



EUROPEAN CENTRAL BANK

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OPINION OF THE EUROPEAN CENTRAL BANK

of 27 October 2017

on the role of Národná banka Slovenska in supervising the education of financial intermediaries and financial agents

(CON/2017/43)

Introduction and legal basis

On 22 September 2017 the European Central Bank (ECB) received a request from the Ministry of Finance of the Slovak Republic for an opinion on a draft Law amending and supplementing Law No. 186/2009 on financial intermediation and financial consultancy and on the amendment and supplementation of certain laws (hereinafter the 'draft law').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union and the third indent of Article 2(1) of Council Decision 98/415/EC¹, as the draft law relates to Národná banka Slovenska (NBS). In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose of the draft law

- 1.1 The primary aim of the draft law is to transpose Directive (EU) 2016/97 of the European Parliament and of the Council² and to improve the transposition of the provisions of Directive 2014/17/EU of the European Parliament and of the Council³, as regards the cross-border performance of financial intermediation or financial consultancy in the field of real-estate credit.
- 1.2 In addition to the transposition of Union directives, the draft law introduces stricter regulation of specialised financial education with respect to the requirements for professional competence of financial intermediaries and financial agents as well as stricter conditions to be fulfilled by legal entities providing specialised financial education.
- 1.3 As a part of the reform of financial education, the draft law introduces a new task for NBS in relation to the supervision of financial education⁴.

¹ Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42).

² Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ L 26, 2.2.2016, p. 19).

³ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

⁴ Point 54 of the draft law which introduces a new Article 22a on specialised financial education in Law No. 186/2009 and Point 90 of the draft law, which amends Article 38(1) of Law No. 186/2009 assigning competence to NBS to supervise the implementation of specialised financial education.

- 1.3.1 More specifically, NBS will be obliged to maintain a register of specialised financial education providers. NBS will assess whether an applicant to be included on the list of specialised financial education providers has provided sufficient evidence that: (i) the applicant is authorised to perform educational activity; (ii) the applicant is of a good character (in the case of an individual) or each member of the statutory body or management body of the applicant responsible for providing specialised financial education is of a good character (in the case of a legal entity); and (iii) the applicant has the technical and organisational expertise for providing specialised financial education⁵.
- 1.3.2 NBS is furthermore entrusted with the general task of supervising the implementation of financial education by specialised financial education providers⁶ as well as by financial institutions providing specialised financial education to employees, financial agents and financial consultants. This includes the power to impose specific sanctions on specialised financial education providers and on persons providing specialised financial education, which is not in line with Law No. 186/2009, as amended by the draft law, or who are not on NBS's register.⁷

2. General observations

- 2.1 This opinion does not consider whether the draft law effectively implements into national law Directive (EU) 2016/97 or certain provisions of Directive 2014/17/EU. The ECB only assesses the provisions of the draft law that impact on the tasks of NBS as a national central bank (NCB) and as a member of the Eurosystem and the European System of Central Banks (ESCB).
- 2.2 The draft law confers upon NBS the new task of supervising financial education and specialised financial education providers, as specified in paragraph 1.3. Where a new task is conferred on an NCB in the ESCB it must be assessed against the prohibition on monetary financing under Article 123 of the Treaty. For the purposes of that prohibition, Article 1(1)(b)(ii) of Council Regulation (EC) No 3603/93⁸ defines 'other type of credit facility' as, inter alia, 'any financing of the public sector's obligations vis-à-vis third parties'.
- 2.3 Ensuring that Member States implement a sound budgetary policy is one of the key objectives of the monetary financing prohibition, which may not be circumvented⁹. In view of this, the task of financing measures, which are normally the responsibility of the Member States and funded from their budgetary sources rather than by the NCBs, must not be entrusted to NCBs. To decide what constitutes financing of the public sector's obligations vis-à-vis third parties, which can be translated as the provision of central bank financing outside the scope of central bank tasks, it is necessary to carry out on a case-by-case basis an assessment of whether the task to be undertaken by an NCB is a central bank task or a government task, i.e. a task within the responsibility of the Member States. In other words, adequate safeguards must be in place to

⁵ Point 54 of the draft law introducing a new Article 22a in Law No. 186/2009.

⁶ Point 90 of the draft law amending Article 38(1) of Law No. 186/2009.

⁷ Point 94 of the draft law introducing, among others, Article 39(3) of Law No. 186/2009.

⁸ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

⁹ Article 123 of the Treaty also serves the objective of maintaining price stability and reinforces central bank independence.

ensure that circumventions of the objective of the monetary financing prohibition of maintaining a sound budgetary policy of Member States do not take place.

- 2.4 As part of its discretion in the exercise of its duty, on the basis of Article 271(d) of the Treaty and Article 35.6 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the ‘Statute of the ESCB’), to ensure that NCBs honour the obligations laid down by the Treaty, the Governing Council has endorsed safeguards of that kind in the form of criteria for determining what may be seen as falling within the scope of a public sector’s obligation within the meaning of Article 1(1)(b)(ii) of Regulation (EC) No 3603/93 or, in other words, what constitutes a government task as follows:

First, central bank tasks are in particular those tasks that are related to the tasks that have been conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB. These tasks are mainly defined in Article 127(2), (5) and (6) and Article 128(1) of the Treaty, as well as Article 22 and Article 25.1 of the Statute of the ESCB.

Second, as Article 14.4 of the Statute of the ESCB allows NCBs to perform ‘other functions’, new tasks, i.e. tasks that are not related to tasks that have been conferred upon the ECB and the NCBs, are not precluded per se. However, new tasks that are undertaken by an NCB and which are atypical of NCB tasks or which are clearly discharged on behalf of and in the exclusive interest of the government or of other public sector entities should be considered government tasks.

Third, an important criterion for qualifying a new task as atypical of an NCB task or as being clearly on behalf of and in the exclusive interest of the government or other public sector entities is the impact of the task on the institutional, financial and personal independence of that NCB.

In particular, the following aspects should be taken into account:

- (a) Whether the performance of the new task creates conflicts of interest with existing central bank tasks which are not adequately addressed and does not necessarily complement those existing central bank tasks. If a conflict of interest arises between existing and new tasks, sufficient safeguards to mitigate that conflict should be in place. The complementarity between a new task and the existing central bank tasks should not be interpreted broadly, so as to lead to the creation of an indefinite chain of ancillary tasks. Such complementarity should also be examined in relation to the financing of those tasks;
- (b) whether without new financial resources the performance of the new task is disproportionate to the NCB’s financial or organisational capacity and may have a negative impact on the capacity to perform properly the existing central bank tasks;
- (c) whether the performance of the new task fits into the institutional set-up of the NCB in the light of central bank independence and accountability considerations;
- (d) whether the performance of the new task harbours substantial financial risks;
- (e) whether the performance of the new task exposes the members of the NCB decision-making bodies to political risks which are disproportionate and may also have an impact on their personal independence and, in particular, on the guarantee of term of office set out in Article 14.2 of the Statute of the ESCB.

3. Specific observations

On the basis of the criteria set out above, the following paragraphs assess whether NBS's new task is in line with the monetary financing prohibition.

3.1 *New tasks related to the tasks conferred upon the ECB and the NCBs by the Treaty and the Statute of the ESCB*

The supervision of financial education or specialised financial education providers is not among the central banking tasks listed in Article 127(2) or (5) of the Treaty or otherwise conferred upon the NCBs by the Statute of the ESCB. Although the new task conferred on NBS relates, inter alia, to the provision of financial education by financial institutions, it does not form part of NBS's prudential supervisory tasks. According to the explanatory report accompanying the draft law, the objective of the new task is rather one of financial consumer protection¹⁰. It follows that the new task conferred on NBS under the draft law is not directly related to the tasks conferred on the ECB and the NCBs by the Treaty and the Statute of the ESCB. Consequently, a careful assessment of the conferral of this task on NBS is required in order to determine whether it constitutes a government task and whether the related funding gives rise to monetary financing concerns.

3.2 *Tasks which are atypical of NCB tasks*

The new task relating to the supervision of financial education widens the scope of the current tasks carried out by NBS in relation to the supervision of financial intermediaries and financial advisors by extending NBS's tasks to include the supervision of specialised financial education providers. Currently, the tasks carried out by NBS under Law No.186/2009 include supervision of financial intermediation by an independent financial agent and of the provision of financial advice by financial advisers. In line with its current remit, NBS already possesses the powers necessary to ensure that the professional qualifications of financial intermediaries and financial agents meet the required standards. In particular, NBS, or a person appointed by it, currently ensures the conduct of professional examinations for specific financial sectors and the levels of professional qualifications of certain persons active in the financial intermediation and financial advisory services¹¹. NBS is also responsible for nominating the (vice-) chairmen and other members of the examining board and for approving examination regulations¹². NBS also records information on the completion of specialised financial education and professional examinations in its register of financial agents and financial intermediaries¹³.

In contrast with the tasks currently performed by NBS under Law No.186/2009, the content and scope of specialised financial education, the manner in which it is provided and other relevant details are only determined by the Decree of the Ministry of Finance of the Slovak Republic No. 600/2009¹⁴ (hereinafter the 'decree'). According to the decree, specialised financial education is provided by financial institutions or educational facilities. In defining an educational facility, the decree refers to Law No. 131/2002 on universities and Law No. 245/2008 on training and education

¹⁰ See Explanatory Report to the draft law.

¹¹ Article 22(3) of Law No. 186/2009.

¹² Article 22(2) of Law No. 186/2009.

¹³ Article 17(1)(n) and (o) and 17(7)(l) and (m) of Law No. 186/2009.

¹⁴ The legal basis for the decree is Article 22(9) of Law No. 186/2009.

(school law). Therefore, the adequate provision of specialised financial education falls within the scope of government policies on education. It follows that even where the new task conferred on NBS might be regarded as being complementary to a certain extent to the supervision currently exercised by the NBS over entities providing financial services to consumers due to the fact that it contributes to ensuring appropriate professional qualifications of financial intermediaries and financial agents, this task would nonetheless be at least partially discharged on behalf of and in the interest of the government.

It is, consequently, necessary to analyse whether the new task to be conferred on NBS relating to the supervision of specialised financial education is a typical task that is also undertaken by other NCBs of the European System of Central Banks (ESCB). While the majority of NCBs of the ESCB do not appear to have been assigned specific tasks of this nature, the ECB has identified a number of Member States, including Croatia¹⁵, the Czech Republic¹⁶, Greece¹⁷, Hungary¹⁸, Portugal¹⁹ and

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- 15 In Croatia, where there is insufficient evidence to support claims of the required level of knowledge and competency Hrvatska narodna banka (HNB) may reject an application for, or terminate, a licence as a credit intermediary. In accordance with the requirements laid down by Directive 2014/17/EU and transposed into Croatian law, HNB issues a by-law outlining the process for training sales staff and a certificate of adequate knowledge and expertise. A credit institution is also obliged to prepare a training programme and submit it to HNB no later than 31 January of each calendar year.
- 16 In the Czech Republic, persons who are required to sit professional exams as a precondition for providing particular services in the financial market (e.g. consumer credit, capital markets, pensions, handling banknotes and coins) may be examined only by providers of financial education holding accreditation from Česká národní banka (ČNB). ČNB may issue Decrees regulating the precise operation of providers of financial education. ČNB may also impose administrative penalties and sanctions in connection with the supervision of accredited providers of financial education.
- 17 In Greece, pursuant to Article 14 of Law 3606/2007, implementing Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directive 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1), the Bank of Greece (BoG) was assigned the task of ensuring that persons providing investment services or performing investment activities on behalf of credit institutions possess the required knowledge and competence. This task is exercised through Joint Decisions of the BoG and the Hellenic Capital Market Commission (HCMC). Candidates are required to pass certification examinations on a specified syllabus or to successfully complete the relevant certification training course. In both cases, they obtain a certificate confirming their knowledge and competence to provide investment services or engage in investment activities. For renewal of the certificate, candidates are required to pass the certification examination or successfully complete a refresher course. The BoG is assigned a number of tasks in relation to the certification process, including the eligibility assessment procedure and handling of the relevant documentation. The conditions for participating in the certification examinations, the examination syllabus, issues relating to the organisation of the refresher courses, the examinations procedure, the conditions and procedure for the renewal and withdrawal of the certificate, as well as the fees to be paid by the candidates are all outlined in a Joint BoG/HCMC Decision. The examinations and relevant courses may be carried out by various entities, following an assessment of their capability by the BoG and the HCMC. The supervision of the examinations is assigned to a three-member Board of Examiners, of which one member is recommended by the BoG. Remuneration of the members of the Board of Examiners is specified in a Joint Decision of the HCMC and the BoG and the relevant cost falls on the HCMC and the BoG, which in turn charge examination fees to the candidates.
- 18 In Hungary, under the 40/2015. (XII.30.) Decree of the Ministry of National economy related to financial, insurance and capital markets service providers' agents, the Magyar Nemzeti Bank (MNB) is responsible for ensuring that the requirements for official examinations and examiners' activity are complied with. The financial education of financial, insurance and capital markets service providers' agents may be carried out by a trainer firm registered with the MNB, and by an announced trainer, based on the requirements defined by the law. The MNB organises the official exams of financial, insurance and capital markets service providers' agents, and ensures the examiners.

Slovenia²⁰, where NCBs appear to perform tasks similar to that conferred on NBS by the draft law. The new task conferred on NBS regarding the supervision of specialised financial education does not, therefore, appear to be atypical for a national central bank of the ESCB.

3.3 *Impact of the tasks on the independence of NBS*

The impact of the new task on the institutional, financial and personal independence of NBS must also be taken into consideration.

3.3.1 *Extent to which the performance of the new task creates conflicts of interest with existing central bank tasks*

No apparent conflicts of interest with other existing central bank tasks arise from the NBS's new task of supervising specialised financial education providers.

3.3.2 *Extent to which the performance of the new task places a disproportionate burden on NBS's financial or organisational capacity*

The principle of financial independence requires that Member States may not put their NCBs in a position where they have insufficient financial resources to carry out both their ESCB-related tasks and their national tasks, from an operational and financial perspective. Furthermore, when allocating specific new tasks to NCBs, each NCB concerned should have additional financial and human resources at its disposal to ensure that the tasks can be carried out without impacting on the NCB's operational or financial capacity (including sufficient human resources) to perform its ESCB tasks. In order to ensure that NBS's capacity to perform its ESCB-related tasks is not impacted, NBS must, therefore, be in a position to avail itself of the necessary resources, including personnel, for performing assessments and registrations and issuing directions under the draft law.

In this regard, it is noted that the draft law requires applicants to pay a fee for entry in the register of specialised financial education providers. The application fee represents income for NBS²¹.

However, given that NBS's new task would extend beyond the maintenance of the register of specialised financial education providers, to also include assessing whether the conditions of the draft law are met, it is difficult at this stage to predict the resources that would be required to ensure the sound supervision of specialised financial education. Therefore, it is not clear whether the

19 In Portugal, following the transposition of Directive 2014/17/EU, credit institutions will be required to ensure that their staff have an appropriate level of knowledge and competence. Under Decree-Law 74-A/2017 of 23 June 2017, (entry into force on 1 January 2018) credit institutions will have complied with regulatory requirements where, for instance, their employees hold a certificate of professional competence. Credit intermediaries must also conform to specific requirements of knowledge and competence and, for those providing services on mortgage credit agreements, the knowledge and competences of their staff. Under the Credit Intermediaries Law (recently approved by Decree-Law 81-C/2017, of 7 July 2017), the Banco de Portugal must assess compliance with the relevant requirements throughout the authorisation procedure. Compliance with the relevant requirements can, again, only be ascertained by a certificate of professional competence. According to Decree-Law 74-A/2017 and the Credit Intermediaries Law, certificates of professional competence may only be issued by entities certified by the Banco de Portugal. Under the relevant provisions, the Banco de Portugal is also responsible for monitoring those entities and may revoke its certification if it concludes that the conditions required have ceased to exist. However, the Banco de Portugal has not been empowered to impose administrative penalties or sanctions on those entities. The fulfilment of these tasks is financed by the Banco de Portugal.

20 In Slovenia, under the Consumer Credit Act credit providers and credit intermediaries must have properly qualified staff. Banka Slovenije is responsible for the supervising compliance with the Consumer Credit Act of credit institutions, leasing companies and certain credit intermediaries. Banka Slovenije's supervision extends to compliance with the provisions of Consumer Credit Act that regulates education. These tasks of Banka Slovenije are financed by the subjects of its supervision.

21 Point 54 of the draft law which introduces a new Article 22a(8) in Law No. 186/2009.

application fees would cover all the costs related to performing the new task, or whether additional resources would be required, which could impact NBS's regular budget.

3.3.3 Extent to which performance of the new task fits into NBS's institutional set-up, in the light of the principles of central bank independence and accountability

Given that the objective underpinning the new task conferred on NBS by the draft law is similar to the objective of ensuring adequate professional qualifications of financial intermediaries and financial agents, which underlies NBS's existing supervisory tasks as mentioned in paragraph 3.2, the performance of the new task does not appear to conflict with NBS's institutional set-up.

3.3.4 Extent to which the performance of tasks harbours substantial financial risks

The draft law does not directly address NBS's potential liability in the event of any legal action, application or other legal proceeding for damages in relation to the exercise (or failure to exercise) of its powers under the draft law. In the absence of any provision in the draft law excluding NBS's liability in performing the tasks under the draft law, NBS would ultimately be liable for damages in accordance with Slovak state liability rules. Therefore, the new task conferred on NBS under the draft law would entail additional financial risks.

3.3.5 Extent to which the performance of the new task exposes members of NBS's decision-making bodies to disproportionate political risks and has an impact on their personal independence

The performance of the new task does not appear to expose NBS's decision-making bodies to any disproportionate political risk or to have an impact on their personal independence. As mentioned in paragraph 3.3.3, the new task shares a common objective with existing supervisory tasks of NBS to ensure appropriate professional qualifications of financial intermediaries and financial agents.

3.4 Conclusion regarding the compatibility of the draft law with the prohibition on monetary financing

The supervision of financial education or specialised financial education providers is not among the central banking tasks listed in the Treaty. The new task conferred on NBS could be regarded as complementing the supervisory tasks currently performed by NBS, in the light of its contribution to the objective of ensuring adequate professional qualifications of financial intermediaries and financial agents. Furthermore, this task might be seen as a legitimate task to be conferred on the NBS given that this task does not appear to be atypical for NCBs in the ESCB. However, ensuring the sound provision of specialised financial education forms part of the educational policies of the State. In this respect, the new task would be administered at least in part on behalf of and in the interest of the government. Additionally, there is uncertainty as regards the additional financial burden imposed on NBS in undertaking this task. The ECB therefore recommends that the consulting authority take these concerns into account in its decision on whether to confer the new

task of supervising specialised financial education on NBS.

This opinion will be published on the ECB's website.

Done at Frankfurt am Main, 27 October 2017.

[signed]

The President of the ECB

Mario DRAGHI