Chapter 6

The Limits of the Powers of the Central Bank in Slovakia (Liability for Damage Caused by a National Central Bank in the EU)

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Abstract

This chapter is devoted to the legislative and jurisprudential influences on the status and powers of the national central bank in the EU, in general, and in Slovakia, in particular. First, the aim is to present the substantive Slovak legal limits on the central bank's powers and the European legal limits on the central bank's powers in the EU. Regarding EU law, the chapter focuses on the execution of some of the tasks entrusted to the European Central Bank in the supervision of credit institutions, namely, on assessing the practice of the electronic filing of applications by banks in the case of licensing procedures under the Single Supervisory Mechanism, in the context of the relevant Slovak legislative framework (Act on Banks). The last part of this chapter will provide an analysis and assessment of the appropriateness of the current legal status of the liability the central bank in the Slovak Republic has for the exercise of public authority. This will be done in the light of a recent decision of the Court of Justice of the European Union. Following that, the conclusion presents some doubts of the author about the compatibility of Slovak legislation with EU law concerning the liability for damage caused by a national central bank. Based on the above, the Slovak concept of liability is potentially contrary to the prohibition of monetary financing of the public sector and represents a threat to the financial independence of the central bank in Slovakia.

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1. Introduction

Central banks were established later than commercial banks when the two-tier banking system was set up. Generally, according to the manner of their creation, a central bank was established by commissioning an existing commercial bank or by setting up an entirely new institution. In theory,[1] the basic functions of a central bank today include the following:

a) bank of issue (administrative monopoly on the issue of legal tender),
b) the supreme monetary policy authority (manages monetary developments by regulating the quantity of money in circulation, determining the exchange rate of the domestic currency against foreign currencies with the objective of price stability),
c) bank of banks (bank for the commercial banks: sets reserve requirements, lends as lender of last resort, acts as a clearing house),
d) bank of the state (maintains treasury accounts, represents the state in negotiations with supranational banks, monetary institutions),
e) banking regulation and supervision (authorisation to enter the financial market),
f) currency reserve manager (management of gold and foreign currency claims),
g) coordination and supervision of payment systems.

These functions are sometimes supplemented by other functions, or some of these functions are not performed by the central bank because they are not recognised by national law (banking supervision) or because, as a result of membership in the monetary union, the central bank's activities have been transferred to another entity (activities of the bank of issue and the conduct of monetary policy). The legal status and structure of the central bank depend on historical traditions, the territorial division of the state and the legislative expression of its position in the legal order.

Depending on the nature of the body that defines them, the legal limits of the central bank's status and competence in the EU (as well as in the Slovak Republic) could be summarised as:

a) national limits, represented by national legislative acts (national constitution, national central bank law) and the decisions of national judicial authorities (supreme court, constitutional court),

1 Medveď, 2013, pp. 57–58; Nagy, 2022, p. 28.

b) supranational limits, such as European legislation (Treaty on the Functioning of the European Union, hereinafter referred to as "TFEU"; Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, hereinafter referred to as "Statute of the ESCB/ECB", prior to the Treaty of Lisbon, Protocol No 18) or which are the result of the adjudicatory activity of European judicial authorities (the Court of Justice of the EU).

The above breakdown implies that the central bank's actions are legally shaped not only by the legislature but also by the judiciary, i.e. we recognise legislative and jurisprudential influences.

In the second and third chapter, I present the substantive Slovak legal limits on the central bank's powers and the European legal limits that curb central bank powers in the EU. In the fourth chapter, I will focus on the execution of some of the tasks entrusted to the European Central Bank (hereinafter referred to as the "ECB") in the supervision of credit institutions, namely, I will assess the practice of electronic filing of applications by banks in the case of licensing procedures under the Single Supervisory Mechanism (hereinafter referred to as "SSM") the so-called SSM-conduct, in the context of the relevant Slovak legislative framework. In the fifth chapter, in the light of a recent decision of the Court of Justice of the EU, I will examine and assess the appropriateness of the current legal status of the liability the central bank in the Slovak Republic has for the exercise of public authority.

2. Limits of the central bank's powers: status de lege lata and national limits in the Slovak Republic

The National Bank of Slovakia (hereinafter referred to as the "NBS") is regulated at the constitutional level in Art. 56 of the third title of the Constitution of the Slovak Republic "Economy of the Slovak Republic", as follows:

1. The National Bank of Slovakia shall be an independent central bank of the Slovak Republic. The National Bank of Slovakia may, within its competence, issue generally binding legal regulations if it is empowered to do so by law.
2. The supreme governing body of the National Bank of Slovakia is the Banking Council of the National Bank of Slovakia.
3. Details under paras. 1 and 2 shall be established by law.

The NBS was established with effect from 1 January 1993 on the basis of Act No. 566/1992 Coll. on the National Bank of Slovakia, as amended (hereinafter referred to as the "NBS Act"), which was adopted on 18 November 1992.

The legal basis of the NBS gradually reflected the key events in Slovakia's state law, constitutional law and European integration process.

The prerequisites for the establishment of an independent Slovak central bank were the following: (a) the amendment to the Constitutional Act on the Czechoslovak Federation, proposed by the Czechoslovak Federal Government and approved by the Federal Assembly of the Czechoslovak Federal Republic, which allowed Slovakia and the Czech Republic to found their own issuing banks at the end of the Czechoslovak Federation on proviso that the issuing banks of the two republics would be created by the division of the State Bank of Czechoslovakia,2 (b) the monetary separation on 8 February 1993 on the basis of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic on the termination of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic on Monetary Arrangement (concluded on 27 January 1993)3 and the actual issue of the Slovak currency (the Slovak Crown – slovenská koruna).

Although the NBS was formally established as the Bank of Issue in the Slovak Republic, it had all the above-mentioned usual functions, objectives, competences and tasks of a central bank since its establishment on 1 January 1993 (until 30 June 2001).

The original institutional anchorage of the NBS changed at constitutional and legal level on 1 July 2001 from an issuing bank to an independent central bank in the framework of the preparations for Slovakia's accession to the EU.4

The primary reasons for this change in 2001 were: (a) the EU's principled requirements, based on the Treaty establishing the European Community (renamed TFEU as of 1 December 2009) and the Statute of the ESCB/ECB, to guarantee the independence of national central banks (institutional, functional, financial and personal independence) at the relevant national legal level, (b) the national case-law of the Constitutional Court of the Slovak Republic5 had to be reflected, according to which "independence" can only be granted to constitutionally enshrined institutions by an explicit constitutional provision.6 At the same time, it is contrary to the Constitution to grant "independence" to constitutionally enshrined institutions only by ordinary law. It follows then from the case-law cited above that the right to issue generally binding legal acts can primarily be enshrined only in the Constitution7

2 Act No. 143/1968 Coll. on the Czechoslovak Federation, as amended by later constitutional acts. According to Art. 14, para. 4 'The Czech Republic and the Slovak Republic may create their own banks of issue. The issuing banks of the republics shall be formed by the division of the Czecho-Slovak State Bank. An Act of the Federal Assembly shall divide the assets, rights and obligations of the State Bank of Czechoslovakia and determine the date of their takeover by the issuing banks of the republics.'

3 Available at: http://www.mzv.cz/jnp/cz/encyklopedie_statu/evropa/slovensko/smlouvy/ (Accessed: 10 October 2023).

4 Adoption of Constitutional Act No. 90/2001 Coll. of 23 February 2001, amending and supplementing the Constitution of the Slovak Republic with effect from 1 July 2001.

5 Ruling of the Constitutional Court of the Slovak Republic sp. zn. PL. ÚS 17/96 of 24 February 1998, published under No. 78/1998 Coll.

6 Hrčka, 2001, p. 5.

7 Kanárik and Bujňáková, 2002, pp. 242–252.

and that the provisions of an ordinary (non-constitutional) law conferring the right to issue generally binding legal acts on institutions upon which the Constitution does not directly confer such a right are contrary to the Constitution.

For these reasons, the amended Art. 56, para. 1 of the Constitution of the Slovak Republic (and also § 1, paras. 1 and 3 of the NBS Act) stipulates (since 1 July 2001) that the NBS is an independent central bank that can issue generally binding legal regulations within its scope of competence if subsequently authorised to do so by law. With this amended constitutional anchoring of the NBS, the EU's principled requirements for a proper national legal guarantee of its independence as a national central bank were met.

In the past, there were opinions that the central bank as a body of public authority, with its incorporation into the Constitution of the Slovak Republic as an independent entity, represents a new, so-called banking power. I believe that this systematic placement of the central bank in the Constitution of the Slovak Republic is a formal expression of its institutional independence.

The integration of Slovakia into the EU (on 1 May 2004) brought about a significant change for the NBS, since the NBS became a participant in the European System of Central Banks (hereinafter referred to as "ESCB") as a national central bank of an EU member state with a temporary exemption from the adoption and introduction of the euro.

Another important milestone was the adoption of Act No. 659/2007 Coll. on the introduction of the euro currency in the Slovak Republic and on the amendment of certain acts, as amended on 28 November 2007, as this was a legal prerequisite for the introduction of the euro in Slovakia (on 1 January 2009), since the NBS became part of the Eurosystem (the central banking system of the eurozone within the ESCB). In the process of preparing for the introduction of the euro, the NBS carried out and was responsible for a whole range of activities in the field of legislation, such as responsibility for the preparation of the aforementioned law on the introduction of the euro in the Slovak Republic, which was also successfully negotiated with the ECB.[8]

The competence of the NBS as a central bank to issue euro banknotes and euro coins as per the legal regulations in force in the euro area governing the issuance of euro banknotes and euro coins is regulated at national level in § 2, para. 1, letter b of the NBS Act.

§ 17, para. 1 of the NBS Act established the competence of the NBS to manage cash circulation in the Slovak Republic according to special regulations applicable to euro banknotes and euro coins.

With regard to the authority to exercise supervision, after the establishment of the Slovak Republic, the exercise of banking supervision was transferred from the Czecho-Slovak State Bank to the NBS.[9]

8 See ECB opinion CON/2007/43 of 19 December 2007 on the draft law on the introduction of the euro currency in the Slovak Republic and on the amendment of certain acts.

9 See § 36 of the NBS Act.

Under Act No. 747/2004 Coll. on the supervision of the financial market and on the amendment of certain acts, as amended (hereinafter referred to as the "Supervision Act") (with effect from 1 January 2006), the NBS was entrusted with the supervision of the entire financial market in Slovakia in the areas of banking, the capital market, insurance and pension savings. It served the integration and centralisation of supervision under one supervisory authority, the NBS.[10]

The path to the creation of integrated supervision over the financial market spanned a period of almost four years, treaded gradually through the approval of government resolutions (in March 2002 – approval of the concept of integrated supervision over the financial market, in August 2003 – approval of the integration procedure), and preparations up to the adoption of a specific legal regulation in the form of the Supervision Act (2 December 2004).

The reason the entire supervision of the financial market was entrusted to the NBS was that it had proved that it had the necessary qualification, experience and trustworthiness in banking supervision as well as the constitutional base of its independence.

Entrusting the supervision of the entire financial market to the NBS was the very first case when a national central bank became directly and fully responsible for the supervision of the financial market in an EU member state. This fact was received very positively by the ECB during the mandatory consultation (intra-community comment procedure) on the proposal for the Slovak Supervision Act.[11] In this regard, the ECB stated that

> there are good arguments for the concentration of powers in the field of supervision in the hands of a single authority. The ECB welcomes the fact that the independence, trustworthiness and experience of the NBS were considered decisive reasons for the proposal of the Government of the Slovak Republic to entrust the NBS with this task' (point 7 of the ECB opinion).

At the same time, it stated that 'the proposed institutional framework for prudential business supervision is capable of dealing with the growing interconnection between individual sectors within the financial system' (point 9 of the ECB opinion).

Procedural integration was related to organisational integration. Previously, two separate administrative procedures and supervision procedures (before the NBS, for commercial banks and before the Financial Market Office, for other supervised entities) were integrated into a single supervisory procedure and one administrative procedure before the NBS, regulated by a single act (Supervision Act).

Key components of the framework for supervision by the NBS have become: (a) on-site supervision, (b) remote supervision (off-site), (c) separate administrative

10 Mrkývka, 2012, p. 200.

11 See points 7 and 9 of ECB opinion CON/2004/31 of 22 September 2004 on the draft Supervision Act.

proceedings in matters of supervision, (d) secondary regulation of the entire financial market (so-called secondary legislation: generally binding legal regulations, which are measures – decrees).

The establishment of the NBS reached an important milestone after the European System of Financial Supervision [ESFS][12] was set up (on 1 January 2011), as the NBS became a participant in this system as a national institution responsible for the entire supervision (prudential supervision) of the financial market at the micro and the macro level.

3. Limits of the central bank's powers: the independence of the national central bank and the limits of the national central bank's competence under EU law

The involvement of the NBS in the EU infrastructure means that the NBS fully participates in the activities of the ESCB, the Eurosystem and the ESFS institutions (EBA, ESMA, EIOPA). The Slovak Republic must, according to Art. 131 of the TFEU and point 14.1 of Art. 14 of the Statute of the ESCB/ECB, maintain full compatibility (so-called legal convergence) of Slovak legislation, especially the "statute" of the national central bank (NBS Act), with the legal framework of the founding agreements and the Statute of the ESCB/ECB. This legal framework lays down rules that relate in particular to:

a) independence of the central bank,[13]
b) compliance with the prohibition of monetary financing and the prohibition of preferential access,[14]
c) compliance with the objectives and tasks of the ESCB,[15]
d) management and implementation of monetary policy within the Eurosystem,[16]
e) maintaining and managing foreign exchange reserves within the Eurosystem,[17]
f) respecting the ECB's exclusive right to authorise the issuance of euro banknotes and to approve the volume of issued euro coins,[18]

12 Čunderlík et al., 2017, p. 180.
13 E.g. Art. 130 of the TFEU, Art. 7 of the Statute of the ESCB/ECB.
14 Art. 123 and 124 of the TFEU.
15 Art. 127(1) and (2) and Art. 282(2) of the TFEU, Art. 2 and 3 of the Statute of the ESCB/ECB.
16 Art. 282(1) of the TFEU, point 12.1 of Art. 12 and point 9.2 of Art. 9 of the Statute of the ESCB/ECB.
17 Point 12.1 of Art. 12 and point 9.2 of Art. 9 of the Statute of the ESCB/ECB.
18 Art. 128(1) and (2) of the TFEU, point 16.1 of Art. 16 of the Statute of the ESCB/ECB.

g) obligations of national central banks to act in accordance with ECB guidelines and instructions,[19]
h) and aspects related to the integration of national central banks into the Eurosystem.

The independence of the NBS is particularly important, which, due to the detailed analysis of the aspects of the independence of member states' central banks in the ECB documents[20], includes a relatively extensive concept of

a) institutional,
b) functional,
c) financial and
d) personal independence.

However, the elements of independence of the NBS as a central bank that is part of the ESCB are first and foremost determined by (primary) EU law, which has, in accordance with Art. 7, para. 2 of the Constitution of the Slovak Republic, priority over national legal acts.

The independence of a central bank in the EU is based on the perception of the independence of the ECB.[21] Details of the status and functioning of the ECB can be found in: (a) the Statute of the ESCB/ECB (b) Art. 127–132 of the TFEU.

Based on these legal acts, we can define *institutional independence* as meaning that neither the ECB nor the national central bank nor any member of their decision-making bodies can request or receive instructions from the EU authorities, the government or any other body. EU authorities and national governments are committed to upholding this principle. It is anchored in Art. 130 of the TFEU and Art. 7 of the Statute of the ESCB/ECB.

Functional independence is defined using the mandate of the central bank – the main goal of the central bank, which is price stability, the provision of tools to ensure it and the determination of responsibility for this goal. It is enshrined in Art. 127 of the TFEU and Art. 2 of the Statute of the ESCB/ECB.

Financial independence refers to the independence of management, the prohibition of direct financing of budget expenditures, while national governments may not influence the budget of national central banks and may not use national central banks to finance their state expenditures. This is a ban on public sector financing (monetary financing), while terms such as "overdraft" or "credit facility" with the ECB and national central banks in favour of bodies governed by public law, central governments and regional authorities are defined in Council Regulation (EC) No 3603/93 of 13

19 Point 14.3 of Art. 14 of the Statute of the ESCB/ECB.
20 These are primarily convergence reports and advisory opinions of the ECB. Some aspects of independence are addressed, for example, in ECB opinion CON/2009/85 of 27 October 2009 on the independence of the National Bank of Slovakia.
21 Daudrikh and Szakács, 2022, pp. 111–112.

December 1993 specifying definitions for the application of the prohibitions referred to in Art. 123 and 125(1) of the TFEU. The direct purchase of their debt by national central banks or the ECB is also prohibited. This type of independence is enshrined in Art. 123 of the TFEU and Art. 21 of the Statute of the ESCB/ECB.

Personal independence (Art. 14 of the Statute of the ESCB/ECB) must be understood as a guarantee of decision-making autonomy and incompatibility of functions, members of top management must have at least a 5-year term of office, and representatives of national central banks cannot be dismissed by the government for political reasons.[22] It should be noted that, in recent years, personal independence have also applied to rank-and-file employees of the central bank.

Some of these elements have already been referred for interpretation to the Court of Justice of the EU in the context of the threat of their limitation by other EU bodies (see proceedings in Case C-11/00 Commission of the European Communities v ECB, judgment of 10 July 2003).

In the fifth chapter, I will take a closer look at financial independence in the light of the recent decision of the Court of Justice of the EU (C-45/21, Banka Slovenije).

The Constitutional Court of the Slovak Republic as an independent, court-type constitutionality control body[23] has also touched upon aspects of the NBS's independence in connection with the non-appointment of a candidate for vice-governor by the president due to failure to meet professional requirements (Resolution No. PL. ÚS 14/06 adopted in closed session on 23 September 2009).[24] It stated that the NBS is a body independent of the government, while this independence follows directly from Art. 56 of the Constitution of the SR. From the point of view of the formal division of power, as envisaged by the Constitution of the Slovak Republic in terms of its structure, the competence of the NBS falls under the executive power. However, it follows from its constitutional independence that it cannot be subject to the basic hierarchy of the bodies of executive power, i.e. it is not subordinated to the government.

When creating new competences for national central banks in the EU, the obligation to consult with the ECB on draft legislative provisions regulating the powers of the national central bank must be met. According to Art. 127(4) and Art. 282(5) of the TFEU, drafts of national legislation that relate to the competence of the ECB and national central banks must be submitted to the ECB's intra-community comment procedure. The areas that are mandatorily subject to consultation are defined in

22 On the other hand, neither the ECB nor the EU imposes any requirements on the process of selecting members of the decision-making bodies of the central bank. The appeal of the governor of a central bank is subject to review by the Court of Justice of the EU, while other members of the decision-making body (in the case of the NBS, members of the Banking Council) have the opportunity to turn to a national court for review of their appeal.

23 Ľalík and Ľalík, 2019, p. 26.

24 Similarly, there was a second case of non-appointment of a candidate for the office of vice-governor in 2019. The decision of the Constitutional Court of the Slovak Republic in this case (judgment III. ÚS 394/2020) is subject to theoretical criticism. Ľalík, 2022, pp. 670–685.

Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC).

In the following section, I will focus on the European legal limits applicable to national central banks in carrying out two main activities, namely, the conduct of monetary policy (including the issue of money) and the supervision of credit institutions (the first pillar of the Banking Union – Single Supervisory Mechanism).

3.1. Implementation of monetary policy and the issue of money (general legal basis)

After the NBS's integration into the eurozone and, concurrently, into the Eurosystem since the introduction of the euro in Slovakia (on 1 January 2009), the NBS *lost its monetary sovereignty* in the implementation of an independent monetary policy. The ECB is responsible for deciding on a single monetary policy for the entire euro area, while the Governor of the NBS also participates in this ECB decision-making as a member of the ECB's Board of Governors.

According to Art. 3(1)(c) of the TFEU, the EU has exclusive jurisdiction in the area of monetary policy for the member states of the European Union whose currency is the euro. According to Art. 282(1) of the TFEU, the ECB together with the national central banks constitute the ESCB. The ECB, together with the national central banks of the member states whose currency is the euro and which form the Eurosystem, conducts the monetary policy of the EU. As per Art. 128(1) of the TFEU, the ECB has exclusive right to authorise the issue of euro banknotes.[25] Under Art. 16 of the Statute of the ESCB/ECB, the Governing Council has the exclusive right to authorise the issue of euro banknotes in the EU. These banknotes can be issued by the ECB and national central banks. Art. 128(2) of the TFEU provides that member states may issue euro coins in the volume approved by the ECB. Within the meaning of Art. 282(3) of the TFEU, only the ECB can authorise the issue of the euro. It follows from the above that, in matters of monetary policy, the ECB has the upper hand.

3.2. Financial market supervision

EU requirements regarding the legal status of a national central bank (point 14.4 of Art. 14 of the Statute of the ESCB/ECB) permit national central banks to perform functions other than those of the ESCB as long as this does not interfere with the objectives and tasks of the ESCB. However, such functions are performed by national central banks on their own responsibility and do not form part of the functions of the ESCB. Consequently, the NBS is currently entrusted with the full supervision of the financial market in Slovakia.

Similarly, according to Art. 127(6) of the TFEU, the ECB may be assigned special tasks related to the policy of the prudential supervision of credit institutions and

25 Štrkolec, 2022, p. 198.

other financial institutions, with the exception of insurance companies. Accordingly, the first pillar of the Banking Union was created, which only concerns the supervision of banks. The legal basis of the SSM is represented by (a) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (hereinafter referred to as the "Prudential Supervision Regulation") and (b) Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/ 2014/17) (hereinafter referred to as the "SSM Framework Regulation").

In accordance with Art. 25(2) of the Prudential Supervision Regulation, the ECB carries out the tasks entrusted to the ECB by this regulation without prejudice to its tasks related to monetary policy (the so-called separation from the function of monetary policy).

4. The practice of cooperation between the NBS and the ECB within the SSM in the licensing procedure

In this chapter, I will focus on evaluating the effectiveness of the licensing process within the SSM in Slovakia, specifically on the practical usability of the ECB's electronic application system for selected licensing procedures (SSM procedures).

The SSM is a system of financial supervision over credit institutions consisting of the ECB and the competent authorities of the eurozone member states and other EU member states that have decided to join the system voluntarily (the procedure for establishing close cooperation is regulated in Decision ECB/2014/5 of 31 January 2014 on the close cooperation with the national competent authorities of participating member states whose currency is not the euro). The participation of eurozone member states is mandatory. The ECB is responsible for the consistent functioning of the SSM. The SSM was launched on 4 November 2014.

In essence, the SSM consists in the cooperation of the ECB and the relevant national authorities in the supervision of credit institutions which, from the point of view of supervision, are classified into significant and less significant institutions.

The significance of credit institutions directly supervised by the ECB is based on a number of criteria (e.g. the value of the assets of the credit institution exceeding the threshold of 30 billion euros, whether the credit institution received financial support from the European Financial Stability Facility or the European Stability Mechanism or is one of the three most important credit institutions in a member state, regardless of other criteria, such as the volume of assets, etc.), or the ECB may, on the initiative of a national authority, consider a credit institution significant for

the economy of a member state, or the ECB may, on its own initiative, consider a credit institution significant if this institution has established bank subsidiaries in more than one member state.[26]

Other, less significant credit institutions are subject to the supervision of the national authority (NBS). However, the ECB can also exercise certain powers in relation to these institutions. The ECB may, for example, decide to exercise direct supervision even over a less significant credit institution (e.g., if such an institution is close to fulfilling one of the significance criteria).

The aim of this concentration of supervisory power is to ensure that pan-European interests and not national interests are pursued when solving banking crises.

The special powers of the ECB in relation to all credit institutions (regardless of significance) include the possibility to conduct *various types of licensing procedures* (see Art. (4)(1)(a) and (c) of the Prudential Supervision Regulation) *or impose sanctions* (for the possibility of imposing administrative fines, see Art. (18), or for the withdrawal of licence, see Art. (14)(5) of the Prudential Supervision Regulation, or for pecuniary penalties, Art. 2(4c) of Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions).

The ECB will set up, as per Art. 24 of the Prudential Supervision Regulation, an administrative review committee for the purpose of reviewing the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation. After deciding on the admissibility of the review, the Administrative Review Committee issues an opinion and refers the matter to the Supervisory Board for it to draft a new decision. The Supervisory Board will take into account the opinion of the Administrative Review Committee and submit a new draft decision to the Board of Governors. The original decision will be cancelled or replaced by a new draft decision (Art. 24(7) of the Prudential Supervision Regulation).

Administrative procedures before the NBS are regulated in the third part of the Supervision Act, entitled "Procedures in matters of supervision" (§ 12 to § 34a), while any application of the general regulation on administrative procedures is excluded (§ 12, para. 1).

The national legal framework for cooperation between the NBS and the ECB within the SSM regarding licensing procedures consists of § 1, para. 3, letter d) and § 34a of the Supervision Act and § 94, paras. 5 and 6 of Act No. 483/2001 Coll. on banks and on the amendment of certain laws, as amended (hereinafter referred to as the "Act on Banks").

According to § 34a of the Supervision Act, the provisions on procedures before the NBS in matters of supervision (i.e. special administrative procedures under the Supervision Act) also apply to the procedure of cooperation between the NBS (cooperation and preparing documents for procedures and decision-making) and

26 For the categories of criteria, see Art. 6(1) of the Prudential Supervision Regulation. For the determination of materiality, see the SSM Framework Regulation.

the ECB within the SSM under the Prudential Supervision Regulation and the SSM Framework Regulation.[27]

In practice, the NBS assesses the application submitted in the licensing procedure and, for SSM licensing procedures, prepares a draft decision directly for the ECB, where the competent supervisory authority is the ECB as per the Prudential Supervision Regulation.

Pursuant to § 94, para. 5 of the Act on Banks, applicants may submit an application in licensing matters in electronic form. Under § 94, para. 6, the measure that may be taken by the NBS, which is published in the collection of laws, establishes what is understood by electronic form as per para. 5, the manner, form and procedure of submitting the application and its annexes in electronic form, the types of procedures, when the application can be submitted in electronic form, and other details of electronic submission.[28]

According to the explanatory memorandum to these two paragraphs, they introduce the possibility to submit applications in licensing procedures in electronic form. Para. 6 contains an authorising provision, enabling the NBS as a participant of the SSM (within the meaning of the Prudential Supervision Regulation) to determine the conditions for the electronic submission of applications by means of a decree. The aim is to join the ECB's upcoming project for the electronic submission of applications within the framework of procedures for the licensing of credit institutions in the participating SSM member states.

Electronic submission should take place through the ECB's electronic communication system – the IMAS Portal. Para. 6 provides the legal basis for the issue of an act that would guide the applicant in the electronic submission of the application, especially in relation to:

a) the information system through which the application will be submitted electronically,
b) the types of licensing procedures, applications that can be submitted electronically,
c) the procedure for submitting the application and its attachments in electronic form.[29]

The problem is that so far, such an act has not been issued by the NBS, which could result in the provision on the possibility of submitting an electronic application not being enforceable.

Neither of the paragraphs indicate that only certain types of licensing procedures fall within the ECB's competence. However, it is clear from the above-mentioned explanation to para. 6 that it is limited to certain types of requests, i.e. not

27 This provision was adopted by Act No. 279/2017 Coll. with effect from 15 December 2017.
28 These paragraphs were introduced with effect from 29 December 2020 by Act No. 340/2020 Coll.
29 Prepared according to the explanatory memorandum to Act No 454/2021 Coll., which, with effect from 10 December 2021, clarified the empowering provision in para. 6.

all procedures referred to in the Slovak Act on Banks are covered. The link to the ECB's information system clearly indicates the decision-making activity of the ECB within the SSM, which is limited to certain types of licensing procedures (that is, procedures conducted under the authority of the ECB in cooperation with the NBS). The electronic submission of applications should cover banks (credit institutions) that fall under the ECB's decision-making authority within the SSM (significant banks and less significant banks).

The ECB – IMAS Portal is the ECB's electronic communication system which allows banks to submit applications related to SSM procedures, monitor the status of SSM procedures, and enables information exchange between the NBS and the ECB. The goal of this portal is to simplify, streamline and digitise SSM procedures and to increase transparency in relation to banks about the status of their ongoing SSM procedures, directly connecting banks.

In general, the following types of SSM procedures are available through the IMAS Portal: (1) for all banks (significant banks and less significant banks): (a) procedure for granting prior approval for the acquisition or further increase of qualified participation in a bank *(§ 28, para. 1, letter a of the Act on Banks), (Art. 4(1)(c) of the Prudential Supervision Regulation)*,[30] (b) procedure for granting a banking licence *(§ 7 of the Act on Banks), (Art. 4(1)(a) of the Prudential Supervision Regulation),*[31] (c) procedure for granting prior approval for the return of a banking licence *(§ 28, para. 1, letter b of the Act on Banks)*. (2) only for significant banks:

a) procedure for granting prior approval for the election or appointment of a member of the statutory body, a member of the supervisory board or for the appointment of a procurator, for the appointment of a senior employee or head of the internal control and audit department in the bank *(§ 9, para. 4 of the Act on Banks), (Art. 93 of the SSM Framework Regulation)*,
b) procedure for granting consent to the activity of a financial holding company and a mixed financial holding company (*§ 20a of the Act on Banks)*.

On its website, the NBS refers to a link where banks as well as third parties can submit applications related to the aforementioned SSM procedures, while the NBS provides guidelines in this regard.

The IMAS Portal can, in practice, be used in the Slovak Republic: (a) voluntarily, (b) for submitting a proposal for staff appointments at a significant bank (according to § 9, para. 4 of the Act on Banks); it is not yet technically feasible for smaller banks. However, only one major bank actually uses this option.

30 The submission procedure is regulated in Art. 15 of the Prudential Supervision Regulation. In more detail, the procedure of cooperation between the NBS and the ECB is regulated in Art. 85 to 87 of the SSM Framework Regulation.

31 The procedure for applying for a licence and the procedure for withdrawing a licence are regulated in Art. 14 of the Prudential Supervision Regulation. In more detail, the procedures of cooperation between the ECB and the NBS are regulated in Art. 73 to 84 of the SSM Framework Regulation.

By contrast, the ECB already uses the electronic system for the other SSM procedures mentioned above (mainly, the acquisition of qualified participation in a bank and granting a banking licence). In the case of these other procedures, the NBS acts as an intermediary – it communicates with the ECB via the IMAS Portal and scans and sends the submitted application via the portal's electronic system. In the future, use of the IMAS Portal in the Slovak Republic should be:

(a) mandatory,
(b) technically possible for all SSM licensing procedures,
(c) in relation to all banks – significant and less significant banks.

At the European level, it would be appropriate to consider expanding the scope of SSM procedures to include other types of licensing procedures (e.g. granting prior approval for mergers, mergers or demergers of a bank, the dissolution of a bank, the sale of a bank's business). For some types of licensing procedures, however, it is important to leave the evaluation of applications to the national supervisory authority, which knows best the situation of the bank (e.g. consent to changing the bank's articles of association, some types of previous consents under § 28 of the Act on Banks, such as to the use of shares issued by the bank as the subject of securing the obligations of the owner of these shares). In this regard, a completely uniform licensing practice may not be possible, since some types of licensing decisions are based on an assessment of country-specific legal requirements.

5. Liability for damage caused by a national central bank in the EU

In the fifth chapter,[32] I look at and analyse the suitability of the current legal status of central bank liability in the Slovak Republic in the exercise of public authority in the light of a recent decision of the CJEU.

5.1. Slovak law on liability in the exercise of public authority

Liability for damage caused in the exercise of public authority is regulated by Act No. 514/2003 on liability for damage caused in the exercise of public authority and on the amendment of certain acts (hereinafter referred to as the "Liability Act"), which entered into force on 1 July 2004.[33]

32 This fifth part is also an output of the Project VEGA No. 1/0212/23: Financial innovations as a determinant of current and anticipated regulation of the financial market (challenges and risks).

33 Its predecessor was Act No. 58/1969 on liability for damage caused by the decision of a state authority or its maladministration.

The concept of liability in the exercise of public authority in (Czech)Slovak law is historically built on absolute strict liability, which means:

a) that no examination of fault is required for liability to arise (i.e. it arises irrespective of whether the responsible authority acted intentionally or negligently, thus no exculpation is possible; otherwise, it would be liability for fault),
b) liability for the damage caused cannot be cleared (liberation), i.e. there are no grounds for liberation, otherwise it would be relative liability.

The Liability Act (§ 1) distinguishes between the liability of the state for damage caused by public authorities in the conduct of public authority and the liability of local authorities for damage caused by them.

The exercise of public authority is considered to be official action and decision-making concerning the rights, legally protected interests and obligations of natural and legal persons. A public authority includes, inter alia, a legal person entrusted by law with the exercise of public authority.[34]

As mentioned above, the central bank has broad public powers and duties conferred on it by legal acts a) at national level (NBS Act, Supervision Act) and b) at European level in the case of participation in the ESCB/Eurosystem (TFEU, Statute of the ESCB/ECB), SSM, ESFS (e.g. Prudential Supervision Regulation).

Its remit includes e.g. public tasks arising from membership in the ESCB, Eurosystem, the issue of euro coins, being a lender of last resort, the exercise of prudential supervision at the national level, consumer protection and cooperation with foreign supervisors (in the SSM, consolidated supervision).

There is therefore no doubt that a national central bank is clearly a public authority. The state is liable for damages, where the central bank is the public authority, arising from an unlawful decision or maladministration of the central bank.

The Liability Act (§ 4) establishes a list of central public bodies that act on behalf of the state in the matter of compensation for damage caused by a public body. At the same time, the scope of proceedings on behalf of the state includes, in relation to individual plaintiffs, payment of the incurred damage,[35] for which the state is responsible under the Liability Act. It is probably no coincidence that the law does not use the whole customary phrase "acts in the name of the state and on its account". The NBS acts on behalf of the state if: (a) the damage occurred as a result of its unlawful decision or (b) was caused by its incorrect official procedure (§ 4, para. 1, letter h of the Liability Act).

Proceedings on behalf of the state relate to the competence of the competent public authority (e.g. the Ministry of Justice in relation to violations by the courts; in such a case, the competent authority has the right to claim compensation if it has paid the damage – so-called "recourse compensation" – § 21–22 Liability Act).

34 See § 2 of the Liability Act.
35 See, e.g., § 16 of the Liability Act.

Exculpation is only possible for public authorities at a lower level in relation to the central public authorities, when these central public authorities have already paid damages to individual plaintiffs. Exculpation (waiving recourse compensation) applies only if the damage was not caused by an arbitrary decision (which has no legal basis).

Exculpation does not apply in the case of the NBS because the central bank is considered to be the competent central authority that must act on behalf of the state (including paying the damage caused by its unlawful activity).

The Slovak Republic must (according to Art. 131 of the TFEU, Art. 14.1 of the Statute of the ESCB/ECB) maintain full compatibility (legal convergence) of Slovak legislation with the EU legal framework (especially the TFEU, Statute of the ESCB/ECB).

At the time of its adoption, the Liability Act was not subject to a consultation obligation under EU law, as Slovakia was not yet a member.[36]

However, the Slovak legal concept of strict liability conflicts with European rules regarding: (a) independence of the central bank (financial independence), (b) compliance with the prohibition of monetary financing.

5.2. Supervision of the financial market as a conduct of public authority in the Slovak Republic

The power to supervise the financial market can be clearly defined as the exercise of public power.[37] The state entrusted the NBS with tasks (powers, duties) of supervision by a special law (Supervision Act). As mentioned above, the key activities of the NBS within the scope of supervision are (a) on-site supervision, (b) remote supervision (off-site), (c) licensing or sanctioning administrative procedures in matters of supervision.

The costs associated with on-site supervision and remote supervision are borne by the NBS (§ 2, para. 12 of the Supervision Act). In this context, it is necessary to state how the NBS finances the costs of supervision. The sources of financing are own resources, supervised entities' contributions[38] (annual contributions and special contributions, § 40–40a of the Supervision Act), procedural fines for procedural offences (§ 38 of the Supervision Act). However, the NBS income from the latter is not ordinary fines, which are transferred to the state budget under § 34 of the Supervision Act.

36 Currently, it would be subject to mandatory consultation with the ECB, because in accordance with the third point of Art. 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions refers to the position of the national central bank.

37 Kohajda, 2018, p. 101.

38 Supervised entities are legal and natural persons as referred to in § 1, para. 3, letter a of the Supervision Act who operate on the financial market on the basis of a relevant authorisation or other authorisation (e.g. registration).

As regards personnel costs (wages), the income from the contributions of supervised entities covers c. 40% of these costs.

The concept of strict liability under the Slovak Liability Act in the exercise of supervisory jurisdiction should be evaluated in the light of the recent judgment of the Court of Justice of the EU in Case C-45/21 Banka Slovenije [Judgment of the Court (Grand Chamber) of 13 September 2022, in Case C 45/21, request for a preliminary ruling from the Ustavno sodišče (Constitutional Court, Slovenia), made by decision of 14 January 2021, received at the Court on 28 January 2021, in the proceedings Banka Slovenije].

The reference for a preliminary ruling concerns the interpretation of Art. 123 and 130 of the TFEU, and Art. 7 and 21 of the Statute of the ESCB/ECB. The reference was made in the context of proceedings for a review of the constitutionality of national legislation defining the conditions for the liability of Banka Slovenije (the Slovenian central bank) for damage caused by the cancellation of certain financial instruments and access to certain information relating to that cancellation which that central bank has.

The Central Bank of Slovenia brought an action for review of the constitutionality of the Slovenian Banking Act and another Slovenian law (Act on the procedure applicable to the judicial and extra-judicial protection of former holders of eligible bank liabilities, hereinafter the "Protection Act"), claiming that the rules laid down in those provisions, as regards the incurrence of its liability, are incompatible with Union law.

The national court questions the compatibility of the liability regime under the Protection Act with Art. 123 of the TFEU and Art. 21 of the Statute of the ESCB/ECB – in so far as the responsibility assumed by the Central Bank of Slovenia in place of the Slovenian authorities could be equated with a form of financing of those authorities – and with the principle of the independence of central banks under Art. 130 of the TFEU and Art. 7 of the Statute of the ESCB/ECB.

Under the Protection Act, the liability of the Central Bank of Slovenia for damage caused by the cancellation of certain financial instruments may be incurred under two separate and alternative regimes. For the purposes of assessing the Slovak legislation, the first liability regime is of significance.

According to Art. 14.4 of the Statute of the ESCB/ECB, national central banks may perform functions other than those of the ESCB as long as this does not interfere with the objectives and tasks of the ESCB. However, such functions are performed by national central banks on their own responsibility and do not form part of the functions of the ESCB. Thus, for example, the NBS is entrusted with the exercise of financial market supervision.

Where the legislature of a member state assigns such a function to the central bank of that member state, that function must, under that provision, be performed under the responsibility and liability of that central bank (para. 54 of the Judgment of the Court).

As regards the specific rules governing the liability of a national central bank (including where it exercises a function conferred on it by national law), the Statute of the ESCB/ECB states in Art. 35.3 that it is to be liable according to those acts of national law (para. 55 of the Judgment of the Court).

It follows from the above that it is for the member state concerned to define the conditions under which the liability of its national central bank may arise.

It follows from Art. 123(1) of the TFEU (as well as Art. 21.1 of the Statute of the ESCB/ECB) that this provision prohibits the ECB and the national central banks from granting overdraft facilities or any other type of credit facilities to the Union's and member states' institutions, bodies, offices and agencies, as well as from directly purchasing their debt instruments.

5.3. Conclusions in the context of the judgment in Case C-45/21

Art. 1(1)(b) of Regulation No 3603/93 defines the term "other types of credit" for the purposes of Art. 123 of the TFEU as covering any financing of public sector obligations towards third parties. The obligation of a national central bank to pay for the damage for which it is liable may also be regarded as such a situation if the payment is made out of the central bank's own resources. This is the case, therefore, where the legal system of a member state entrusts a national central bank with a specific task (e.g. financial market supervision), but no financial resources are provided by the state to pay for the potential damage arising from its activities (or, alternatively, the revenues from the exercise of this function are differentiated between the state and the NBS, but the obligation to pay for the damage is assumed by the central bank).

Similarly, the CJEU has held that where the incurrence of liability (with an obligation to pay for the damage) results in the national central bank assuming obligations towards third parties (in the case of the NBS, the assumption of an obligation of the state) which could potentially be a public sector obligation, this may be regarded as financing a public sector obligation towards third parties within the meaning of Art. 1(1)(b)(II), (para. 67 of the Judgment of the Court).

However, the incurrence of such liability by reason of the exercise of a function conferred on it by national law does not always constitute financing of a public-sector obligation. An opposite interpretation would be contrary to the diversity of national practice. It would mean that the incurrence of liability by a national central bank by reason of the exercise of a function conferred by national law is in any event incompatible (with Art. 123(1) of the TFEU). However, Art. 14.4 and Art. 35.3 of the Statute of the ESCB/ECB could not explicitly allow national central banks to perform such functions on their own responsibility and at their own risk under the conditions laid down by national law.

In essence, the CJEU has stated that in order for a member state's legislation to be compatible with EU law, it is required that, in "complex and urgent matters", the exercise of a function entrusted to a national central bank must involve a breach of the rules governing the exercise of that function, which is serious (e.g. "infringement

of the duty to exercise due care of a serious nature").[39] It is therefore important to preserve the possibility for the central bank to absolve itself of its liability by proving that the duty/rule:

1. was in no violation,
2. is of a serious nature,
3. relates to a complex and urgent matter.

Failure to do so would result in the central bank bearing a substantial part of the financial risks associated with this exercise. From a compatibility perspective, it is not important who bears the burden of proof regarding the demonstration of due diligence. At the same time, the state must ensure that the national central bank has the necessary financial resources to be able to pay compensation without compromising its independence.[40]

5.4. Doubts about the compatibility of Slovak legislation with EU law (Art. 123 and 130 of the TFEU)

The Court (Grand Chamber) ruled (regarding the first preliminary question) that Art. 123(1) of the TFEU and Art. 21.1 of the Statute of the ESCB/ECB must be interpreted as not precluding national legislation which provides that a national central bank belonging to the ESCB is liable, from its own funds, for damage suffered by former holders of financial instruments cancelled by it pursuant to reorganisation measures, within the meaning of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, ordered by that central bank, where it appears, during subsequent court proceedings, that either that cancellation was not necessary in order to ensure the stability of the financial system, or that those former holders of financial instruments suffered greater losses as a result of that cancellation than they would have suffered in the event of the insolvency of the financial institution concerned, to the extent that the central bank in question is held liable only where it (or the persons whom it authorised to act on its behalf) acted in serious breach of their duty to exercise due care.

Based on the analysis of the judgment in Case C-45/21, we consider the Slovak concept of strict liability incompatible with the CJEU's interpretation of Art. 123 and 130 of the TFEU because of the following reasons.

1. The problem is that the Slovak Liability Act does not distinguish between the state and the central bank. If a national court finds that a decision of the NBS in the scope of its power and duty to supervise the financial market is unlawful, or an official action of the NBS was wrong/unlawful, the NBS will always be liable to compensate the damages incurred (no liberation is possible). The concept of strict liability does not allow the central bank to avoid

39 See para. 75 of the Judgment of the Court.
40 See para. 105 of the Judgment of the Court.

payment, since here, the central bank represents the state (state = central bank) and thus assumes its obligation towards third parties. In this context, it is therefore de lege ferenda necessary to consider changing the national legislation on the concept of strict liability to one of relative liability. Specifically, in the Liability Act, to limit liability by introducing liberalising grounds which, if met, would not give rise to NBS liability;[41] for example: (a) it is not a serious breach of a duty (degree of seriousness[42]) to act with due care, (b) there is a "complex and urgent agenda" (complex and urgent matters).

2. Another problem is that the NBS, in the event of liability for damage incurred in the course of financial market supervision, will have to pay for this damage from NBS resources. As mentioned above, the revenues from fines imposed on supervised entities (in the course of supervision for breaches of legislation) are not a source of the NBS but a revenue of the state budget. In this context, it is therefore de lege ferenda necessary to consider a change in the national legislation: (a) in financial market laws – to make the revenues from all fines be the revenues of the NBS (this solution may not be sufficient in the future if the damage incurred exceeds the volume of fines imposed); or (b) in the Liability Act – to introduce a mechanism whereby in the event of NBS liability, the state would pay for the damages incurred (in full or in some proportion), and at the same time introduce a distinction in the Liability Act between the liability of the state and the liability of the central bank as a public authority.

As a result of these problems, the Slovak concept of liability is contrary to the prohibition of monetary financing of the public sector (Art. 123 of the TFEU, Art. 21.1 of the Statute of the ESCB/ECB) and is a threat to the financial independence of the NBS (Art. 130 of the TFEU, Art. 7 of the Statute of the ESCB/ECB). It is questionable whether the NBS could, in practice, without the proposed legislative changes, challenge performance from its own resources on the grounds of the prohibition of monetary financing and of financial independence if enforcement (forced execution) of a court decision recognising the damage were to be initiated.

41 In this context, the Constitutional Court of the Slovak Republic has expressed the opinion that there is no right to accurate and correct legal banking supervision and, consequently, no right to compensation for damages in case of failure of supervision. Banking supervision is a conceptual, economic and political activity; it is not a traditional administrative activity as per its interpretation in the Liability Act (Resolution of the Constitutional Court of the Slovak Republic, sp. zn. II. ÚS 295/2017). In doing so, the Constitutional Court questioned the liability of the NBS for maladministration.

42 The liability of the Central Bank of Latvia has been regulated in a similar way. The original liability for negligence has been changed in favour of this central bank to liability for wilful misconduct or gross negligence; see ECB opinion CON/2021/9 of 26 February 2021 on the reform of Latvijas Banka. Both the judgment of the Court of Justice of the EU and ECB opinion CON/2021/9 demonstrate that the legal regime of liability for damages in the case of a central bank should be linked to the fulfilment of certain criteria which relativise liability while respecting the financial independence of the central bank. Liability should not arise automatically.

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