THE PRINCIPLE OF MUTUAL RECOGNITION OF BANKING LICENCES UNDER THE NEW BANKING ACT

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The main principles, institutions, and terms of modern European banking laws have been incorporated into the new Banking Act and it is possible to say, in general, that its harmonisation with the law of the European Community was quite an arduous task. One of the most important principles on which the efficient functioning of the European banking system is based and which is the subject of this article, is the principle of mutual recognition of banking licences (hereinafter referred to as ‘the principle of mutual recognition’).

The adoption of this principle and the need for its application in practice arises from the Treaty establishing the European Community, which sets the goals of the Community. They include the creation of a common internal market among the member states, which is viewed as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. In addition, the Treaty contains a clause prohibiting any restriction of the freedom of a subject of a member state to do business in another member state. This prohibition also applies to restrictions concerning the opening of agencies, branches, and subsidiary companies by subjects of a member state in another member state.

The application of the principle of mutual recognition in accordance with the law of the European Community will have an impact on:
a) the licensing of banks and branches of foreign banks;
b) the conduct of on-site and off-site banking supervision;
c) the exchange of information between the supervisory authorities;
d) the imposition of remedial measures;
e) the method of deposit protection.

In this way, a legal framework has been created for the joint and co-ordinated supervision of banks and branches of foreign banks within the European Community.

The basic questions concerning the application of the principle of mutual recognition in the Slovak banking law are dealt with in Article 2, paragraph 8, and Articles 11 to 20 of the Banking Act. They are based on Art. 18 of the Banking Directive, which enables credit institutions, i.e. banks, to conduct banking activities abroad, either through a branch office, or directly, by providing banking services, under certain conditions, without a banking licence from the host country.

In its introductory provisions, the Banking Act defines a branch office of a foreign bank as an organisational unit of a foreign bank located in the Slovak Republic, which is directly engaged in banking activities. All branches established in the Slovak Republic by a foreign bank with a registered office in a member state of the European Community are regarded, from the point of view of authorisation to perform banking activities, as a single branch of the foreign bank concerned.

Article 11 of the Banking Act deals with questions related to the performance of banking activities in the Slovak Republic by foreign banks from EC Member States (hereinafter referred to as ‘Member States’), without a banking licence issued by the National Bank of Slovakia (the principle of a single banking licence). Provided that the foreign bank has been issued with a licence in its home country, the National Bank of Slovakia (hereinafter referred to as ‘NBS’), is obliged to allow a minimum range of activities, as specified in Annex 1 of the Banking Directive. In the Banking Act, these activities are listed in paragraphs 1 and 2 of Article 2. Mortgage business and the acceptance of deposits pursuant to Act No. 385/1999 Z.z. on Collective Investment as amended by Act No. 329/2000 Z.z. (Art. 2 paragraph 2 letters n) and o) of the Banking Act) remain subject to authorisation by the NBS.

Apart from the prescribed range of activities, another condition for the provision of banking services in the Slovak Republic without authorisation from the NBS, is a written approval from the body of banking supervision in the Member State concerned.

It is to be stressed that the possibility of using a single banking licence only applies to banks with a registered office in a Member State. The provision of banking services by banks from other countries of the world is subject to standard licensing procedure and requires a banking licence pursuant to Article 7 of the Banking Act.

The provision of Article 11 paragraph 2 of the Banking Act makes it possible for foreign banks to provide banking services directly, without establishing a new organisational unit, e.g. via the Internet. In this case, the Banking Act requires that the supervisory authority of the relevant Member State deliver a written notification of the proposed banking activities to the NBS before the first banking transaction.

The single banking licence principle shall also apply to a financial institution (a financial institution is defined, for the purposes of the Banking Act, as a non-bank legal entity, performing, as its main activity, one of the activities listed in Article 2 paragraph 2 of the Banking Act, or whose principle business is the acquisition of capital interests pursuant to separate regulations, or any entity based abroad with a similar scope of...
business) with a registered office in a Member State, which is a subsidiary company of a foreign bank or a subsidiary of two or more foreign banks based in a Member State, and whose statutes or partnership agreement allow the performance of activities pursuant to Article 2 paragraphs 1 and 2 of the Banking Act (except banking activities listed under Art. 2 para. 2 letters n) and o)) subject to the following conditions:

a) the foreign bank or foreign banks concerned is/are licensed to perform banking activities in the Member State whose laws apply to the foreign financial institution in question;

b) the foreign financial institution in question de facto performs banking activities in the same Member State;

c) the foreign bank or foreign banks owns/own at least 90% of the voting rights of the foreign financial institution;

d) the foreign bank or foreign banks ensure the management of the financial institution in a prudential manner and provide irrevocable, common, and indivisible security for the commitments undertaken by the foreign financial institution; the form of security must be approved by the supervisory authority of the relevant member state; and

e) the foreign financial institution in question is subject to banking supervision on a consolidated basis, i.e. carried out as for one consolidated unit of the foreign bank or foreign banks.

The above conditions must all be complied with at one and the same time. Their fulfilment shall be reported by the foreign financial institution to the NBS in the form of a written certificate from the supervisory authority of the relevant Member State. In addition, such financial institutions will be subject to the same requirements as branches of foreign banks, pursuant to Article 11 paragraph 1 of the Banking Act.

A foreign bank enjoying the advantages of a single banking licence is exempt from some provisions of the Banking Act, i.e. those laid down in Article 11 paragraph 7 (e.g. the representative office of such a bank is not subject to registration, its branch office may be sold without prior approval).

Article 12 stipulates the procedure to be followed by the NBS as a supervisory authority in connection with the commencement of operations by foreign banks in the Slovak Republic. According to the said Article, the NBS shall prepare for the supervision of the branch office of a foreign bank and notify the branch, if necessary, of the relevant provisions of generally binding regulations of the Slovak Republic pertaining to its activities, within two months of submission of a statement made by the supervisory authority of the relevant Member State confirming that the NBS has no reason to have doubts about the organisational structure and financial situation of the foreign bank concerned. After submission of the said statement or the expiration of two months, the branch of the foreign bank may carry on banking business in the Slovak Republic.

On the basis of Article 13, a bank holding a banking licence in accordance with the Banking Act is authorised to operate in any Member State. Paragraph 1 sets the list of data that are to be reported to the NBS by banks wishing to establish a branch office in a Member State. A bank intending to open a branch office in a Member State shall submit a written report on the following data to the NBS:

a) the Member State in which the branch is to be established;
b) the registered office of the branch in the Member State;
c) the full names of persons in charge of the branch office;
d) the business plan containing a list of proposed activities;
e) the organisational chart of the branch office.

Pursuant to paragraph 2 of the cited Article, the NBS shall evaluate the organisational chart and financial situation of the bank in relation to the allowed banking activities prior to the establishment of a branch office in a Member State. If the NBS has no reason to doubt the suitability of the establishment of a branch office in an EC country, the NBS shall submit the data required (including data on the bank’s own resources and details about deposit protection) to the banking supervision body of the Member State in which the bank intends to operate (the supervisory authority of the host country) within three months.

Should the NBS has doubts about the facts under analysis, and/or the conditions and relations of the bank, the NBS shall inform the bank, within three months, of the fact that the report has not been forwarded to the supervisory authority of the relevant Member State and shall supply an explanation.

At the same time, the Article places the bank under the obligation to notify, in writing, the NBS and the supervisory authority of the relevant Member State within 30 days, in advance of any alteration to the facts on the basis of which the proposal to establish a branch office in the Member State was evaluated.

The direct provision of services by a Slovak bank in a Member State without establishing an organisational unit for this purpose, is regulated in paragraph 5 of the cited Article.

Paragraph 6 of the cited Article places the NBS under the obligation to inform the supervisory authority of the relevant Member State if a financial institution with a registered office in the Slovak Republic, which is a subsidiary company of a bank or a subsidiary of two or more banks, fails to meet the conditions stipulated in Article 11 paragraph 3 letters a) to b) of the Banking Act.

In connection with the introduction of the single licence principle (mutual recognition of banking licences), it proved necessary to incorporate the principle of supervision by the home country into the Slovak legal system. In Article 14, the Banking Act prescribes the procedure for banking supervision of a branch office of a bank established in accordance with the Banking Act. Supervision of a branch office of a Slovak bank operating in a Member State shall be carried out by the NBS. Supervision of the liquidity of the branch shall be carried out by the supervisory authority of the relevant Member State in co-operation with the NBS unless they agree otherwise. The branch office shall also be subject to measures adopted by the Member State as part of its monetary policy; where the Member State belongs to the euro area, the branch shall be subject to regulations adopted by the European Central Bank. If the supervisory authority of the Member State warns the NBS that the branch office of a bank is in breach of the legal regulations when conducting banking business in the Member State concerned, the NBS shall take the necessary measures to redress the unlawful state of affairs. In this connection, it should be said that if a branch office of a Slovak bank breaks the law of a Member State in which it operates, the body of banking supervision of the Member State shall be entitled, pursuant to the banking directive, to take the same steps against the branch office as under Article 17 of the Banking Act.
Since the actions of foreign entities cannot be regulated by the Banking Act, the Act places the branches of Slovak banks under the obligation to submit to, or carry out the measures imposed by the supervisory authority of a Member State to remedy the unlawful state of affairs.

Under Article 15 of the Banking Act, the supervisory authority of the relevant Member State (host country) is entitled to require the same information for banking supervision as from foreign banks with a registered office in the Member State, despite the fact it does not conduct supervision to such an extent as the licensing authority (i.e. the NBS). The Member State concerned may require a bank with a branch office within its borders to submit regular reports on its banking operations conducted in the country, for statistical purposes. The bank in question is obliged to fulfil this requirement.

Article 16 deals with the opposite situation to that governed by Article 14 of the Banking Act. It specifies which body shall supervise the activities of a branch of a foreign bank operating in the Slovak Republic and to what extent (the supervisory authority of the home country and the NBS).

Supervision of a branch office of a foreign bank enjoying the advantages of a single banking licence, shall be conducted in the Slovak Republic by the supervisory body of the Member State concerned. The liquidity of the branch shall be supervised by the NBS in cooperation with the supervisory authority of the Member State unless otherwise agreed. The branch office is also subject to regulations adopted by the NBS as part of its monetary policy. These regulations must be neither discriminatory nor restrictive. After the Slovak Republic joins the euro area, the branch office in question shall be subject to the directives of the European Central Bank.

Although the NBS does not exercise full banking supervision over branches of foreign banks that are subject to banking supervision in the Member State in which they are registered (home country), provision of Article 17 of the Banking Act authorises the NBS to take measures against branches of foreign banks breaking the law of the Slovak Republic. Such measures are categorised according to the seriousness of the offence. The Banking Act does not specify the individual types of measures directly in this respect. It may be said that the measures in question consist exclusively of remedial measures applied by the NBS in the course of banking supervision of banks licensed by the NBS.

If the NBS becomes aware that a branch of a foreign bank enjoying the advantages of a single banking licence in conducting banking activities, or a foreign bank benefiting from a single banking licence when providing banking services in the Slovak Republic pursuant to Article 11 paragraph 2, infringes the legal regulations, the NBS shall instruct the foreign bank concerned to rectify the infringement. If the foreign bank fails to take the necessary measures, the NBS shall notify the supervisory authority of the Member State concerned and request the said authority to take measures to rectify the unlawful state of affairs and to provide information on the measures taken.

Consequently, if a foreign bank or a branch of a foreign bank holding a common banking licence fails to comply with the legal regulations despite the aforementioned measure, the NBS may, after notifying the supervisory authority of the relevant Member State, adopt measures for the elimination of the unlawful state, including measures for the restriction or cancellation of its operations. Under European Community law and/or the national law of a Member State, foreign banks and branches of foreign banks are obliged to carry out the measures adopted.

In urgent matters, the NBS may take measures for the protection of the clients of a foreign bank’s local branch. The NBS shall notify the Commission of the European Community (hereinafter referred to as "The European Commission") and the supervisory authority of the relevant Member State of the measures adopted. However, the NBS must cancel or modify these measures if the European Commission decides so to do.

Under Article 18, the NBS is authorised to request that branches of foreign banks from Member States submit statements, reports, and other documents for the purposes of banking supervision and that foreign banks enjoying the advantages of a single banking licence and conducting banking activities, directly without a branch office or through a branch office in the Slovak Republic, present regular reports on their activities for statistical purposes.

Article 19 paragraph 1 places the NBS under the obligation to notify, without undue delay, the supervisory authority of the Member State in which the bank operates in accordance with the Banking Act, of the withdrawal of the banking licence of a bank with a registered office in the Slovak Republic. This purpose of this notification requirement is to enable the supervisory authority concerned to take steps for the closure of the bank’s branch office in its territory in the interest of depositors.

At the same time, paragraph 2 places the NBS under the obligation to notify the European Commission of its refusal to provide information on the establishment of a branch office.

Paragraphs 3, 4, and 5 stipulate further reporting requirements vis-à-vis the European Commission, which relate to the licensing of branch offices with a registered office outside the Member State and to cases where the bank becomes a subsidiary company, and incurs the obligation to report any difficulty occurring during the establishment of a bank outside the European Community. The purpose of this information is, first and foremost, to enable the European Commission to negotiate with third countries with the aim of gaining effective access for banks from Member States to the markets of third countries, comparable with that provided by the European Community to third countries.

Article 20 of the Banking Act lays down and guarantees the free use of advertising in promoting banking services in the Slovak Republic. On the other hand, the Banking Directive places Member States under the obligation to enable Slovak banks to advertise in their territories. However, this obligation is not included in the draft of this Act, since a Slovak law cannot place foreign entities under an obligation.

The introduction of the single banking licence principle represents a major step towards the harmonisation of Slovak banking legislation with the law of the European Community, which enables the free provision of banking services within the European Community. The principle of mutual recognition of banking licences will become effective in the Slovak legal system on the day of the Slovak Republic’s accession to the European Community.