзиром на њену улогу међународном монетарном поретку и није толико изненађујуће. Институционала структура ЕЦБ се од почетних година њеног оснивања увек развијала и прилагођавала текућим збивањима на монетарној сцени, како у погледу формалних, тако и суштинских елемената што је у великој мери утицало на еволуцију њених надлежности која је у првим годинама деловања ЕУ била изграђена на темељу класичних монетарних поставки о томе шта јесу задаци централне банке и како треба бити организовано њено пословање, преко осавремењивања класичних постулата новим задацима из терена фискалне и других сегемента опште економске политике, до прихватања потпуно нових (за неке теоретичаре помало радикалних) ставова о поимању ЕЦБ као властитог законодавца чије право постоји изван комунитарног правног корпуса ЕУ и егзистира независно од њега (или барем равноправно са њим).

Монетарни спорови представљају посебну категорију управних спорова у којима се решава о поступању централне банке, тачније, одлучује се о управноправној природи аката врховне независне монетарне институције где се као претходни

услов јавља поседовање специјализованих правничких знања из проблематике јавног монетарног управљања. У разматрању монетарних спорова од стране суда, потребно је указати на чињеницу да постоје одређене сличности у начину конституисања и организовања правосудних органа и највише монетарне институције, а које се огледају у томе да обе институције јесу одраз кредибилитета обећања које је влада дала својим грађанима и да су идејни елементи законодавца код обе институције присутни у делу које треба да им гарантује независност у раду и спречавање последица евентуалног застрашивања од стране носиоца других облика власти. Занимљиво је да су проблеми који су се уочили током глобалне финансијске кризе, а потом и кризе проузроковане пандемијом Ковид-19 довели до својеврсног монетарноправног феномена који се огледа у ширењу надлежности Европске централне банке, са једне стране, али и процесу оснаживања позиција националних централних банака у еврозони, са друге стране, што јесте извесни монетарни парадокс узимајући у обзир чињеницу да државе чланице еврозоне не могу дискреционо водити своје националне монетарне политике и да рачунају на механизам прилагођавања девизних курсева у околностима привредних поремећаја и донекле умањени национални монетарни суверенитет (јер су готово све компоненте пренете на ниво ЕУ).Поменуто само потврђује тезу о „животности“ проблематике монетарног права ЕУ и права ЕЦБ које се у кризним моментима прилагођава и ослушкује потребе својих грађана на начин који штити њихово право на монетрану стабилност као јавно добро, право на чврсту валуту и очување кредибилитета и вредности заједничке монетарне политике.