

The License To Perform The Activity Of A Financial Advisor

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Abstract

Financial advisory is a business activity connected with the financial market. Financial advisors grant services to their clients in order to help them to find a proper financial product. Due to this fact and the responsibility that is linked to this kind of entrepreneurship interference from the side of the state is needed. This is given not only by the regulation, but also through supervision of financial advisors performed by the National Bank of Slovakia. The independent central bank is subject intending to start this kind of business meets all the conditions set by law. The license to perform the activity of a financial advisor is an individual administrative act, a decision of the National Bank of Slovakia, issued in the proceeding in supervisory matters pursuant to Part Three of the Act No. 747/2004 Coll. On Financial Market Supervision Amending and Supplementing Certain Acts as amended.

Key words

financial advisor, the National Bank of Slovakia, the license to perform the activity of a financial advisor

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Introduction

The Act No. 186/2009 Coll. On Financial Intermediation And Financial Advisory And Amending And Supplementing Certain Acts, as amended (hereinafter only "Financial Advisory Act") has unified the conditions under which financial advisory can be performed in various sectors of the financial market. These are the insurance or reinsurance sector, the sector of the capital market, the sector of supplementary pension savings, the sector of lending, housing and consumer credit, the sector of deposit-taking and the sector of old-age pension savings. One of the essential innovations introduced by the Financial Advisory Act has been the distinction between financial intermediation and financial advisory. Financial advisory is a type of business in which the remuneration for the service is provided exclusively by the client. It is a business, providing the client an output meeting client's requirements. Financial advisory is inextricably linked with the independent appraisal of a client or potential client based on the financial situation.

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1 Methodology

The paper is focusing on the analysis of the rules of financial law. Especially the rules of its subdomain, the law of the financial market. The current regulatory framework will be analysed in the context of legal theory and practice. According to the website of the National Bank of Slovakia, only 12 subjects possess the license to perform the activity of the financial advisor.² The objective is to provide information concerning the conditions which must be met by the applicant in order to gain the license and to start business activities on the financial market.

2 Results and discussion

The Financial Advisory Act contains in its third part the conditions that must be met for the performance of financial intermediation and financial advisory. The financial advisor is obliged to gain a license in order to start the providing of services. The core of the business of the financial advisor is to provide advice to clients which is based on the impartial analysis of one or more financial services. This kind of entrepreneurship requires specialized skills, technical and organisational preparedness which must be checked by the supervisory body. The National Bank of Slovakia examines whether the applicant meets the conditions set by the regulatory frame in the proceeding in supervisory matters. Its outcome is an individual administrative act.

2.1 Legal conditions to be met

The legislation allows both natural and legal persons to participate in legal relations. The legal order confers legal personality on legal persons as constructed social units. These are entitled to have rights and obligations within the limits set by law. The regulatory framework requires that an applicant- a legal person intending to start a business as a financial advisor has to meet the conditions leading to the performance of business in accordance with the Financial Advisory Act and the related secondary legislation.

If the applicant, is a legal person, the following conditions must be proven, in order to obtain the license to perform the activity of a financial advisor: a) the credibility of a natural person who is the statutory body of the applicant or a natural person who is a member of the statutory body of the applicant, the natural person who is a member of the supervisory body of the applicant and the credibility of the professional guarantor of the applicant, b) professional competence of a natural person who is the statutory body of the applicant, or at least one natural person who is a member of the statutory body of the applicant pursuant to Section 24, Par. 2 of the Financial Advisory Act, and the applicant's professional guarantor, c) the credibility and professional capacity of the applicant's employees who will carry out an activity involving financial advisory, if the applicant intends to carry out financial advisory through its staff, d) a group with close links, which also includes persons exercising control over the applicant and the qualified participation of persons on the applicant does not prevent the effective

² <https://regfap.nbs.sk/index.php>.

exercise of supervision by the National Bank of Slovakia, e) technical and organizational preparedness of the applicant for financial advisory, f) the applicant has not been convicted for an offense.

If the applicant is a natural person, the following conditions must be proven: a) the credibility of the applicant and his full legal capacity, b) professional competence of the applicant, c) the credibility and professional capacity of the applicant's employees who will carry out an activity involving financial advisory, if the applicant intends to carry out financial advisory through its staff, d) technical and organizational preparedness of the applicant for financial advisory.

The conditions laid down by the legislator must be fulfilled cumulatively. Further we are going to focus on the technical and organisational preparedness.

2.2 Technical and organizational preparedness

Applicants are required to analyze the processes that will be undertaken when performing financial advisory and consequence, be equipped with the appropriate software and hardware. The information system consists of hardware security (such as workstations, network support, database servers) and software security (e.g. operating programs). Particular attention should be paid to software elements as they are intended to facilitate data archiving and processing, secure transfer to the National Bank of Slovakia.

The applicant is obliged to prove the existence of a set of internal rules which determine the future performance of the financial advisory.

Internal rules on measures to prevent money laundering and terrorist financing

This internal regulation should mainly include the objective and purpose, basic concepts and definitions, obligations of the financial advisor, forms of unusual business operations that may occur in practice when conducting financial advisory, how to conduct customer care, how to evaluate and manage risk assessment, assessing whether the trade is unusual, the procedure for detecting an unusual business operation, reporting an unusual business operation, processing and storing data and determining the responsible person.

Internal rules on how to handle complaints from clients and potential clients

The internal directive in question is submitted in a licensing procedure in order to examine the adjustment of internal processes to their responsiveness to clients. The legislator has laid down in the legislation a 'minimum standard' for handling complaints. At the same time, however, the Financial Advisory Act does not preclude the financial advisor from laying down more rights for his clients in this internal regulation. The internal document dealing with the handling of complaints should contain in particular the objective of the internal regulation, the definition of terms and complaints, as well as a negative definition of what is not considered to be a complaint, and it seems appropriate

to establish that submission is being reviewed according to its content and not denomination. Furthermore, it is also necessary to define the manner of filing complaints, its contents, from which it must be clear who is the complainant (the legislation explicitly states that filing an anonymous complaint is excluded), the subject of the complaint, the signature of the person authorized to act on the complainant. In the case of a natural person, the address to which the notification should be delivered, under which circumstances the financial advisor is entitled to postpone the complaint when inviting the complainant to complete it, the organizational unit responsible for receiving and handling the complaint, deadline for handling the complaint, recording of complaints, way of accepting changes and approval of this internal document. A submission that alleges misconduct must also be treated as a complaint.

Internal rules governing the prevention of conflicts of interest

A conflict of interest is a situation where the independence and impartiality of the financial advisor is not given or is threatened. Independence and impartiality are related, but the concepts in question do not overlap in meaning. Impartiality is an attribute of independence based on the absence of reasonable doubt about bias. Subjective impartiality is an internal psychic attitude (Košíčiarová, 2013). Objective impartiality is based on external organizational expressions (Košíčiarová, 2013).

Independence consists of the fact that the financial advisor assesses financial services by own opinions generated by the factual assessment, on knowledge and without any obligations to financial institutions or third parties. A guarantee of autonomy in making decisions is a matter of staff independence (Medved' et al., 2012).

Regarding the structure of the internal rules, its essential content requirements are in particular: provisions on the mission and activities of the financial advisor, definitions (especially specific to legal provisions following a definition of what constitutes conflicts of interest in company conditions); functions, modifying procedures for identifying and detecting potential conflicts of interest, measures to address conflicts of interest and ensuring equal treatment of natural and legal persons to whom services are provided, procedures used to eliminate the threat of conflict of interest and, where conflict of interest arises, notification of its creation to the client and the subsequent factual preference of the client's interests over the own interests, keeping records of conflict of interest, the organizational unit responsible for the resolution of conflicts of interest, the method of amending and approving the internal rules.

Internal rules governing the regulation of contact with the client and the potential client

The document should reflect some of the basic norms of communication and conduct, namely: priority of client's interests, truthful, objective and complete information about the financial service, adherence to the principles of fair competition, helpfulness towards the client or potential client. In addition, provisions concerning the legal diazoon of information intended for a potential client or client must not be forgotten. Another essential element of a document of this kind is the imposition of a client assessment obligation on the basis of their individual preferences, knowledge and knowledge in the context of the financial product to be provided.

It should be noted that the applicant for the license to pursue the activity of the financial advisor is obliged to reflect in these internal rules to the specific requirements for the capital market sector, the pension savings sector and the insurance or reinsurance sector.

Internal rule governing the keeping of records about the activities of the financial advisor

This internal rule should contain mainly records of internal directives relating to financial advisory, which are used in relation to a potential client, respectively records of fulfillment of reporting obligations to the National Bank of Slovakia. The obligation of keeping records about the activities of the financial advisor is followed by the obligation to archive. Financial advisors are required to maintain communication with the client by all available means, e. g. mail or paper correspondence. In fulfilling the archiving obligation, the legislation does not determine which material substrate is to be used. The key is the functionality of the medium storing legally determined data and information and ensuring the supervisory authority's future access. It must be possible to access and detect modifications or corrections, as well as the ability to detect the original content of the data before it is executed and to protect against data and information manipulation.

The applicant demonstrates the organizational preparedness to carry out financial advisory by proposing an organizational structure, more precisely by its graphic presentation. The starting point in the creation of the organizational structure is the definition of the main production process leading to the fulfillment of the mission determined by management (Váchal, Vochozka et al., 2013).

The organizational structure is a way of organizing the organizational units, so that the object of business - financial advisory can be fulfilled efficiently.

In current management, the basic classification criteria of organizational structures are:

- association of activities forming the content of structural units,
- exercise of decision-making power between the structural units - on the basis of which we distinguish between line, staff and combined structures,
- degree of delegation of powers and responsibilities - this includes centralized and decentralized structures,
- segmentation - number of subordinate structural units in relation to superior structural units,
- time - structures are stable and temporary (Vodáček, Vodáčková, 2009).

Regarding the above criteria of organizational structure classification, we consider the aspects association of activities and the degree of delegation of powers and responsibilities to be crucial. The aspect association of activities, we believe that a functional structure seems to be the most appropriate. The functional structure is based on the specialization of partial structural units according to their functions; the same functional activities are accumulated into one organizational unit (Vodáček, Vodáčková, 2009).

In the organizational structure of the financial advisor, we could differentiate the financial services analysis department, customer care department, legal and AML - prevention department, complaints department, marketing and new client acquisition department, and IT department, with a common supervisory body – the director.

In terms of centralization, respectively decentralization, meaning the extent to which management is willing to give subordinates a “free hand” in fulfilling their responsibilities /Dedouchová/, we note that an individual client demands quick responses, recognizing this fact, strictly centralized organizational structures appear to be not flexible. A certain degree of decentralization must be allowed.

The applicant is obliged to submit a proposal of the organizational structure which must make clear the assessment of the distribution and adjustment of powers between the members of the statutory body, the statutory body, and the members of the supervisory board, the supervisory board and the professional guarantors of the applicant.

2.3 The beginning of the proceeding in supervisory matters

In legal theory, the submission on the grounds of which a proceeding starts, is being designated as a submission in the strict sense of the word. On the beginning of the proceeding in supervisory matters the principle of disposal is being applied. Meaning the beginning of the proceeding is at the disposal of the applicant, as this subject is determining the moment of its commencement. The proceeding in supervisory matters starts on the first working day following the day, on which the application has been submitted to the National Bank of Slovakia. The principle of disposal is being applied until the decision of the National Bank of Slovakia is being issued. The applicant is allowed to change the submission or to withdraw the submission until this moment.

The legislator sets a term, 30 calendar days, for the decision on the applicant's application. The period starts to run only when the application is complete. If the applicant submits an incomplete application, the term for the decision will not start to run. In accordance with the principle of free evaluation of evidence, the National Bank of Slovakia proves whether the applicant has met the requirements set by law. Failure to provide evidence about meeting the requirements does not mean "automatic" non-compliance with the legal conditions and is not resulting in a denial of granting the license. In the absence of documents proving compliance with the legal conditions, the National Bank of Slovakia will call upon the party to the proceeding to complete the application. In this case, optionally, the proceeding may be suspended.

2.4 The decision of the National Bank of Slovakia

The Financial Advisory Act specifies that the proceeding in supervisory matters will be completed with an individual administrative act. It will be a decision of the National Bank of Slovakia. The Act No. 747/2004 Coll. On Financial Market Supervision Amending And Supplementing Certain Acts as amended (hereinafter only “Financial Market Supervision Act”) as amended shows exactly what content and formal requirements a decision

of the National Bank of Slovakia has to have. Formal requirements include data completing the form of the decision (Potásch et al., 2017). The substantive requirements shall include a statement, the grounds of decision and an information concerning appeals against the decision.

For the applicant, the information contained in the statement is of importance. It results in a clear, understandable manner how it has been decided in the matter.

The grounds of the decision contain which factual findings were the basis for the decision, the evidence and considerations in the evaluation of the evidence and the provisions of the generally binding legislation to assess the facts. The National Bank of Slovakia should clarify the thought processes for evaluating the evidence (this will be the 'core' of the grounds of the decision). In our view, the projection of the regulation in question means, in particular, the following: the date on which the supervisory proceedings were initiated, the name of the party (and, where appropriate, the authorized representative) and the subject of the application, specification of annexes to the party's application, details of the possible completion of the application and payment of the fee for the action of the National Bank of Slovakia. It is justified to provide the party with information on the evaluation of evidence individually, clarifying their relevance, truthfulness and legality, as well as evaluating their interrelationship. The evidence concludes factual findings. Finding the facts is necessary for its subsequent subordination to the relevant legal standards.

The information concerning appeals provides data whether an appeal is possible, within what time limit it should be lodged and to what unit it shall be lodged.

When granting the license to perform the activity of a financial advisor, the right to engage financial advisory arises. This is a constitutive decision whose validity is given by the new legal situation. In this context, however, it should also be pointed out that the validity of an individual administrative act does not mean the point in time at which the financial advisor takes up business. The legislator connects the commencement of an authorization for financial advisory with the entering in the Register of Financial Agents, Financial Advisors, Financial Intermediaries from another Member State within the Insurance or Reinsurance Sector and Financial Intermediaries from another Member State in the Area of Housing Lending (hereinafter only "register"). The entering is subject to additional legal requirements.

If it is a legal entity, it is obliged to submit the following documents in order to be entered into the register:- a copy of the insurance contract showing proof of liability insurance together with the document proving the payment of the insurance premium,- information on the registration of the authorized activity in the Commercial Register, while not only the relevant activity (ie performing financial advisory as a financial advisor), but also the sectors in which the activity has been authorized must be registered.

Upon submission of documents, the legal entity will be entered in the register within 10 calendar days from the date of submission to the National Bank of Slovakia and is from that moment authorized to carry out the activity. If only one of the documents requested by the legislation is submitted, the time limit for entry in the register shall not run until the receipt of the other. If it is a natural person, is obliged to submit- a copy of the insurance contract proving the liability insurance together with the document proving the payment of insurance premium. Upon submission of documents, within 10 calendar days from the date of submission to the National Bank of Slovakia, the natural

person will be entered in the register and from that moment will be entitled to perform the activity.

Conclusion

Financial advisory is a business activity. The financial advisor is an entrepreneur according to Section 2, paragraph 2 letter c) of the Act No. 513/1991 Coll. Commercial Code as amended. The performance of financial advisory is subject to a license granted by the National Bank of Slovakia within the proceeding in supervisory matters. The conditions that must be met in order to obtain the license are set by the Financial Advisory Act. The provision set by law concerning financial advisory must be fulfilled not only during the proceeding in supervisory matter, but continually, through the whole period of the performance of this activity.

In the interests of the proper performance of financial advisory, entities are required to comply with the conditions imposed by the legislator on these types of business, not only when they enter the market, but during the entire period of their activity. In this context, it seems appropriate to recall one of the supervisory objectives of financial market supervision which is the contributing to the stability of the financial market. This implies that every supervised entity needs to be prudent and secure. A set of properly supervised entities brings the stability of the market. In our opinion, the obligation of continuous compliance with the license conditions is a reflection on the objectives of financial market supervision, formulated in the Financial Market Supervision Act.

The number of entities to which the license to perform the activity of a financial advisor has been granted is relatively small. This is not due to the fact, that the current regulations set conditions which can not be fulfilled, but due to the concept that the financial advisor must be paid only by the client a not by the financial institution.

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