

MARKET SURVEILLANCE BY THE NATIONAL BANK OF HUNGARY AS ADMINISTRATIVE PROCEDURE

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ABSTRACT

In this paper I intend to study market surveillance procedures as one of the administrative procedures by the National Bank of Hungary (hereinafter: MNB or Supervision) from the aspect of procedural law. During my previous studies, I found no academic papers or only came across short articles on market surveillance, while legal practice over the past decade has required scientific support of the topic. In market surveillance procedures customers often lack proper knowledge about the nature of the proceedings; that is why I made efforts to present a paper that may assist them. In the following paper, the legal provisions relating to market surveillance will be reviewed including the customers, subject, the process, specific acts of procedural law, the data that can be learnt during the process, their management, the legal consequences to be drawn from the procedure, and finally the concept of market surveillance will be established.

JEL codes: E58, K10

Keywords: National Bank of Hungary (MNB), central bank, market surveillance, administrative procedures

1 INTRODUCTION

One can say in general that the MNB applies a preventive approach in administrative procedures, accordingly, market surveillance procedures do not focus on subsequent sanctions of legal violations, instead, they intend to prevent and manage potential future market surveillance risks.² Market surveillance is a specific

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2 DR. BABAI-BELÁNSZKY, TAMÁS – DR. BARNÓCZKI, PÉTER – DR. KARDOS, GYULA (2017): Piacfelügyeleti és fogyasztóvédelmi eljárások [Market surveillance and consumer protection procedures], in: LEHMANN, KRISTÓF – PALOTAI, DÁNIEL – VIRÁG, BARNABÁS (eds.) (2017): *A magyar út – Célzott jegybanki politika* [The Hungarian way – Targeted Central Bank politics]. Budapest: Magyar Nemzeti Bank, 905. (hereinafter: Babai-Belánszky–Barnóczki–Kardos, 2017).

administrative procedure where the MNB acts as the competent authority if players of the financial market behave in a certain way.

Law CXXXIX of 2013 on the National Bank of Hungary (hereinafter: Central Bank Act) identifies the legal provisions relating to market surveillance procedures. Market surveillance is a³ a specific administrative procedure belonging to the micro prudential surveillance activities of the MNB, and as such - progressing from specific to general rules - it is subject to Title 30, Chapter VII of the Central Bank Act on market surveillance procedures, Chapter VI of the Central Bank Act on the common rules of official procedures, and certain provisions of Law CL of 2016 on the general administrative procedure (hereinafter: Ákr).

It should be noted that this study focuses on the procedural aspects of market surveillance procedures, while a review of substantive law is not included because of its bulk and complexity. Considering that I have never met the concept of market surveillance procedure during my research, my objective was to establish a general concept for that specific supervisory procedure by the end of this study for two reasons. On the one hand, I wanted to achieve that the general public not engaged in market surveillance could interpret the nature and essence of the procedure, on the other hand, to provide jurists and economists with a clear, unambiguous definition of market surveillance. To understand the concept, I needed to study the legal provisions relating to market surveillance in detail.

2 THE MARKET SURVEILLANCE

2.1 Legal provisions related to market surveillance

As mentioned in the Introduction, market surveillance is subject to Chapter VI of the Central Bank Act on the common rules of official procedures and Title 30, Chapter VII of the Central Bank Act on market surveillance procedures - progressing from general to specific rules - as governing regulations. The latter includes the specific provisions related to market surveillance procedures. Considering that the objective of this paper is to analyse the market surveillance pro-

3 DR. KANDRÁCS, CSABA – FENYVESI, RÉKA – SEREGDI, LÁSZLÓ – VARGA, BENCE – SZEGFŰ, LÁSZLÓ PÉTER (2018): Bankszabályozás és bankfelügyelés [Bank regulation and bank surveillance], in: FÁBIÁN, GERGELY – VIRÁG, BARNABÁS (eds.) (2018): *Bankok a történelemben: innovációk és válságok* [Banks in history: innovations and crises], 749., a series by the National Bank of Hungary. Budapest: Magyar Nemzeti Bank (hereinafter: Kandrács–Fenyvesi–Seregdi–Varga–Szegfű, 2018).

cedure, Ákr as underlying legislation is only presented as much as it is required for the description of a special MNB administrative procedure.

Section 8 (1) point f) of Ákr provides “the scope of this Act does not extend...to the administrative procedures of the National Bank of Hungary subject to Law CXXXIX of 2013 on the National Bank of Hungary, Section 4 paragraphs (2) and (5)-(9) and Law XV of 2014 on trust managers and the rules of their activities”.⁴ Accordingly, the MNB’s official procedures are deemed to be outside the scope, which means those types of procedures - as a rule, in general and primarily - are not subject to the provisions of Ákr.⁵ This, however, does not mean the Ákr is completely neglected in such specific official procedures. In such cases special procedural provisions identify the cases when a general provision of Ákr shall be applied as underlying legislation to a special rule.⁶

Pursuant to this dogmatic rule of Ákr, Section 46 (1) of the Central Bank Act provides the Supervision shall apply “in the course of the MNB’s official procedure and inspection as defined by this law” and in certain issues not regulated in sectoral law the relevant provisions of Ákr, this Section (2). The following Table includes the cases when the relevant rules of Ákr shall be applied.

4 HAJAS BARNABÁS (2020): Alapelvek és a törvény hatálya, I. fejezet [Basic principles and scope of law, Chapter I], in PETRIK FERENC (ed.) (2020): *A közigazgatási eljárás szabályai I. Az általános közigazgatási rendtartás magyarázata* [Rules of administrative procedures. Commentary for practice, explanation of general public administration procedures, 4th edition, Book I], 19. HVG-ORAC Lap és Könyvkiadó Kft., Budapest, 2020 (hereinafter: Ákr. Commentary, 2020).

5 Ákr. Commentary, 2020:19–20; cf also: BOROS, ANITA (2019): A közigazgatási eljárás és eljárásjog fogalma és rendszere [Concept and system of administrative procedures and procedural law], in BOROS, ANITA – DARÁK, PÉTER (eds.) (2020): *Az általános közigazgatási rendtartás szabályai* [Rules of general public administration procedures]. Budapest: NKE, https://antk.uni-nke.hu/document/akk-uni-nke-hu/Az%20%C3%A1ltal%C3%A1nos%20k%C3%B6zigazgat%C3%A1si%20rendtart%C3%A1s%20szab%C3%A1lyai_190128.pdf Downloaded on 16 March 2022 (hereinafter: Boros, 2019), 8.; BALOGH-BÉKÉSI, NÓRA (2019): A közigazgatási eljárásjog alapelvei, hatályai [Principles and scope of public administration procedural law], in: Rules of general public administration procedures, edited by: Boros– Darák (2019), op. cit., downloaded on 16.03. 2022 (hereinafter: Balogh-Békési, 2019), 34–35.

6 Ákr. Commentary, 2020:19–20; cf also: BOROS, 2019:8.; BALOGH-BÉKÉSI, 2019:34–35.

Table 1
The provisions of Ákr to be applied in MNB official procedures

The relevant rules of Ákr shall be applied	
1.	to the role of principles, to the principle of legality, to the principle of responsibility for the procedure, to the principle of efficiency, to the principles relating to customers, to the principle of good faith and to the principle of trust,
2.	to procedural ability and representation,
2a.	to procedural obligation identified in Section 15 (2),
3.	to the assessment of scope and jurisdiction,
4.	to the rules of request,
5.	to data management, the closed handling of data,
6.	to the procedural protection of minors, the incapacitated or partially incapacitated persons of age or persons with disabilities,
7.	to patrons,
8.	to the participation of special authorities,
9.	to the application for restitutio,
10.	to the general rules of summoning a witness and the obligation of the summoned to appear,
11.	to the clarification of facts, to calling a customer to make a statement,
12.	to witnesses, to inspections, to experts, to interpreters, to the presentation of evidence to customers,
13.	to recording of procedural acts, to official witnesses,
14.	to the general rules of notification of decisions, to delivery agents,
15.	to the adjustment of decisions, to complementing decisions,
16.	to official certificates, IDs and registers,
17.	to seizure and requisition,
18.	to legal remedies except for appeals, and supervisory procedures, to the general rules of the cost of proceedings,
19.	payment of the costs of proceedings, advance payment of the costs of proceedings and decisions on advance payment of the costs of proceedings.

It is clear from the above list that legislators allow the application of Ákr provisions in MNB official procedures in cases that are sufficiently general to be applied. Next, let us review the specific procedural legal institutions and concepts of market surveillance procedures.

2.2 Customers in market surveillance procedures

In addition to the MNB, customers are the other indispensable players of market surveillance procedures similarly to other public administration procedures. Section 47(1) of the Central Bank Act provides, “In the MNB’s authorisation, inspection, consumer protection inspection, market surveillance procedure, during its supervisory inspection, and in the procedure specified in point f) of Section 45, a customer is,

- a) for whom the MNB may establish rights and obligations,
- b) who is subject to the control of MNB,
- c) who submits an application for authorisation to the MNB,
- d) who, as a consumer, submits a request for the conduct of a consumer protection control procedure, or
- e) for whom the official register maintained by the MNB contains data.”

Naturally, the above list defines the concept of customer in general terms with respect to the official procedures of the MNB, so not all points of the list can be interpreted for market surveillance procedures.

Considering that Section 90 (1) of the Central Bank Act starts with, “The MNB initiates a market surveillance procedure...”, that type of procedure is deemed official, which commences either based on a natural person’s application, or because of a report by an authority, or if suspicion arises indicating some irregularity noticed during monitoring by the MNB.⁷

Following the same logic, a customer of the MNB (the term ‘natural or legal persons subject to the proceedings’ would describe the nature of a market surveillance procedure better in view of its most typical termination), shall be a person for whom the MNB establishes a right or obligation, or who is subjected to surveillance by the MNB.⁸

7 MNB (2014): *Pénzügyi fogyasztóvédelmi és piacfelügyeleti jelentés* [Financial consumer protection and market supervision report]. Budapest: Magyar Nemzeti Bank (hereinafter: MNB market supervision report), 42.

8 Central Bank Act, Section 47 (1), points a) and b)

2.3 Subject and course of market surveillance procedures

The cases for the initiation of market surveillance procedures have been recorded in two passages of the Central Bank Act, first in Chapter V, Section 42, points g) and l), and then in Title 30 on market surveillance procedure, Section 90 (1)

For easier understanding, the following Table includes the provisions of the two paragraphs side by side.

Table 2
Cases when MNB shall initiate market surveillance procedures

The MNB initiates a market surveillance procedure	
Central Bank Act, Section 42, points g) and l)	Central Bank Act, Section 90 (1)
if it detects an activity carried out without a licence or in absence of notification.	a) in the event of suspicion of financial services, supplementary financial services, Stock Exchange, Commodities Exchange, asset fund management, CSD services, mutual society, private pension fund, insurance, reinsurance, occupational pension provider, investment services, supplementary services, mediation (agency) services carried out without a licence or in absence of notification. ¹
in case of detection of activity carried out without a licence or in the absence of notification; in case of suspicion of insider trading or market influence (hereinafter including insider trading and market manipulation as described in Articles 37-42 of Commission Regulation 1031/2010/EU); for the purpose of checking insider reporting and disclosure requirements.	b) in the event of suspicion of insider trading or market manipulation, or unauthorised disclosure of insider information.
for the purpose of reporting and disclosure obligation of an insider person.	c) for the purpose of inspecting the rules related to managers and persons closely related to them pursuant to Commission Regulation No 596/2014 (EU), and in given cases for disclosure obligations of persons closely related to them pursuant to Commission Regulation No 596/2014 (EU).
inspects if the rules and principles related to acquisitions in public limited companies are observed.	d) for the purpose of inspecting the rules of corporate acquisition.
further, for the purpose of inspecting if the rules related to reporting and disclosure obligations provided in Sections 5-8 of Regulation No 236/2012/EU of the European Parliament and of the Council and to controlling unsecured transactions in Sections 12-14 are observed.	e) for the purpose of inspecting if the rules related to reporting and disclosure obligations provided in Sections 5-8 of Regulation No 236/2012/EU of the European Parliament and of the Council and to controlling unsecured transactions in Sections 12-14 are observed.

9 Point [35] of Order No Kfv.35.642/2016/6 by the Curia as Court of Appeal, cf also Point [38] of Order No Kfv.35.588/2016/10 by the Curia as Court of Appeal; point [33] of BH 2019.281, and Point [33] of Order No 35.220/2018/9 by the Curia as Court of Appeal

As one can see, the MNB market surveillance procedures are activity-based, i.e., they are related to financial services or activities, investment services or mediating activities that are, in certain cases, subject to a licence by the Supervision on, in other cases, the MNB must be notified.¹⁰ Market surveillance procedures are, on the one hand, initiated in the absence of notification to the MNB or, on the other hand, if such unlawful activities are carried out. This can be explained because in the event of an abuse of the capital market (e.g., insider trading) it is unlikely that a licence has been applied for or the MNB has been notified. Studying the actual activities is not subject matter for this paper, since it is focused on the aspect of procedural law rather than of substantive law related to market surveillance procedures.

Regarding the connection between market surveillance and inspection procedures, it should be noted that the rules of inspection procedures are in Title 27 of the Central Bank Act while those governing market surveillance procedures are in Title 30.¹¹ Regarding market surveillance and inspection procedures, the former allow more “playing field” for the MNB, because “carrying them out or requirements of disclosure are not necessarily linked to the inspection of certain authority decisions, observation of legal provisions or a single customer”¹²

The legal provisions about conducting market surveillance procedures were significantly changed in 2018, when the regulation about processing time was modified as follows: Section 90 (2) of the currently effective Central Bank Act provides, “in the market surveillance procedure specified in points a)–d) and f) of paragraph (1), the administrative deadline starts from the date of initiation of the inspection *ex officio* and lasts for

- a) six months to conduct the official inspection procedure, and
- b) in the event of a violation of the law, an additional three months to conduct the official procedure.”

In view of the regulation, a market surveillance procedure can be divided into two phases. The first is an official inspection procedure, and the second one, in case the Supervision establishes a violation of law, is a procedure by the competent authority. The former lasts for six and the latter for three months, so the processing time for market surveillance procedures is nine months in total, as a general rule, starting from the date of initiation of the inspection *ex officio*, which

10 BABAI-BELÁNSZKY–BARNÓCZKI–KARDOS, 2017:906–907.

11 BH 2017. 248. [24]; cf also: Order No kfV.35.761/2015/8, [29] of the Curia as Court of Appeal

12 KÁLMÁN, JÁNOS (2016): Administrative law aspects of the macroprudential regulation and supervision of the financial intermediary system – normativity, organisation, toolkit. In: *Financial and Economic Review*, 15(3), 27–50.

does not include the time of conducting certain procedural steps,¹³ for instance, contacting a foreign authority, the duration of proceedings by the relevant authorities, or the time an expert opinion is prepared.

2.4 Specific procedural actions of market surveillance procedures.

During a market surveillance procedure, the MNB can utilise all available evidence to clarify the legal situation and to reveal a customer's activities as accurately as possible.¹⁴ In this study, the special procedural actions and legal institutions are presented only. They include on-site search, temporary measures, and delivery. Although the latter two are not unique, they can be seen to be specific compared to general rules.

On the other hand, on-site search/inspection is a legal concept to be found in Title 27 of the Central Bank Act alone. In view of this, the rules of on-site search will be discussed in this part of the paper. Accordingly, the following can be established regarding the analysis of on-site searches with respect to time, space, and method. The outstanding importance of on-site search and the depth of how it intervenes with privacy is indicated by the fact that, in some cases, it is subject to the prior approval of the Court,¹⁵ and the Supervision may request police assistance to carry it out.¹⁶ On-site search is subject to Court approval if it is carried out against the will of the owner, holder or the person staying at the premises, or if it necessitates opening a closed area, building or room.¹⁷ An important rule of guarantee provides that an on-site search can only be carried out within fifteen days from notification of the Court approval,¹⁸ so that the MNB could not use the opportunity unlimited in time.

It can occur that the officers of the MNB find evidence during an on-site search subject to Court approval, which is not related to the subject of the market surveillance procedure in question nor is it covered by Court approval, still, it is considered a reason for initiating market surveillance proceedings. In such a case a copy of the evidence may be made, it can be confiscated or seized.¹⁹ Judicature has

13 Central Bank Act, Section 49 (4)

14 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

15 Central Bank Act, Section 90/A (3); cf also BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909..

16 Central Bank Act, Section 90/A (1); cf also BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

17 Central Bank Act, Section 90/A (1); cf also BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

18 Central Bank Act, Section 90/A (5); cf BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:908.

19 Central Bank Act, Section 90/A (9)

an important part to play in that case too, since a subsequent Court approval must be obtained within fifteen days from the on-site search, otherwise the evidence found cannot be used as proof.²⁰

Regarding the time horizon of an on-site search, the Central Bank Act provides it must be carried out on workdays between eight and twenty hours, unless another time is justified by the successful execution of the inspection.²¹ An on-site search is always linked to a market surveillance procedure, as the market surveillance procedure must be started at the same time as the on-site search is commenced.²² It also means no on-site search can be carried out outside or prior to a market surveillance procedure. In view of the purpose of the legal provision, the customer or, if the customer is a legal entity, the customer's employee,²³ or the person on site must be informed of the fact of starting an on-site search at the site (the latest).²⁴ The reason for this provision is that an earlier notification could jeopardise the success of the inspection.

Where can an on-site search be carried out? Actually, almost anywhere, since the Central Bank Act provides as a main rule that, to clarify the facts, an on-site search for evidence linked to potential legal violations can be carried out at any place where evidence can be found.²⁵ This provision is supplemented in the Central Bank Act, Section 90/A, paragraph (2), which provides "an on-site search is also possible at real estate, in vehicles and data carriers that are not declared as the customer's residential address, seat or business location, or for private use".²⁶

On-site search of the latter places, however, is only possible if "they are used by a natural person who is a customer during the procedure, or - in the case of a non-natural person - the customer's senior official, employee or agent or - in the case of a non-natural person - the person who actually exercises control over the customer or was such during the period covered by the investigation."²⁷

With respect to the method of an on-site search, the Central Bank Act provides, "an on-site search must be carried out in such a way that it does not result in a disproportionate restriction of the private life of the person concerned, and that it

20 Central Bank Act, Section 90/A (9) and (10)

21 Central Bank Act, Section 90/A (8)

22 Central Bank Act, Section 90/A (6)

23 Central Bank Act, Section 90/A (6)

24 Central Bank Act, Section 90/A (7)

25 Central Bank Act, Section 90/A (1)

26 Central Bank Act, Section 90/A (2)

27 Central Bank Act, Section 90/A (2)

does not hinder the work and intended activities of the person concerned.”²⁸ During an on-site search, the presence of the person affected is important, but their absence will not prevent conducting it. If they are absent, and their presence cannot be ensured, the cooperation of an official witness can be used²⁹, in which case the relevant provisions of Ákr shall apply.³⁰ From the aspect of the authorities, it is better if the person affected is present during an on-site search, because “during the on-site search, the person conducting the research can oblige the affected parties to provide information and explanations orally or in writing, and can obtain information in other ways on-site.”³¹

The detailed, mostly technical provisions in the Central Bank Act, Section 90/B and 90/C relating to evidence - data carriers, seizure copies, examination working copies, closed storage device - will not be presented here. It should be noted, however, that in July 2016 the MNB was among the first of Hungarian administrative authorities to receive statutory powers to prepare physical copies (mirror the contents), which means in practice that copies can be made from computers, smart phones or any other data carriers in which data can be restored even if they have been deleted.³² The Supervision cannot only make such copies during on-site search but also during on-site inspection.

In addition to on-site search, temporary security measures are also among the special rules of market surveillance. Ákr provides the relevant general provisions. Procedural law provides that temporary security measures can be applied if “it can be reasonably assumed that there is a risk of non-fulfilment of the obligation imposed in the substantive decision.”³³ The general rule is supplemented with specific elements in the chapter of the Central Bank Act about the common regulations of authority procedures and a provision in a point related to market surveillance.

28 Central Bank Act, Section 90/A (8)

29 Central Bank Act, Section 90/A (7)

30 Central Bank Act, Section 46 (2), point 13

31 Central Bank Act, Section 90/A (7)

32 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

33 Law CL of 2016 on general administrative regulations, Section 107 (4), cf also: VÉRTESY, LÁSZLÓ – BOROS, ANITA – PFEIFER-TÓTH, TAMARA (2019): A kérelemre induló eljárás [Application-based procedures] in: BOROS-DARÁK (2019): op. cit. 115. https://antk.uni-nke.hu/document/akk-uni-nke-hu/Az%20%C3%A1ltal%C3%A1nos%20k%C3%B6zigazgat%C3%A1si%20rendtart%C3%A1s%20szab%C3%A1lyai_190128.pdf (downloaded on 16.03.2022).

Table 3
Cases when the MNB orders temporary measures

The MNB can order a temporary security measure if	
Central Bank Act, Section 49/D (3)	Central Bank Act, Section 93 (4)
a) it is urgently necessary due to the protection of the legal or economic interests of the interested parties,	to ensure collection of market surveillance fines, or
b) to ensure the protection of the customers of the person or the financial organisation subject to supervision carrying out an activity without a license or in absence of notification,	to ensure the protection of the interests of the customers of the person or financial organisation carrying out activities without a licence or in absence of notification
justifies such measures.	

The above *Table 3* indicates that the rules of temporary security measures applicable by the MNB during administrative procedures and those of temporary security measures applicable during market surveillance are almost identical, however, in this case the financial organisation supervised is not included in the definition. The MNB issues an independent non-appealable order for temporary security measures,³⁴ to order “freezing money or financial assets, prohibition of alienation or encumbrance with respect to other movable or immovable assets”³⁵

As legislators provided in Ákr, a temporary security measure is in effect until a substantive decision is made. Following a substantive decision, the MNB may order a security measure for its execution, which comprises of the same measures as the temporary security measure.³⁶ A security measure can also be ordered so that a decision made in a market surveillance procedure could be executed.³⁷

The Supervision shall inform the affected financial institutions about both security and temporary security measures directly so that they can be executed as soon as possible.³⁸ Naturally, the justification for conducting either of them is to pro-

34 Central Bank Act, Section 49/D (1)

35 Central Bank Act, Section 49/D (4)

36 Central Bank Act, Section 49/D (4), cf also: PFEIFER-TÓTH, TAMARA – IVÁN, DÁNIEL (2019): Az egyes hatósági intézkedések különös szabályai [Application-based procedures, in BOROS-DARÁK (2019), op. cit. 205. https://antk.uni-nke.hu/document/akk-uni-nke-hu/Az%20%C3%A1ltal%C3%A1nos%20%C3%B6zigazgat%C3%A1si%20rendtart%C3%A1s%20szab%C3%A1lyai_190128.pdf (hereinafter: Pfeifer-Tóth-Iván, 2019) (downloaded on 16.03.2022).

37 Central Bank Act, Section 93 (4)

38 Central Bank Act, Section 93 (4)

vide enhanced protection for investors if the customer of a market surveillance procedure might be found guilty of violating the law. The MNB shall publish an order that has resulted from such measures of preventive nature on its website - not in every case, for instance, in the event a bank account is blocked, bank secrets must be considered - to reach as many of potentially harmed persons as possible, and also to prevent further people being affected by a customer's unlawful activities.³⁹ In most cases, the activities are banned until a decision is made.

The Supervision pays particular attention to prevention not only during a market surveillance procedure but also in other cases. That is the why a so termed "warning list" is managed. Its purpose is to provide investors with updated information about persons or organisations suspected of conducting activities without a licence or in absence of notification.⁴⁰

2.5 Data available in a market surveillance procedure and their management

The data available to the MNB during a market surveillance procedure can be categorised in several ways. One can differentiate, on the one hand, by the mode of storage (data on electronic data carriers or in hard copies), on the other hand, by the persons affected by the data, (a customer, a natural person potentially in possession of further evidence with respect to the market surveillance procedure), or by the source of the data, (linked to payment accounts, securities accounts or electronic telecommunication devices).⁴¹

However, the most important criterion of categorisation of data available during a market surveillance procedure - in line with the Central Bank Act - is whether they require prosecutor's approval for the MNB. It can be considered a main criterion of categorisation because Title 30 on market surveillance of the Central Bank Act placed the provisions related to data in two separate paragraphs according to that - Section 90, paragraphs (3)-(5) and Section 91. In everyday practice, however, the MNB will obtain prosecutor's approval before requesting disclosure in almost every case.

Prosecutor's approval needs not be obtained to have access to the data regulated in the Central Bank Act Section 90 (3) and (4). In such cases, "a person or organisation subject to the provisions of the Central Bank Act Section 39 (1) and (2)

39 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:910.

40 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:910.

41 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:908.

shall forward, called on by the MNB including the reason and purpose, the data they process linked to the customer of a market surveillance procedure or to the case.³² Credit institutions, financial enterprises, housing savings banks and other persons or organisations subject to MNB surveillance have obligation to cooperate.⁴³

What does that obligation cover? It should be noted that the right to avoid self-incrimination known from criminal law is also present in market surveillance procedures, which means a “suspected violator” is not obliged to make a declaration admitting a potential violation of law.⁴⁴ On the other hand, the subjects identified in law shall “present documents, electronically recorded data, signals, recorded telephone conversations, provide other information, and hand over personal data the MNB is authorised to process pursuant to a specific law.”⁴⁵ As regards access to data, the Supervision has additional powers during a market surveillance procedure. Although Law CXLI of 1997 on the real estate register, Section 70 (1) cannot be applied, the relevant powers can only be exercised to the extent necessary for the market surveillance procedure.⁴⁶

The provision cited includes a restriction, according to which “natural personal identification data, or personal identifiers may not be used for the purpose of determining all the owner’s properties from the real estate register or providing information about them.”⁴⁷ Pursuant to the Central Bank Act, however, the Supervision can - during a market surveillance procedure - obtain information about an owner’s all real estate, which is significant from the aspect of legal consequences or potential subsequent criminal proceedings.

The Central Bank Act includes strict rules about the management of personal data obtained unless they are subject to prosecutor’s approval. The Supervision may process personal data until the conclusion of the official inspection, if the MNB has not initiated official proceedings or criminal proceedings based on the inspection, or in the procedural phase, during the official procedure until the execution of the ordering decision or until the expiration of enforceability, or, in the case of court proceedings related to the market surveillance procedure, until their final conclusion.⁴⁸

42 Central Bank Act, Section 90/A (3); cf also BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

43 Central Bank Act, Section 39 (1) and (2)

44 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:909.

45 Central Bank Act, Section 90 (3), points a), b), and c).

46 Central Bank Act, Section 90 (4)

47 Law CXLI of 1997 on the real estate register, Section 70 (1).

48 Central Bank Act, Section 90 (5)

The provisions related to data subject to prosecutor's approval are included in the Central Bank act, Section 91. This can be rightly interpreted as a provision of the market surveillance procedure strengthening its criminal law side, since it is infrequent in Hungarian law that public authorities can have access to the data regulated here during their procedures.

Table 4
Data to be learnt during a market surveillance procedure
requiring prosecutor's approval⁴⁹

To fulfil its duties, during its market surveillance procedure, the MNB shall be authorised to learn and process data related to the customer subject to the procedure or subject to the customer's right of disposal
a) related to securities, customer and payment account transactions, the number and owner of the account to be debited and credited, the legal title of the debit and credit and the payment identification code of the transfer,
b) related to the number of other identifiers of the subscriber station owned or used by the customer, the calling and called subscriber numbers, as well as the date and start time of the call and other service, as well as the subscriber's family and regarding their surname, birth name, place of residence, place of stay,
c) necessary for the identification of a natural person known based on the turnover of the payment account and securities account of the customer subject to the procedure, who probably has additional evidence from the point of view of the market surveillance procedure

The Supervision must be incredibly careful if they want to learn the above data, since pursuant to the Central Bank Act, prosecutor's approval is subject to strict conditions, and the prosecutor's office will refuse approval if the conditions are not met.⁵⁰ The MNB is obliged to demonstrate that the data is necessary. Although it is not an exact legislative concept, it provides some indication for the request. Such grounds are if the data is necessary to fully clarify the facts or to learn about other relevant facts linked to the actions being the subject of the procedure.⁵¹

The rules related to processing such type of data are different from those in the Central Bank Act, Section 90 (5), since the Supervision may process them for five years from the conclusion of the official inspection, or - in the case of the initia-

⁴⁹ Central Bank Act, Section 91 (1)

⁵⁰ Central Bank Act, Section 91 (4)

⁵¹ Central Bank Act, Section 91 (2)

tion of official proceedings - from the decision or the order terminating the proceedings becoming final, or from the final conclusion of any court proceedings initiated in connection with the market surveillance procedure.⁵²

2.6 Legal consequences to be established during a market surveillance procedure

In its 2014 market supervision report, the MNB declares, “the purpose of market surveillance procedures is to ensure uniform, predictable and consistent policy of market surveillance measures and sanctions.”⁵³ Accordingly, the legal consequences applicable by the Supervision have been identified so that “they can guarantee sufficient deterrent effect from activities generating market deviance and effective detection of market abuse for all players in the money and capital markets”⁵⁴

The relevant provisions of the Central Bank Act divide the legal consequences to be established during a market surveillance procedure into two parts on the basis whether the activity was conducted without a licence or in absence of notification. The same categories were already used at the time of the operation of the State Supervision of Financial Institutions (PSZÁF), so the regulation has not changed in this respect since 2013.⁵⁵ For easier understanding, the Figure below illustrates the legal consequences in the above breakdown.

52 Central Bank Act, Section 91 (6)

53 MNB market supervision report, p. 42.

54 MNB market supervision report, p. 42.

55 SEREGDI, LÁSZLÓ (2013): A PSZÁF jelenlegi helyzete, szerepe, a várható, illetve indokolt változások [Current position of PSZÁF, its role, expected and justified changes], in: PROF. DR. LENTNER, CSABA (ed.) (2013): *Bankmenedzsment, bankszabályozás, pénzügyi fogyasztóvédelem* [Bank management, bank regulation, financial consumer protection]. Budapest: Nemzeti Közzolgálati és Tankönyv Kiadó, 414. (hereinafter: Seregdi, 2013).

Figure 1
Legal consequences to be established during a market surveillance procedure⁵⁶



As you can see, three of the legal consequences are the same, the only difference is linked to the initiation of criminal proceedings the MNB shall apply in the event of a customer’s activity carried out without a licence and only in case the Supervision considers the activity to be a criminal act pursuant to Law C of 2012 on the Criminal Code.⁵⁷

The MNB also reviews during a market surveillance procedure if the obligations resulting from EU law are complied with. Accordingly, if it detects a violation of the notification obligations stipulated in Regulation 236/2012/EU of the European Parliament and of the Council, Sections 5-8, it shall obligate the person or organisation defaulting to comply.⁵⁸ In the same way, if the Supervision establishes violation of the provisions related to restrictions on uncovered transactions stipulated in Sections 12-14 of the above EU Regulation, it shall call on the person

⁵⁶ Central Bank Act, Section 93 (1) and (2), cf also: SEREGDI, 2013:414.

⁵⁷ Central Bank Act, Section 93 (1), cf also: SEREGDI, p. 414.

⁵⁸ Central Bank Act, Section 93 (3), point a)

or organisation to comply with the conditions.⁵⁹ The MNB shall impose a market supervision fine in both cases in addition to the legal consequences above.⁶⁰

In addition to initiating and conducting criminal proceedings, imposing market supervision fines in market surveillance procedures - considering their upper limit - seem to be the most powerful deterrent from conducting similar activities in future. It should be underlined that pursuant to the Central Bank Act, Section 93 (1), point d) and Section 93 (2), point c), in the event that activities carried out without a licence or in absence of notification are established, the MNB has no discretion with respect to a market supervision fine as the legal consequence to be applied.⁶¹

The Curia as Court of Appeal also declared the same in 2018. On the other hand, the actual amount of market supervision fines is at the discretion of the MNB matching the measure and weight of the illegal activity in question and observing the lower and upper limits pursuant to the Central Bank Act, Section 93 (5) and (5a). The following Table includes the amount of fines to be imposed on legal violations established. It is clear the range open for the MNB with respect to market supervision fines is wide, as the lower limit is HUF hundred thousand, while the upper limit can be as high as HUF 4.67 billion.

59 Central Bank Act, Section 93 (3), point b)

60 Central Bank Act, Section 93 (3), point c)

61 BH 2019.281. [43]; cf also: Order No kfv.35.220/2018/9, [43] of the Curia as Court of Appeal

Table 5
Market supervision fines to be imposed during a market surveillance procedure⁶²

Market supervision fines to be imposed during a market surveillance procedure	
Legal violation established	Amount of fine to be imposed
on activities carried out without a licence or in absence of notification	can be from HUF hundred thousand to HUF two billion;
on violating the rules related to company acquisition,	can be from HUF hundred thousand to HUF two billion;
on violating the provisions of Law CXX of 2001 on the capital market (hereinafter: Tpt), Section 405 (3) and (4)	can be up to the amount provided in Tpt, Section 405 (3) and (4), which is up to HUF two billion, or HUF 4.67 billion in certain cases.
on violating the rules related to reporting and disclosure obligations provided in Sections 5-8 of Regulation No 236/2012/EU of the European Parliament and of the Council and to controlling unsecured transactions in Sections 12-14	can be from HUF hundred thousand to HUF two billion;
In the case the customer is not a natural person, the natural person contributing to the activity subject to a market supervision fine,	the amount of the fine to be imposed can be in a range of HUF hundred thousand to HUFM 100 in addition to the application of the provisions of Section 93 (5).

The last line of the *Table 5* is most interesting and worth attention. It generates a break through the civil liability of a legal entity by providing that during market surveillance a market supervision fine can also be imposed on a person contributing to the activity of a legal entity. The provision applicable since July 2015 has been included in the Central Bank Act, because natural persons often wilfully carried out illegal financial activities hidden behind and making use of the limited liability of legal entities.⁶³

Earlier, the Supervision did not have the right to take action against a “natural person contributing” in proceedings initiated against a legal entity during market surveillance. The above provision settles the issue. Accordingly, a market supervision fine can be imposed on a natural person if “they held an initiating, control-

⁶² Central Bank Act, Section 93 (5) and (5a)

⁶³ BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:911

ling or organising function - beyond simple participation - in the establishment and operation of illegal activity, and the illegal activity could not have been conducted or could only have been conducted at a much smaller scale without their violation of the law.⁶⁴ In such a case, the market supervision fine imposed on a natural person is fairly high, its amount can be in a range from HUF hundred thousand to HUFM 100.⁶⁵

Finally, the MNB may apply publication on its website as a legal consequence in the event a market supervision fine is imposed, or if it orders the prohibition of the further continuation of unlawful behaviour, or orders the termination of an unlawful state due to the activities carried out without a licence or in the absence of notification if “it is necessary to protect the legal or economic interests of the clients of the person or organisation conducting the activity without a licence or in the absence of notification, or to protect public interest”.⁶⁶

In such a case the number and subject of the decision establishing a violation of law, the family and first name and the address of the natural person who violated the law, and the name and headquarters of the infringing legal entity or organisation without legal entity as well as the operative part of the decision become public and accessible for a year from the date of publication.⁶⁷ Publication is a very important legal consequence for prevention. Its application may reduce the number of future violations of law and of injured parties.

3 SUMMARY: THE CONCEPT OF MARKET SURVEILLANCE PROCEDURES

In accordance with the goals set in the Introduction, the conceptual components of market surveillance procedures by the MNB can be defined as follows.

As regards the structural position of market surveillance procedures, one can state it is a special procedure of public administration that belongs among the micro prudential surveillance of the MNB resulting from its basic tasks of surveillance of the financial mediation system. Resulting from the nature of administrative procedures, the person or organisation affected by the procedure is the customer.

Considering that market surveillance is deemed an administrative procedure, it is subject to Ákr. At the same time, the MNB official procedures are deemed to be outside scope, which means those types of procedures - as a rule, in general and

64 BABAI-BELÁNSZKY-BARNÓCZKI-KARDOS, 2017:911

65 Central Bank Act, Section 93 (5a)

66 Central Bank Act, Section 94 (1)

67 Central Bank Act, Section 94 (1) and (2)

primarily - are not subject to the provisions of Ákr. This, however, does not mean the Ákr is completely neglected, as special procedural provisions in the Central Bank Act identify the cases when a general provision of Ákr shall be applied as underlying legislation to a special rule.

Resulting from the provisions of the Central Bank Act, market surveillance is deemed a procedure *ex officio*, which means the MNB initiates it acting in its role of supervisory authority. Considering that market surveillance procedures initiated because of capital market abuse or unlawful activities related to financial services or activities, investment services or mediating activity that are in certain cases subject to a licence by the Supervision, in other cases to notification to the MNB, they are deemed to be activity-based.

A market surveillance procedure can be divided into two phases. The first is an authority inspection procedure, and the second one - in case the Supervision establishes a violation of law - is a procedure by the competent authority. One can say in general that MNB applies a preventive approach in administrative procedures, accordingly, market supervision procedures do not focus on subsequent sanctions of legal violations but intend to prevent and manage potential future market supervision risks.

The MNB closely cooperates with the investigative bodies during market surveillance, including the police and the prosecutor's office, while the court also plays an important part regarding the evidence obtained during a procedure. To sum up, one can state that market surveillance is a complex but effective, quick, and professional official procedure in the event of suspected capital market abuse and financial activities carried out without a licence or in absence of notification.

Based on the above, the concept of a market surveillance procedure can be defined as follows:

“Market surveillance is a special administrative procedure of preventive nature by the National Bank of Hungary (MNB), during which the MNB shall conduct official control and administrative procedures resulting from its basic task of supervising the financial mediating system in the event of suspected capital market abuse, or financial activities and investment services carried out without a licence or in absence of notification.”

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