

The evaluation of an activity's commercial nature in the regulator's practice

The question of commercial nature is essential for the assessment whether an activity shall be deemed to be as financial service activity, thus shall be subject to authorisation or not. According to the relevant provisions pursuing a specific activity is exclusively deemed to be a financial activity (thus for example acceptance of deposits, granting of loans and credits, mediation of financial services, purchase of claims etc.) if the activity is pursued on a commercial basis.

The Financial Supervisory Authority has considered the question of commercial activity in numerous opinions as the establishment and definition of the commercial nature of an activity is not a simple and obvious task in many cases. Based on the opinions and the practice of the Financial Supervisory Authority in general the followings need to be taken into consideration relating to the determination of the commercial nature of an activity, provided that the individual and comprehensive examination and assessment regarding the specific activity cannot be omitted.

According to the definition of the Banking Act, business or commercial activity shall mean "an economic activity carried out on regular basis, which aims at entering into transactions not specified individually in advance, for consideration in order to make profit or to acquire assets."

It is important to emphasise that the establishment of commercial nature requires that all conditions laid down in the aforementioned definition **are collectively and simultaneously fulfilled**. Besides that, the fulfilment of the aforementioned three criteria is necessary to establish the commercial nature of an activity, it must be emphasised that the examination of the fulfilment of the three criteria may and needs to be specifically carried out by considering them with a view to one another.

In connection with the aforementioned criteria of the business activity, the question of pursuing an activity for consideration in order to make profit or acquire assets can be easily assessed in general, which at the same time also determines the economic nature of the activity. In the practice of the regulator if a service is provided for any further cost or fee in addition to the normal costs incurring in connection with granting the service or it is granted for the sake of any other economic advantage then the profit-making aim can be established. **Thus, it must be basically examined whether the service provider generates income or makes profit relating to the provision of the service or this is the aim of its activity.** Thus, for example, in case of lending activities, if the debtor has an obligation to pay interest on the loan, the aim of making profit is usually fulfilled with respect of the creditor as the interest is deemed to be an amount payable as consideration for the loan and therefore the profit-making and



economic activity of the creditor can be also confirmed relating to its lending activities. At the same time, it is also important to emphasise that the fulfilment of this criterion can be also established in case of gaining profit indirectly, thus **a transaction without consideration alone does not necessarily exclude that the aim of making profit or acquiring assets is fulfilled**. Accordingly, the aim of making profit can be also established in case of granting interest-free loans, for example in the case the interest-free loan is granted in order to receive other indirect revenue or profit, basically to gain any detectable economic advantage.

In connection with the issue of commercial nature in general it is more difficult to assess the question of regularity and the aim to enter not individually specified transactions, which are strongly related criteria according to the consistent position of the regulator. According to the position of the regulator if with respect to an activity it can be established that it is carried out for consideration and on a regular basis, then as a result the incapability of defining the transactions individually in advance can be also established, as the regulator has previously pointed out that the basic meaning of the definition of regularity is the repeated occurrence of events in the future, which cannot be identified in advance.

First of all, the assessment of regularity depends on the number and the frequency of the transactions, however it is important to emphasise regarding this question that according to the consistent practice of the regulator even one or two transaction (s) per year or even one transaction, as well may be already deemed as regular, for example if its subject is to purchase a large number of receivables. According to the practice of the regulator, the regularity can be also fulfilled in this case if the collection of the acquired receivables also belongs to the activity of the acquiring party, considering that the activity of purchasing receivables means not only the purchase of receivables but their recording, monitoring and collection, as well.

Based on the practice of the regulator, with respect to “the aim of entering into transactions not specified individually in advance” it can be established that it is worth examining the fulfilment of this criterion with regard to an activity by considering whether the given activity’s aim is to conclude transactions clearly defined individually in advance or not. Thus, according to the practice of the regulator, if each element of the content of a contract is not determined specifically then these transactions are not specified individually in advance. In particular, but not exclusively, the subject, the value, the characteristics of the transaction, the parties concluding the transactions and the conditions of the fulfilment must be clearly defined in advance. If in connection with the transactions relating to a given activity any of these are not determined in advance, then the aim to conclude transactions which are not individually specified in advance can be established with respect to the activity concerned.



In the light of the foregoing, it must be emphasised that although essentially common and several opinions of the regulator regarding the statutory definition of business or commercial activity are available and general statements regarding the practical assessment of the definition of commercial nature can be made on their basis, the commercial nature of an activity cannot be mechanically evaluated on this basis, the thorough examination of the specific conditions regarding the given activity can never be omitted.