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PROFESSIONAL MOTIVATED OPINION: FUTURE TRENDS AND PLACE IN THE BANKING SYSTEM OF LAW AND LEGISLATION (Part 3)

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Abstract

The article is devoted to a comprehensive analysis of the concept of professionally motivated opinion applied by regulator (Bank of Russia) in respect of a credit institution. This concept (category) is seen in a variety of ways: as the approach used in international banking practice, as an institution of banking supervision, as assessment assigned by to the Bank of Russian to a credit organization, on the basis of analysis of numerous financial parameters of the latter, the ownership structure, the risks taken and the objective economic factors. The article discusses also the main directions of banking supervision, which includes elements of professionally motivated opinion as well as the goals of the latter.

Keywords: professional opinion, banking supervision, financial stability of the credit institution, the Central Bank of the Russian Federation, objective economic factors, financial parameters, financial statements, banking activities, banking risks, banking inspection.

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Currently, the right to use the professional motivated opinion in certain areas of banking activities is already regulated by the legislation. In a world where financial processes happen at a very high pace, the need to adapt the new standards of the Basel agreements, develop new methods for the use of professional opinion motivated is one of the most important areas for development and effective functioning of the banking sector of a country.

At the same time, it is important to understand that every banking regulation instrument has its own unique limitations and that they must be used in the appropriate banking sphere. The scope of use of the professional motivated opinion in the banking sphere is quite significant.

First of all, we would like to note that the requirement for the implementation of the Bank of Russia strategy to improve the quality component of banking supervision – the optimization of inspection activities, was one of the motives in the development and establishment of the professional motivated opinion.

In accordance with the instructions № 108 of the Bank of Russia from 12.01.2003 "About the organization of inspection activities of the Central Bank of the Russian Federation" and № 105 of the Bank of Russia from 08.25.2003 "About the order of inspections of banks and their branches by the authorized representatives of the Central Bank of the Russian Federation", the goals of the inspections of credit organizations are not only to identify

deficiencies, irregularities in the formation of the banks reports, but also a qualitative assessment of the risk management systems and internal controls, financial condition and prospects of the credit institution on the basis of professional motivated opinion [1, 2].

Therefore, professional motivated opinion can be applied not only in the assessment of the credit institution for management review and internal controls, financial condition and prospects of the credit institution, its own funds, loan portfolio, but also to assess the various types of risks inherent to the banks activities.

Let's take a closer look at the regulative documents of the Bank of Russia, adopted in order to implement a more thorough (subjective) evaluation of the risks of individual activities of banks and influencing the development of the professional motivated opinion.

Among the first preconditions in the development of the category of "professional motivated opinion" is the transition of banking supervision from the formalized approach to the meaningful one – the period of finding new methods and instruments of qualitative assessment of the financial and economic activities of credit institutions (see Fig. 1).

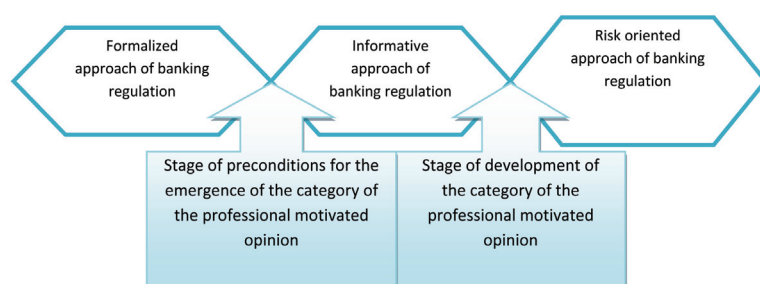


Fig. 1. Stages of emergence and development of the category of the "professional motivated opinion"

This period can probably be described as a period of "shifting the focus from a formal evaluation of the quantitative parameters to a deep, high-quality and timely diagnosis". New technologies appeared in the banking sector which transformed the set of banking instruments and the speed of their implementation. But the problem of global business. As a result of a supervision system based on detailed, but inflexible hardwired rules came into conflict with the rapidly changing and difficult to categorize (based on which the standards are developed) practice.

The regulator agreed with the postulate that the control cannot be absolute (which does not mean that it should not be). Formal control at a certain stage began to show a negative effect instead of the

planned stimulating effect. When it comes to banks, such a policy is usually incompatible with the main goal - sustainability: in order for a bank to achieve significant stability it requires constant development, consistent and effective implementation of both active and passive operations. An overregulated bank will doubtlessly be deprived of corresponding opportunities.

Thus, in the supervisory practice the informative approaches came to the fore in forms of conceptual ideas and principles instead of the strict standards. Changes in these areas can be defined as a shift of the focus from the form to the content and the transition from the regulation based on rules, to the regulation based on the principle. The essence of these changes allows us to discuss the new paradigm of regulation, which can be described as the strategic dominance of informative concepts and principles.

The new paradigm of regulation could be determined thus: from the rules to the principles, from the principles to the rules. It appears that this formula conveys the idea of a balanced approach to the development of banking supervision, based on a content basis.

The informative approach has changed supervisory practices deeper than just adding a more flexible interpretation of the rules and the possibility to reasonable decisions beyond fixed legal regulations. New regulations should conform to a common general direction of development, form a system and be periodically reevaluated. It creates a kind of "conveyor" to modify and update the rules so that they are at any given moment consistent with the situation and the needs of supervisory practices. [3]

In this sense, the new notion, the new institute "motivated opinion" appears partly identical to the concept of "professional opinion" perceived by the Russian banking practice, but formed in English-speaking countries, where the accountants' "created a cult out of the professional opinion" [4] and, on the other hand, generated under the influence of "internal" factors.

Among the first regulatory legal acts of the Bank of Russia, reflecting the prerequisites for the category "professional opinion" should include the Bank of Russia letter from 12.16.1998 № 363 "On the methodological recommendations of the verification of the loan portfolio of credit organizations"[5]. In this letter the category of the "subjective opinion of the inspector" arises for the first time. The document

notes that "while assessing the credit portfolio of the credit organization not only the formalized criteria stipulated by the normative acts of the Bank of Russia and the recommendations developed on the basis of their methodological approach should be used, but also the subjective opinion of the inspectors, consisting of multi variable factors identified during the check."

The next documents of the Bank of Russia related to the precondition phase for the emergence of this category is the letter of the Bank of Russia from 03.31.2000 № 766 "On the criteria for determining the financial condition of credit institutions" (hereinafter, the letter of the Bank of Russia № 766) [6] which reflects the use of banking supervisions substantive approach. Thus, it is specified that the regional branches of the Bank of Russia, while classifying credit institutions that "the assignment of a credit institution to the appropriate category and the group should reflect a meaningful representation of the territorial office of the Bank of Russia on the state of the credit institution, taking into account trends in its development."

At the same time, the guideline of the Bank of Russia № 766 requirements were determined to situations in which "it is impossible to use this guide" and situations "when the rated application of the criteria provided for in this guideline give substantively inaccurate response the territorial office of the Bank of Russia has the right to decide on assigning the credit institution to a different category and (or) the classification group "on the basis of a motivated informed decision. This motivated justification for improvement or deterioration in a category (classification group) related to the credit institution must be submitted to the Bank of Russia in due time.

The transition period from formal criteria to meaningful supervision was also characterized by the introduction of new principles in combating fictitious capital, as reflected in the position of the Bank of Russia from 02.10.2003 № 215 "On the methods of determining own funds (capital) of credit institutions" [7] and from 03.19.2003 № 218 "On the procedure and criteria for assessing the financial position of legal entities its founders (participants) of credit institutions [8] (hereinafter - the Bank of Russia № 218). Banking supervision, by assessing the economic validity of the source of the formation of capital may apply the appropriate supervisory response measures to such banks.

The complexity of determining the facts and signs that the formation of their own capital was made with the help of improper assets of the credit institutions, as well as the use of illegal schemes of credit institutions authorized capital, for example, granting loans, purchase of promissory notes or other securities of by third parties, the proceeds of which go to the

purchase account members (shareholders) to enroll in the charter capital, eventually led to the application of professional opinion professional in banking supervision in this matter.

Thus regulation of the Bank of Russia № 218 first introduced "the procedure and criteria for assessing the financial situation of the founders (participants) of the credit institution", which is performed in the following three groups of factors:

- Availability of own assets,
- The absence of signs insolvency,
- The absence of significant financial difficulties.

Formerly the financial condition of the members (shareholders) of credit institutions was assessed only with the use of formal criteria on the basis of quantitative assessment. In accordance with the regulation of the Bank of Russia № 218 a comprehensive, quality assessment using professional opinion started to be used. The first time a statutory definition of the category of "reasoned opinion" in order to form conclusions about the qualitative evaluation of the acquirer of the shares in the authorized capital of the requirements of the financial position. According to the regulation to Bank of Russia № 218-P "reasoned opinion on the sufficiency of the financial situation of the purchaser – is a reasoned conclusion on the recognition of the financial situation of the purchaser satisfactory (unsatisfactory) based on approaches as defined in these Regulations."

Thus, the principles set out in order to form a qualitative assessment of the financial condition of the members (shareholders) of the credit organization, marked the beginning of the establishment of control over credit institutions that are financially unstable and use illegal schemes like artificial "inflation" in equity, and will also contribute to transparency of information about the owners of the banks.

At the same time, during the period of application and development of the substantive approach in banking supervision it became necessary for credit institutions to use, in some issues of its activities, not only the quantitative assessment, but also the qualitative, and as a result the need to use the professional motivated opinion. The most significant issues that are reflected in the adopted regulatory acts of the Bank of Russia, specified during the transition period were:

- the procedure of formation by banks of reserves for possible losses;
- the procedure of formation by banks of reserves for possible losses on loans and similar debts.

For the first time credit institutions were given the right to use motivated opinion in the Regulation of the Bank of Russia from 04.12.2001 № 137 "On the formation of reserves by credit institutions for possible losses"

[9] (hereinafter - the Bank of Russia № 137), which was applied while assessing the level of risk when determining the estimated reserve base.

Thus, according to the regulation of the Bank of Russia №137 in order to carry out reasoned opinion about the level of risk of a credit institution, a checklist of factors as established by this Regulation and the others must be used, if their presence is considered essential for the classification of the individual elements the calculation base in the appropriate risk. At the same time, the sources of information about the risk factors may come from different sources, including the media, and their set depends choice of the credit institution.

Among the factors on which the motivated opinion is formed regarding the level reserves for possible losses, in accordance with the Regulations are:

- The current financial condition of the counterparty, as determined in accordance with the credit policy of the bank in respect of the borrowers;
- The history of the business relationship with the counterparty;
- The duration of stay of the funds on the account (not considered, if duration of stay in the account corresponds to the duration of the ongoing operation);
- The existence of judicial decisions in which the counterparty is a defendant, and the date of their entry into force.

In addition, other factors for the various elements estimate base in the formation of the reserve are the macro-and microeconomic indicators, which are measured in the aggregate for each type of asset.

Later on the list of criteria used by the credit institution when making motivated opinion was supplemented by a provision of the Bank of Russia from 07.09.2003 № 232 "On the formation of credit institutions reserves for possible losses" [10] (hereinafter – the Bank of Russia № 232-P) adopted "in exchange" of the regulations of the Bank Russia № 137. The Supplementary list of criteria included the following:

- Country risk
- Business reputation of the counterparty and of the management of the organization counterparty
- The quality of management of the organization and their competitive position in the market,
- Short-term and long-term plans and prospects of the counterparty,
- Credit history,
- Involvement of the counterparty in various legal proceedings
- Other factors which are accessible and provide information about the level of risk.

When rendering motivated opinion about the level of risk on the elements estimate base of the bank in order to determine the amount necessary to establish reserves for possible losses, credit institutions shall make every reasonable effort to obtain the information necessary to make such opinion. Such a reasoned opinion in accordance with paragraph 1.9 Regulations of the Bank of Russia № 232 should be based on the following principles:

- The maximum adequacy of the procedures for determining the asset quality and size required to establish reserves stipulated in the internal documents of the credit institution, the spectrum of operations and level of complexity of the operations of the credit institution;
- The adequacy of the amount of reserves to the level of losses arising from the credit institution in the normal course of business;
- Timeliness of provisions and reserves reflected in the account.

A little later, on the issue regulation of the procedure of formation of credit institutions reserves for possible losses, the Bank of Russia from 03.20.2006 № 283 "On the formation of credit institutions reserves for possible losses" [11] (hereinafter - the Bank of Russia № 283) the term motivated opinion transformed into "professional opinion", the list of factors used in the cross-sectional estimates of the elements calculation base expanded and also remained open. The principles of professional opinion on the elements of estimate base and the formation of (regulation) of the reserve in accordance with the Bank of Russia № 283 are as follows:

- Compliance with the actual actions on the classification (reclassification) elements of the calculation base and the formation of (regulation) of the reserve requirements of this Regulation and specified in the internal documents of the credit institution;
- A comprehensive and objective analysis of all the information taken into consideration in the classification (reclassification) of the elements calculation base and the formation of reserve (regulation) of the reserve;
- Timeliness classification (reclassification) of the elements calculation base, the formation of (regulation) of the provision and accuracy of the allowance to reflect changes in accounting and reporting.

Another document, which gave the right to credit institutions to use the category "professional motivated opinion" is the regulation of the Bank of Russia from 03.26.2004 № 254 "On the formation of credit institutions reserve for possible loan losses in loans and similar debts" [12] (hereinafter – the Bank of Russia № 254). This document establishes the right

of credit institutions to determine the quality of the loan (the probability of loan impairment) in the absence of other significant factors taken into account when classifying loans, using their professional motivated opinion based on a combination of classification criteria. Under the Regulations, the following criteria for a secured professional motivated opinion, which is determined by the results of a comprehensive and objective analysis of the borrower considering the following:

- The financial situation
- The quality of service of the debt,
- Different available to credit institution information (including the risks of the borrower).

A list of information required to be reflected in the professional motivated opinion of the credit institution when determining the classification of loans and similar debts, which includes:

- Information on the level of credit risk for the loan;
- Information about the analysis the results of which affected the professional motivated opinion;
- The conclusion of the evaluation of the financial situation of the borrower, including the rationale for the implementation of the borrower-legal entity actual activities;
- The conclusion of the evaluation of the quality of service of debt for the loan;
- Information on the presence of other relevant factors taken into account when classifying loans or unaccounted indicating the reasons for which they were not taken into account by the credit institution;
- Calculation of the reserve;
- Other relevant information.

Thus, the transition to a meaningful banking supervision practice was marked by the appearance of right for credit institutions to use in the assessment of individual activities the category "professional motivated opinion", while the methodological approaches of the Bank of Russia to the development of this institution became less formalized, that was certainly a positive novelty in the banking practice.

We note that in the process of transformation of market relations the regulators while in the process of implementation of its supervisory functions have to choose between formalized and informative approaches when determining the tools of supervision of credit institutions and, as a consequence, they are reflected in the regulations in the development of methodological support. One of the main advantages of a formalized approach is the clarity of presentation and ease of use. However, a serious intrinsic flaw in the formalized approach is the impossibility to carry out a reliable analysis or discover the indicator parameters, which would fully reveal a spectrum

of the factors affecting it. The formalized approach may even conflict with the task of ensuring effective banking supervision. In turn, the "quality" of the implementation of substantive approach depends on the competence of the methodology of supervision, as well as the qualifications and professionalism of the supervisory unit.

The next step of formation of the category "professional motivated opinion" may include the period of application of the risk-based approach to banking supervision of credit institutions.

Risk-based supervision is a structured approach based on the identification of potential risks faced by credit institutions, and assessment of the financial and operational factors that enable one to control these risks and ensure their minimization (reduction). Within the framework the risk-based approach banking supervision is carried out to the prospect: it seeks to identify the issues that may arise in the future, and to take the necessary preventive measures, rather than react with rigid regulatory measures. At the same time, if the current financial condition of the credit institution meets the requirements and standards, it can not be guaranteed that the credit institution is dealing with a reasonable level of risk. Risk-based supervision is not limited to verifying compliance with the norm of credit institutions and rules, and is aimed at revealing possibility of fulfillment credit institution with its obligations in the future, especially when the manifestation of risk phenomenon in the economic environment. When implementing a risk-based supervisory approach, resources are not evenly distributed to all supervised institutions, and focus primarily on those credit institutions that pose the greatest threat to achieving the objectives of the regulator to ensure the stability of the banking sector. That is, when using the risk-based approach baking supervision attempts to determine the credit institutions that do not require the attention of regulators and those credit institutions which are subject to significant risks and require significant intervention and operational control. Risk-based supervision does not mean the rejection of the application of quantitative restrictions, but rather a particularly understanding of the need for additional tools to ensure sound and cautious management of the credit institution in the future - with minimal risk. Therefore, the current financial state of the credit institution established by the requirements on quantitative limits, though is desirable, but may be insufficient to maintain the risk at a low level (below the permissible value.) While quantitative restrictions may apply only to certain risks, for instance the risks of the market and not the operational ones.

Thus, the transition of banking supervision on risk-oriented principles requires methodological

improvement of the supervisory process. Implementation of the tasks set out before banking supervision can combine quality and supervision, and the creation of additional tools for carrying out professional motivated opinion.

Risk-based supervision and application of Basel-II, as well as the transition to Basel-III sharpen the relevance of the use of new methods to combat fictitious capital of credit institutions. Certain steps in this direction of its decisions have been made within the framework Regulations of the Bank Russia from 06.19.2009 № 337 "On the procedure and criteria for assessing the financial position of legal entities-founders (participants) of the credit institution" [13], where more broadened criteria are used for assessing the financial position of legal entities-founders (participants) of the credit institution. This regulation clearly identified the limits of applicability of the professional motivated opinion: its application in individual cases (strictly regulated) is one of the bases for the recognition of the financial situation of the legal entity as unsatisfactory.

Again, the most significant regulations in regard to the application of risk-based supervision are currently found in the finalized Bank of Russia Instruction of 12.01.2003 № 108 "On the organization of inspection activities by the Central Bank of the Russian Federation (Bank of Russia)" and from 08.25.2003 № 105 "On the Procedure of inspections of credit institutions (their branches) authorized by the representatives of the Central Bank of the Russian Federation."

According to the documents the professional motivated opinion shall be made by the inspectors working group regarding the compliance with the credit institution (its branch) requirements of Russian legislation and regulations of the Bank of Russia on countering the legalization (laundering) of proceeds of criminally obtained funds and the financing of terrorism, evaluation of risk management systems and internal controls of the credit institution (or its branch), financial condition and prospects of the credit organization.

The verification by the supervisory authority of the banks system of risk management in is one of the most important in the risk-based supervision, and in order to improve the application of professional motivated opinion.

Therefore, in order to systematize and improve various approaches to risk assessment the specialists of the Bank of Russia have developed "Guidelines on inspection and evaluation of risk management in credit institutions" (hereinafter – Guidelines). These guidelines are designed to test new approaches to assessing the results of the preliminary analysis of

the risk management system in credit institutions. Thus, the professional motivated opinion is recommended to be used on the issue of assessments of risk management inspections conducted by the authorized representatives of the Bank of Russia in accordance with the instructions of the Bank of Russia № 105 and 108, as well as on the basis of the content of banking risk management according to the Bank of Russia from 12.16.2003 № 242 "On the organization of internal control in credit institutions and banking groups" (hereinafter – the Bank of Russia № 242) [14].

In order to verify the risk management system and its individual components, as well as organizations internal control of the credit institution is to identify the compliance risks reasonable level, character and scope and conditions regarding the activities of the credit organization. The aforementioned guidelines in order to reach these objectives take into account the operational direction of the Bank of Russia from June 23, 2004 № 70 "On typical banking risks" [15] and evaluate the following risks:

- Credit risk,
- Market risk,
- Equity risk,
- Interest rate risk,
- Currency risk,
- Liquidity risk,
- Operational risk,
- Legal risk,
- The risk of loss of business reputation,
- Country risk
- Strategic risk.

On one hand, in order to assess the quality of the risk management system an integral component is used, which is calculated as the arithmetic mean of the following indicators to assess management procedures:

- Credit risk
- Market risk (in terms of stock market risk and interest rate risk only on financial instruments related to the trading portfolio of the credit institution)
- Currency risk,
- Interest rate risk,
- Liquidity risk,
- Operational risk
- Banking risks in certain areas of the banks activities.

The final assessment of the quality of the risk management system in the credit institution is recommended to be defined depending on the value of the integral indicator of the risk management system on the basis of the correspondence table.

On the other hand, considering the factors and circumstances that are not covered in the guidelines, but have a significant impact on the quality of the risk management system of the credit institution, the final assessment of the quality of the risk management system is corrected based on the professional opinion of the working group. In the inspection report the reasons which influenced the final assessment deviation from the calculated values of the integral index of the risk management system are stated.

Thus, during the verification and evaluation of the risk management system of the credit institution the regulator uses the professional motivated opinion as an additional corrective tool to provide additional assessment of the activities of the credit organization.

It should also be noted that the use of professional motivated opinion within risk-based supervision is also used in the assessment of internal control in credit institutions. In order to improve the analysis, as well as to systematize and summarize the results of inspections of credit institutions on compliance with the rules of internal control established by the Bank of Russia № 242, the Bank of Russia guidelines have been developed for the verification and assessment of the internal control in credit institutions governing the evaluation of internal control in the credit organization on the basis of certain indicators with a numerical score.

The analysis of these regulations of the Bank of Russia, defining area of application category "professional motivated opinion" indicates that the activities of credit institutions to which special attention is paid by the regulator are matters such as the control of risk management, control over the organization's internal control. Control of risk management includes assessing the risk management strategy, its fundamental principles, identification, measurement and determination of an acceptable level of risk of the credit organization, constant supervision of banking risks, the adoption of supervisory response in case of significant risks. A specific role is given to the internal control system of the credit institution, which also includes the control over the functioning of the risk management system and its assessment (identification and analysis of factors affecting the performance of the credit institution). The need to implement effective supervisory process for individual processes in banking operations require the use of the professional motivated opinion, which should contribute to the creation of incentives for the efficient operation of credit institutions.

However, while the institute of the professional motivated opinion is still developing, and the category of the same name is still being filled with content that requires further research outlined in this paper, among them, perhaps, could be attributed the

quite frequently mentioned in the press issues of the professional motivated opinion:

- Absence of clear assessment criteria, the unreliability of the techniques that imply a discrepancy in their interpretation;
- Dismissal or lack of clear understanding of the current trends in the business processes of the real economy, ignoring these problems imposes additional unrealistic requirements to the credit organizations;
- Lack of a single coherent system of regulation of the banking sector;
- Lack of a clear definition of the responsibilities, powers and purposes of banking supervision;
- Instability of macroeconomic policies;
- High degree of dependence of economic processes on political factors;
- Imperfection of regulatory framework of banking regulation and supervision;
- Lack of clear criteria and objective assessment of regulatory activities (banking supervision);
- Other factors that have an impact on subjective imposition motivated the professional opinion.

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ИННОВАЦИИ

ПРОФЕССИОНАЛЬНОЕ МОТИВИРОВАННОЕ МНЕНИЕ: ТЕНДЕНЦИИ БУДУЩЕГО И МЕСТО В БАНКОВСКОЙ СИСТЕМЕ ПРАВА И ЗАКОНОДАТЕЛЬСТВА

Е. Е. Фролова, Е. В. Кармадонова

Аннотация

Статья посвящена всестороннему анализу понятия профессионального мотивированного суждения, применяемого регулятором (Банком России) в отношении кредитной организации. Данное понятие (категория) рассматривается в различных аспектах: как подход, используемый в международной банковской практике, как институт банковского надзора, как оценка, присваиваемая Банком России кредитной организации на основании анализа многочисленных финансовых параметров деятельности последней, структуры собственности, принимаемых рисков, а также объективных экономических факторов. В статье рассматриваются также основные направления банковского надзора, в которых присутствуют элементы профессионального мотивированного суждения, а также цели его вынесения.

Ключевые слова: профессиональное мотивированное суждение, банковский надзор, финансовая устойчивость кредитной организации, Банк России, объективные экономические факторы, финансовые параметры, финансовая отчетность, банковские операции, банковские риски, инспектирование.

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