DISTRIBUTING FINANCIAL SERVICES BY FINANCIAL AGENTS IN CORRELATION WITH LEGAL AND MANAGERIAL ASPECTS: CASE STUDY OF THE SLOVAK REPUBLIC

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Received: 30 March 2024  Accepted: 30 April 2024  Online Published: 09 May 2024

ABSTRACT

Legal rules regulate various social relations, among them also performing of business on the financial market, which is connected with a certain level of risk and therefore needs to be permitted (via a license, registration or other kind of authorisation) by the state. This is also the case when performing the distribution of financial services. Here the authorization to act as financial agent is being granted by the National Bank of Slovakia via a registration or license. Legal rules are the “instruments” which determine, by means of orders, prohibitions and permissions, the way in which financial services are being distributed by financial agents. In the Slovakian legal environment, the Act No. 186/2009 Coll. On Financial Intermediation and Financial Advisory and on the Change and Amendment of Certain Act as Amended, is regulating financial intermediation and financial advisory dominantly. This normative legal act is unique, because it represents an integrated legal framework of performing distribution of financial services in the essential sectors of the financial market. The paper focuses on selected legal aspects of the regulation of financial intermediation performed by financial agents, with a particular emphasis on de lege ferenda proposals that protect clients.

Objectives: The objective of the paper is to provide de lege ferenda proposals. Methods/Approach: The analysis, synthesis, induction, deduction, abduction and the comparative method are being used. Results: Results of the research are de lege ferenda proposals. Conclusions: The regulatory framework should be improved in order to provide a higher level of protection of financial consumers.

Keywords: independent financial agent, subordinate financial agent, financial intermediation, National Bank of Slovakia, Slovak republic
JEL classification: K2, K23, K22, K33, O20
Paper type: Case study

INTRODUCTION

A legal rule is the smallest (atomic) part of the legal system (legal order) and at the same time an elementary object of knowledge of law. A legal rule is an intangible product of human thought, a part of social consciousness, and its contents are commands, prohibitions and permissions (Knapp, 1981).

A set of legal rules regulating the distribution of financial services in the Slovak Republic is represented by the Act No. 186/2009 Coll. on Financial Intermediation and Financial Advisory and on Amendments and Additions to Certain Acts, as amended (hereinafter referred to as the “Financial Intermediation Act”).
In the currently valid legislation, we find both positive and negative definitions of the term financial intermediation. With the negative definition, the legislator creates a range of activities that do not constitute financial intermediation, meaning they are not covered by the Act on Financial Intermediation. This includes in particular expert opinions which lack an individual element, i.e. they are provided for an indeterminate number of recipients, as well as the activities of financial institutions and their employees, and also outputs in which data relating to the financial market are processed, but which are used for purposes other than financial intermediation, e.g. in the context of the provision of advocacy services.

The concept of financial intermediation is not limited to the conclusion of a contract for the provision of a financial service. On the contrary, the legal definition reflects the fact that the relationship between the financial agent and the client is one of trust and confidence and therefore the scope of this legal institute includes activities such as, various consultations relating to the financial service contract and its administration, modification or termination, cooperation in the handling of claims and performance of the client under the financial service contract.

The currently valid regulation carries the idea that a financial agent's care for its client does not end with the establishment of a contractual relationship, the legislator educates to responsibility and to cooperation at the key moment of the emergence of a claim for performance arising from the contractual relationship, which clearly shows the legislator's efforts to implement the concepts of client protection in the financial market (Sidak et al., 2020).

Therefore, the legal definition of financial intermediation includes activities that provide services to the client even after the conclusion of a contract for the provision of a financial service.

Financial intermediation is a business under Act No. 513/1991 Coll., the Commercial Code, as amended (hereinafter referred to as the “Commercial Code”).

According to the Financial Intermediation Act, financial intermediation can be performed by a tied financial agent, a tied investment agent, ancillary insurance intermediary, a subordinate financial agent and an independent financial agent. It is being focused on the independent and subordinate financial agent.

Despite the fact that financial agents perform financial intermediation, there are three key differences in the legal regulation of financial intermediation carried out in the category of independent and subordinate financial agent.

The first difference represents the access to the business. While for the independent financial agent, the legislator imposes the obligation to have the relevant authorisation, for a subordinate financial agent the necessity to register in the register of financial agents, financial advisors, financial intermediaries from another Member State in the insurance or reinsurance sector and financial intermediaries from another Member State in the field of housing credit (hereinafter referred to as the “register”) arises (Chernov et al., 2019).

The second area reflects the different legal status in the performance of financial market supervision. The independent financial agent is a supervised financial market entity, the legislator includes it in the enumerative list of supervised financial market entities enshrined in Article 1 of the Act No. 747/2004 Coll. on Financial
Market Supervision and on Amendments and Additions to Certain Acts, as amended (hereinafter referred to as the “Financial Market Supervision Act”). The subordinate financial agent is not a supervised financial market entity. This entrepreneur is not supervised by the National Bank of Slovakia, meaning not under the direct supervision of the supervisory body. However, the legislator has through a set of legal rules incorporated in the Financial Intermediation Act, the so-called delegated supervision (Shakespeare 2020). This is a supervision exercised by the independent financial agent over the subordinate financial agent. At the same time, the National Bank of Slovakia supervises the independent financial agent in the fulfilment of this obligation. Therefore, we can speak of delegated, devolved supervision (Kuril et al., 2024).

The third aspect relates to the possibility of carrying out financial intermediation through subordinated entities. The independent financial agent is entitled to carry out the distribution of financial services through subordinate financial agents under the conditions defined in the Financial Intermediation Act. The subordinate financial agent is not entitled to carry out financial intermediation through subordinated entities (Khan et al., 2022).

METHODOLOGY
The paper is developed using analysis, synthesis, deduction, induction and abduction. Analysis is a decomposition method based on a thought process in which the whole is decomposed into its parts (Ochrana, 2009). The goal is to explain a given problem by examining its components in detail (Ochrana, 2009). We decompose the whole, represented by the regulation of the conduct of financial intermediation by a subordinate financial agent, into its individual parts. In particular, the individual components represent the conduct of financial intermediation by a subordinate financial agent and the legal relationship between the subordinate financial agent and the independent financial agent (Yermachenko et.al., 2023).

Synthesis is the assembling of the individual parts into a whole, or the creation of new concepts by assembling previously isolated elements (Knapp & Gerloch, 2001). Deduction is based on syllogism, in which a conclusion is drawn from two original premises (Ochrana, 2009). The deductive method uses deductive reasoning to know the truth. Deduction is a thought process by which we deduce a new proposition from the mixtures of certain rules used, proceeding from the general to the particular (Ochrana, 2009) and will be used from the general arrangement of delegated supervision to the specific manner of its implementation. By induction, we derive general regularities and laws based on the analysis of individual data (Ochrana, 2009). However, unlike deductive inferences, inductive inferences are valid only with a certain degree of probability (Ochrana, 2009).

Abduction is the thought process by which we look for connections between seemingly unrelated facts; therefore, abduction results in the statement that appears most likely based on the available data (Ochrana, 2009).

The key objective of the paper is to introduce de lege ferenda proposals that lead to transparent information on the authorization of an independent financial agent to carry out financial intermediation through subordinate
financial agents and that act as a preventive measure against the phenomenon of “migration” of the network of subordinate financial agents. Following the defined objectives, these hypotheses are being set:

H1: The legal regulation of transparent information of the client about the authorization of an independent financial agent to carry out financial intermediation through subordinate financial agents is not at a sufficient level.

H2: The legal framework for financial consumer protection in financial intermediation carried out by a subordinated financial agent is not at a sufficient level.

RESULTS

Proceedings in Supervisory Matters and Disclosure of Information on the Authorisation to Dispose of Subordinate Financial Agents

The content of the fundamental right to conduct business is being defined as a case-by-case right, with the particular significance of a case-by-case approach (Drgonec, 2019).

The Constitutional Court of the Slovak Republic first ruled that the right to conduct business is guaranteed only to natural persons under the Constitution of the Slovak Republic, and then it granted the right to conduct business to legal persons (PL ÚS 37/1999. Ruling of 25 May 1999, ZNUÚS 1999, p. 76-94), and this decision has been repeated several times (Drgonec, 2019).

The first prerequisite for exercising the right to conduct business is the freedom to enter into entrepreneurial activity. “Market entry” cannot be equated with absolutely unrestricted access to a chosen business activity, purely on a discretionary basis, without any conditions whatsoever (Drgonec, 2019). According to Article 35 Paragraph (2) of the Constitution of the Slovak Republic, the conditions for the exercise of professions and activities by which the right to conduct business is exercised, may be established by an act (Drgonec, 2019). Such a normative legal act is represented by the Financial Intermediation Act, which regulates financial intermediation, financial advisory, maintenance of the register, supervision of financial intermediation and supervision of financial advisory, as well as certain relations related to the provision of financial services by a financial institution.

This is one of the key pieces of legislation for the business of the independent financial agent and the subordinate financial agent.

A fundamental feature of access to performing business on the financial market is the necessity to have the relevant authorisation or registration. Among the categories of financial agents, only the independent financial agent will be required to obtain a licence. Stricter broker licensing leads to an increase in default rates (Shi et al., 2018).

A natural or legal person intending to engage financial intermediation as an independent financial agent will be required to demonstrate preparedness for this activity. This will be done in proceedings in supervisory matters. Proceedings in supervisory matters represent sui generis administrative proceedings, contributing to the fulfilment of the function of the National Bank of Slovakia as a supervisory authority, to the fulfilment of
the obligations arising for supervised entities of the financial market and other persons from special legal regulations.

Among essential features of the proceedings in supervisory matters, the following can be included:
- Deciding on the rights and obligations of supervised financial market entities or other persons as provided by specific regulations, in this case deciding on the rights and obligations of the applicant for authorisation to act as an independent financial agent;
- The parties to the proceedings have procedural rights and, in order to ensure the conduct and purpose of the proceedings and have procedural obligations;
- In the proceedings, the National Bank of Slovakia is the holder of rights, which the National Bank of Slovakia is entitled to exercise in order to ensure the fulfilment of tasks arising from specific legislation, in this case the Financial Intermediation Act;
- The proceedings take place in the forms provided for by financial law rules;
- The outcome of the proceedings is an individual administrative act, which may take the form of a procedural decision or an authorisation decision or a sanctioning decision.

It can be abstracted from the current legislation that proceedings in supervisory matters comprise two categories of proceedings. Proceedings initiated by on the basis of a party's request are referred to as licensing proceedings (Slezáková et al., 2018). This designation can be accepted from a practical point of view, as it covers the vast majority of proceedings initiated at the initiative of a party, but from a theoretical and legal point of view it should be noted that there are also a few exceptions (e.g. proceedings in which the National Bank of Slovakia determines the insurer that is obliged to conclude an insurance contract with the policyholder pursuant) (Slezáková et al., 2018). Proceedings initiated on the National Bank of Slovakia's own initiative are usually referred to as sanction proceedings, but this designation should also not be taken absolutely (Slezáková et al., 2018).

Proceedings in supervisory matters in which the National Bank of Slovakia decides exclusively on the basis of an application for authorisation to act as an independent financial agent, shall be one of the licensing proceedings.

It follows that there are two subcategories of licensing procedures. Those whose purpose is to enable the supervised financial market entity to perform a legal act, based on the approval or prior approval of the National Bank of Slovakia, and those whose purpose is to start a business on the financial market. The legislator does not define in the current legislation the set of legal acts which an independent financial agent will be entitled to perform exclusively on the basis of the approval or prior approval of the National Bank of Slovakia. The Financial Intermediation Act provides the conduct of proceedings for the purpose of granting the relevant authorisation. In this context, we note that we are referring to licensing proceedings conducted for the purpose of access to business on the financial market.

The licensing procedure, completed by the decision of the National Bank of Slovakia granting the authorisation to carry out the activity of an independent financial agent, shall primarily have:
- a regulatory function - it admits to business, to financial intermediation, only entities fulfilling the legal conditions, i.e. if the submitted application and its annexes show that the conditions for business on the financial market are met, the supervisory authority grants the relevant authorisation, thus ensuring that the activity is carried out exclusively by prepared entities;

- a protective function - if the application and its annexes show that the legal conditions for performing business on the financial market are not met, the supervisory authority will not grant the license, thereby protecting the market from unprepared operators.

The licensing procedure is governed by a set of legal rules regulating a specific field of activity of the National Bank of Slovakia. The procedures in question are characterised by a set of principles as a set of objectives, ideas determining the direction of legal regulation, defining the characteristics and content of the rules of regulation.

The following principles of the licensing procedure can be derived from the financial law rules contained in the Financial Intermediation Act and the Financial Market Supervision Act:

- The principle of imperativeness - which implies that the National Bank of Slovakia, as a supervisory authority, by its individual administrative acts issued on the basis of and within the limits of the Financial Intermediation Act and the Financial Market Supervision Act exercises public administration and determines unilaterally binding rules for the independent financial agent;

- The principle of subordination - it is related to the principle of imperativeness, which implies that the applicant is in a subordinate position in the authorisation procedure in relation to the National Bank of Slovakia;

- The principle of protection of the public interest - the licensing procedure constitutes a means of enforcing the public interest in the functionality of the financial intermediation service provided by an independent financial agent.

The statutory conditions which a legal person must prove to be in accordance with Article 18 of the Financial Intermediation Act (we disregard the conditions specified for natural persons) are as follows:

- The credibility of the statutory body or members of the statutory body, members of the supervisory body and the professional guarantor of the future independent financial agent;

- The professional competence of the statutory body or at least one member of the statutory body who will be responsible for carrying out the financial intermediation and of the professional guarantor of the future independent financial agent;

- The credibility of the professional competence of the staff carrying out the activity the content of which is financial intermediation;

- The qualifying holding, which includes the persons exercising control over the future independent financial agent, and the qualified participation of the persons in the future independent financial agent do not prevent the effective exercise of supervision by the National Bank of Slovakia;

- Technical and organisational preparedness;
The applicant has not been convicted of a criminal offence.

Compared to other supervised financial market entities (e.g. payment institutions or investment firms), the independent financial agent is not subject to on-site verification of its readiness to carry out financial intermediation. The readiness to carry out the activity in question is demonstrated by the applicant by means of a set of internal directives containing a description of how the activity is to be carried out.

In accordance with the Decree of the National Bank of Slovakia No 1/2018 of 6 February 2018 on the manner of proving compliance with the conditions for granting an authorisation to act as an independent financial agent and for granting an authorisation to act as a financial advisor, as amended by the Decree of the National Bank of Slovakia No 4/2019 of 1 October 2019 amending the Decree of the National Bank of Slovakia No 1/2018 on the manner of proving compliance with the conditions for granting an authorisation to act as an independent financial agent and for granting an authorisation to act as a financial advisor, the applicant who applies for the relevant authorisation and intends to act through subordinate financial agents, is obliged to demonstrate, in the context of technical and organisational readiness for the implementation of financial intermediation, by means of internal directives how the relationship of the statutory body, or the relationship of the members of the statutory body, the professional guarantor, the applicant's employees, if any, with the subordinate financial agents will be regulated (Sidak, Slezáková, Hajnišová & Filip, 2023).

Secondary legislation also requires that the applicant demonstrate in a further internal directive how it will ensure compliance with its statutory obligations under Article 29 of the Financial Intermediation Act, i.e. how it will implement delegated supervision.

The range of internal directives submitted is also completed by a draft written contract to be concluded by the independent and subordinate financial agent pursuant to Article 9 of the Financial Intermediation Act. If a party to the proceedings has demonstrated its technical and organisational readiness to carry out financial intermediation through subordinated entities, the National Bank of Slovakia shall assign the entity a login name and password serving for the fulfilment of information obligations, as well as for the electronic submission of proposals for registration (its change or cancellation) of subordinate financial agents.

In accordance with the principle of free assessment of evidence, the National Bank of Slovakia compares the assumptions made by the applicant for the granting of the relevant authorisation with the requirements imposed on the performance of the activity of an independent financial agent. That assessment shall then be reflected in the supervisory decision granting the authorisation to carry out the activity of an independent financial agent or rejecting the application.

As stated above, the substantive decision issued in the proceedings in supervisory matters constitutes an individual administrative act. The Financial Market Supervision Act defines its content and formal requirements. The substantive elements are the operative part, the statement of reasons and the notice of appeal. The content and formal requirements of the National Bank's decision are set out in an exhaustive list in the Financial Market Supervision Act.
The supervisory authority does not indicate in the operative part of the individual administrative act whether the participant will be authorised to carry out financial intermediation through subordinate financial agents. This means that if the operative part of the final decision of the National Bank of Slovakia granting the authorisation to act as an independent financial agent is published, the public will not acquire knowledge of the authorisation to distribute financial services through subordinated entities. At the same time, we would like to draw attention to the fact that, on the basis of the non-legally binding model application for the authorisation to act as an independent financial agent published on the website of the National Bank of Slovakia, the applicant, whether a legal entity or a natural person, is obliged to state whether it is interested in carrying out activities through subordinate financial agents. The supervisory authority must therefore undoubtedly comment on this fact in its statement of reasons. However, as stated above, the information in question is not made visible in the operative part of the decision of the National Bank of Slovakia (Sidak, Slezáková & Filip, 2023).

In practice, the possibility of verifying the authorisation of a specific independent financial agent to carry out financial intermediation through subordinate financial agents remains an option for both the professional and the general public, through the register. By entering the business name or the name and surname of the subordinate financial agent, the registry will find out who is the applicant for registration. Similarly, the information obligations under Article 33 of the Financial Intermediation Act, in which the subordinate makes information about its promoter available to the client, are not consistently fulfilled in some cases.

Following the mentioned above, there are two tables being provided, from which results the current numbers of particulars categories of financial agents carrying out activities in Slovakia (Table 1 and Table 2).

<table>
<thead>
<tr>
<th>Table 1. Number of Financial Agents in Slovakia – Key Categories</th>
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<tr>
<td><strong>Category of Financial Agent</strong></td>
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<tr>
<td>1. Independent Financial Agents</td>
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<tr>
<td>2. Subordinate Financial Agents</td>
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<td>3. Tied Financial Agents</td>
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*Note: Website of the National bank of Slovakia retrieved April 9, 2024.*

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<th>Table 2. Number of Financial Agents in Slovakia – Non-Key Categories</th>
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<tr>
<td><strong>Category of Financial Agent</strong></td>
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<tr>
<td>1. Brokers of Supplementary Insurance</td>
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<tr>
<td>2. Tied Investment Agents</td>
</tr>
<tr>
<td>3. Financial Intermediaries from Another Member State</td>
</tr>
</tbody>
</table>

*Note: Website of the National bank of Slovakia retrieved April 9, 2024.*
Contractual Penalty – Protection against Migration of Subordinate Financial Agents

An applicant for an authorisation to act as an independent financial agent shall, inter alia, demonstrate its readiness to perform financial intermediation through subordinate financial agents by drafting a written contract which the independent financial agent concludes with the subordinated entity in accordance with Article 9 of the Financial Intermediation Act. In this regard, we consider that the National Bank of Slovakia is entitled to comment in proceedings in supervisory matters on the draft contract between two entrepreneurs only to the extent that it is necessary to ascertain whether the entity is properly ensuring the implementation of the delegated supervision. Other elements are not assessed and, in our opinion, cannot be assessed by the National Bank of Slovakia, as this is a private law relationship between two entrepreneurs. From the point of view of legal theory, a contract is considered to be a legal fact consisting of two or more unilateral legal acts in which there is a clash between them, with the conclusion of the contract occurring at the moment when the proposal for the conclusion of the contract and the acceptance of the proposal for the conclusion of the contract meet (Krajčo, 2015).

Contract rarely occurs as an abstract concept, but is mostly applied in the context of a standard contract type, a kind of abstract model of a contractual relationship (Bejček et al., 2015).

By types of contracts we mean named models of contractual relationships governed by certain individualised rules (such as a contract of sale, a contract for work, a contract of agency) (Bejček et al., 2015).

For named contracts, the parties may agree differently, only within the framework of the dispositive provisions intended for the specific contract type (Marek, 2008).

As mentioned above, a subordinated financial agent is an entrepreneur under Article 2(2)(c) of the Commercial Code. This entity constitutes the distribution channel of an independent financial agent with which it is obliged to conclude a written contract in accordance with Article 9 of the Financial Intermediation Act.

An independent financial agent and a subordinate financial agent may conclude a nominee contract provided for in the Commercial Code, namely a commercial agency contract, for the purpose of regulating their mutual relations.

A commercial agency agreement concluded pursuant to Article 652 et seq. of the Commercial Code creates the prerequisites for the organisation of a distribution network build by independent entrepreneurs.

The essential parts of a commercial agency contract are the identification of the parties to the contract (the parties to the contract are the commercial agent - the subordinate financial agent and the represented - the independent financial agent), the obligation of the subordinate financial agent to undertake activities aimed at concluding certain types of contracts (contracts for the provision of financial services), the obligation of the independent financial agent to pay the subordinate financial agent a remuneration (commission). We are of the opinion, however, that the independent financial agent will not ordinarily enter into the named contract in question because of mandatory commercial law rules are granting to a commercial agent (subordinate financial agent) the right to a severance payment.
Article 269 Paragraph 2 of the Commercial Code provides the possibility of concluding an innominate (unnamed) contract, since the specific factual situation does not belong to the contractual types regulated by the Commercial Code.

For the needs of practice in the field of distribution of financial services, an innominate contract concluded pursuant to Article 269 Paragraph 2 of the Commercial Code in conjunction with Article 9 of the Financial Intermediation Act appears to be optimal. For a valid conclusion of an unnamed contract, the subject matter of the commitment must be sufficiently specified.

The subject matter will consist of the performance of financial intermediation by a subordinate financial agent so that the client has the opportunity to enter into a financial service contract with a financial institution (a contractual partner of the independent financial agent). At the same time, the independent financial agent, as the proposer, i.e. as a superior entity performing delegated supervision, has an incentive to incorporate the security device into the contract in question. The basic legal regulation of security institutes in the Slovak Republic is found in the Act. No 40/1964 Coll. Civil Code as amended and for the area of commercial obligation relations it is supplemented or modified by the regulation contained in the Commercial Code. By its nature, a contractual penalty is a pecuniary sanction for the breach of a contractual obligation (Dohnal et al., 2016). However, it is also possible to be sanctioned for a breach of a legal obligation (Dohnal et al., 2016). In order to be applicable, it must be contractually determined (Dohnal et al., 2016). One of the functions of a contractual penalty is to strengthen the position of the creditor in other ways (Horák, 2015). We define a contractual penalty as a contractually specified consideration for a breach of a secured obligation, which the party who breaches the secured obligation (the subordinate financial agent) is obliged to provide to the beneficiary (the independent financial agent) (Ovečková, 2011).

The contractual penalty in the innominate contract shall be agreed between the independent and the subordinate financial agent, primarily to ensure the fulfilment of the obligations relating to the exercise of delegated supervision.

In this context, we also point to another dimension of the possibility of incorporating this security institute in the innominate contract concluded between the independent and the subordinate financial agent. To the group of clients of the independent financial agent that carries out financial intermediation through subordinated entities belong also the clients of the subordinated financial agents. In practice, a relatively common phenomenon is the termination of a contract by a subordinate financial agent and the conclusion of a new written contract pursuant to Section 9 of the Financial Intermediation Act with another independent financial agent. In these cases, clients, especially non-professional clients, are also exposed to the risk that they will be repeatedly approached by a subordinate financial agent with offers to conclude another financial service contract. A pertinent question that arises in this context is whether the offer in question actually corresponds to their needs or the needs of the members of their household. They may already be satisfied by a financial service that was provided to them by a subordinate financial agent in the past with a previous contractual partner.
It therefore seems legitimate for the independent financial agent and the subordinate financial agent to agree on a contractual penalty in the event that the subordinate financial agent terminates the contract within a certain period of time from its conclusion, e.g. two years from the date of its conclusion. It follows that the contractual penalty can serve as a hedging device to prevent the termination of the contract by the subordinate financial agent and the conclusion of a new contract with another independent financial agent. It also serves to protect non-professional clients, as it is a well-established market practice that subordinate financial agents tend to conduct financial intermediation with a new independent financial agent in the environment of the group of clients built up with the previous proposer.

We also take the view that by extending information obligations and, in particular, by transparently informing the client that the subordinated financial agent has started to carry out financial intermediation for another independent financial agent, the protection of the retail client is enhanced (Sidak, Slezáková, Hajnišová & Filip, 2023).

**Certain Aspects of Regulation of Distribution of Financial Services in the Czech Republic and Slovakia**

The Act No. 427/2011 Coll. Act on Supplementary Pension Savings as amended (hereinafter only “Act on Supplementary Pension Savings”) distinguishes between an independent intermediary and a tied agent, which represent natural persons or legal entities engaged in business.

**Independent intermediary**

The independent intermediary carries out the intermediation of supplementary pension savings on the basis of an authorisation for the activity of an independent intermediary granted by the Czech National Bank. The legislator lays down the following conditions for the applicant for the authorisation to act as an independent intermediary:

- the applicant's registered office or a branch of the applicant is located in the territory of the Czech Republic,
- the credibility of the applicant, if the applicant is a legal person, the credibility shall be demonstrated by a member of the statutory body or another person with similar powers; the condition of credibility must also be fulfilled by the controlling person of the applicant, which is a legal person,
- professional competence, where the applicant is a legal person, professional competence shall be demonstrated by a member of the statutory body or other person with equivalent powers, provided that those persons actually manage or are to be responsible for the distribution of supplementary pension savings,
- the applicant is insured against the obligation to compensate the participant or prospective participant of supplementary pension savings for damage caused by a breach of one of his/her obligations set out in the Supplementary Pension Savings Act or other legal regulations to the extent to which they apply to the mediation of supplementary pension savings, with a limit of indemnity of at least CZK 13,500,000 per one insured event and at least CZK 2,025,000,000 in the event of the concurrence of several insured events in one year,
- the data on the applicant's person provided in the application enable the applicant to be identified in the relevant basic register,

- the applicant is not an independent intermediary or a tied agent under the Supplementary Pension Savings Act.

**Tied agent**

A tied agent is an entity authorised to arrange supplementary pension savings on the basis of registration in the register of persons authorised to mediate supplementary pension savings. This means that the registration principle is applied to the category in question. The principle in question reflects the fact that the Czech National Bank does not carry out a substantive examination (Hudáková, M., Urbancová, H., Vnoučková, L., 2019).

The Supplementary Pension Savings Act established a register of persons authorised to arrange supplementary pension savings, which is kept by the Czech National Bank exclusively in electronic form and in which individual intermediaries and, as mentioned above, tied agents are entered.

According to Article 22 Paragraph 1 of the Act No. 650/2004 Coll. on Act on Supplementary Pension Savings and on the Amendment and Supplementation of certain acts as amended a supplementary pension asset management company is a joint-stock company with its registered office in the territory of the Slovak Republic, the subject of activity of which is the creation and administration of supplementary pension funds for the purpose of carrying out supplementary pension savings, on the basis of a permit for the establishment and operation of a supplementary pension asset management company granted by the National Bank of Slovakia. A supplementary pension asset management company is allowed, when distributing its financial products, to use tied financial agents and independent financial agents. Independent financial agents may cooperate with subordinate financial agents.

**Certain Aspects of Regulation of Distribution of Financial Services in Austria**

According to Article 1 Paragraph 1 of the “Bundesgesetz vom 17. Mai 1990 über die Errichtung, Verwaltung und Beaufsichtigung von Pensionskassen (Pensionskassengesetz – PKG)” (hereinafter “Pension Management Companies Act”) a pension management company is an enterprise authorized under this Federal Act to conduct pension fund business.

According to Article 1 Paragraph 2 of the Pension Management Companies Act business of the pension management company shall consist of the legally binding promise of pension management company to beneficiaries and the provision of pensions to beneficiaries and surviving dependents, as well as the related collection and investment of pension fund contributions. Each pension management company shall grant commitments for old-age and survivors' pensions; in addition, commitments for disability pensions may be granted. Old-age pensions shall be paid for life, disability pensions for the duration of disability and survivors' pensions in accordance with the pension fund contract. Pensions to be paid out by a pension fund may only be settled if

1. the cash value of the amount paid out does not exceed EUR 9,300 when the insured event occurs, or
2. A person who is entitled to a survivor's pension within the meaning of this Federal Act has remarried. The amount limit under no. 1 shall not apply in this case.

For the Austrian regulatory environment, regulating the distribution of financial services the “Gewerbeordnung 1994- GewO 1994, BGBl. Nr. 194/1994” (hereinafter “Austrian Trade Licensing Act”) plays an important role in the area of the distribution of financial services. One of the categories of brokers regulated by the Austrian Trade Licensing Act is represented by a commercial insurance intermediary. A commercial insurance intermediary is in accordance with Article 137 Paragraph 2 of the Trade Licensing Act a commercial insurance intermediary is any natural person, legal entity or registered partnership that engages in or performs the activity of insurance intermediation for remuneration. The activity of insurance mediation within the scope of a trade license under Article 94 Z 75 or Z 76, as a secondary trade or as a secondary activity (para. 3) may be exercised either in the form of "insurance agent" or in the form of "insurance broker and consultant in insurance matters", depending on the actual relationship with insurance undertakings. According to Article 137 Paragraph 1 of the Trade Licensing Act Insurance mediation are

1. advising, proposing or carrying out other preparatory work for the conclusion of insurance contracts,
2. concluding insurance contracts or assisting in their administration and performance, especially in the event of a claim,
3. providing information about one or more insurance contracts based on criteria chosen by a customer through a website or other media, as well as ranking insurance products, including price and product comparison, or offering a discount on the price of an insurance contract, if the customer can conclude an insurance contract directly or indirectly through a website or other medium, or
4. the activities referred to in items 1 to 3 with respect to reinsurance contracts.

An important question that rises in this context is whether a commercial insurance intermediary may mediate pension fund contract or a contract of accession to an occupational pension fund. According to a statement of the professional association of insurance agents1: The IDD regulates insurance distribution, linking it to the term "insurance contract", without defining this kind of contract in a detailed way. Retirement products that "are recognized under national law as products whose primary purpose is to provide the investor with an income in retirement and which grant the investor an entitlement to certain benefits" are, according to Art 1 Nr. 17 Letter c of the IDD, at least, not covered by the term insurance investment product. Neither pension funds nor occupational pension funds are likely to meet the definition under Art. 1 Par. 1 Nr. 17 Letter c of the IDD insurance undertakings, neither pension funds nor occupational pension funds are likely to meet the definition under Art. 1(1)(6) IDD (in conjunction with Art. 13(1) and 14 of Directive 2009/138/EC, Solvency II). It can be assumed that neither a pension fund contract nor a contract of accession to an occupational pension fund constitutes an insurance contract within the meaning of the IDD.

Commercial insurance intermediaries often have a long-term communication with their clients providing them consultations. In practice, a situation may arise, in which corporate customers ask for advice concerning retirement provision options for their company and employees and to assist them in concluding such contracts and for support in concluding such contracts.

A pension fund contract or a contract of accession to an occupational pension fund are not considered insurance contracts in the sense of the IDD. The mediation of such contracts is therefore not covered by the direct scope of authorization of Commercial insurance intermediaries.

When focusing on this question not only Article 137 and the following of the Austrian Trade Licensing Act should be taken into consideration. The brokerage of pension and retirement fund contracts (including possible and disability insurance) by commercial insurance intermediaries may be regarded as a service which complements an economically reasonable supplementing service according to Article 32 Paragraph 1a of the Trade Licensing Act.

Therefore, the mediation of pension fund contract or a contract of accession to an occupational pension fund by commercial insurance intermediaries is possible through the use of other right under Article 32 Paragraph 1a of the Trade Licensing Act. According to which traders shall also be entitled to provide services of other traders if such services are economically complementary to their own services. Complementary services may not exceed in total 30% of the trader’s total turnover in a business year. Within this limit, supplementary services of regulated trades may also be provided, provided that they are awarded pending acceptance by the principal in the case of target engagements or pending the termination of the supplementary own services in the case of continuing engagements, and that they represent at the same time no more than 15% of the total volume of services.

**Certain Aspects of Regulation of Distribution of Financial Services in Germany**

According to Article 232 of the “Versicherungsaufsichtsgesetz vom 1. April 2015 (BGBl. I S. 434), das zuletzt durch Artikel 9 des Gesetzes vom 31. Mai 2023 (BGBl. 2023 I Nr. 140) (hereinafter “Insurance Supervision Act”) a pension management company is a legally independent life insurance company whose purpose is to provide cover for lost income from employment due to old age, disability or death and which 1. conducts its insurance business on a funded basis,

2. provides benefits, in principle, only from the time when the income from gainful employment ceases to exist; if the income from gainful employment ceases to exist in part, the general terms and conditions of insurance may provide for pro rata benefits,

3. may provide benefits in the event of death only to surviving dependents, whereby a death benefit limited to the amount of ordinary funeral expenses may be agreed for third parties, and

4. grants the insured person his or her own claim to benefits against the pension fund or provides benefits as a reinsurance policy.

For the German legal environment regulating the distribution of financial services the “Gewerbeordnung in der Fassung der Bekanntmachung vom 22. Februar 1999 (BGBl. I S. 202), die zuletzt durch Artikel 6 des
Gesetzes vom 31. Mai 2023 (BGBl. 2023 I Nr. 140) geändert worden ist” (hereinafter “German Trade Licensing Act”) is of importance.

In connection with the regulation mentioned above, especially, Article 34d of the German Trade Licensing Act is of relevance as it regulates the category of the insurance intermediary and insurance broker. These entities are allowed to distribute financial services provided by the pension management company. An insurance intermediary is a person who

1. is entrusted as an insurance agent of one or more insurance companies or of an insurance agent with the task of brokering or concluding insurance contracts, or
2. as an insurance broker, undertakes the brokerage or conclusion of insurance contracts for the principal without being entrusted with this by an insurance company or an insurance agent.

An insurance broker is a person who gives the impression to the policyholder that he is providing his services as an insurance broker. The activity as an insurance broker also includes

1. the involvement in the management and performance of insurance contracts, especially in the event of a claim,
2. if the policyholder can conclude an insurance contract directly or indirectly via the website or the other medium,
   a) providing information on one or more insurance contracts based on criteria chosen by a policyholder through a website or other medium, and
   b) providing a ranked list of insurance products, including a price and product comparison or discount on the price of an insurance contract.

Anyone wishing to broker the conclusion of insurance or reinsurance contracts on a professional basis (insurance intermediary) requires a license from the competent chamber of industry and commerce. The license pursuant to sentence 1 shall state whether it is granted to an insurance intermediary or an insurance broker. An insurance intermediary is prohibited from granting or promising special remuneration to policyholders, insured persons or beneficiaries under an insurance contract. The license granted to an insurance broker shall include the authority to provide legal advice to third parties who are not consumers on the agreement, amendment or review of insurance contracts for a separate fee; this authority to provide advice shall also extend to employees of companies in cases where the insurance broker advises the company.

Also of importance is Article 34d Paragraph 2 of the German Trade Licensing Act that is regulating the insurance advisor. Any person who wishes to provide professional advice on insurance or reinsurance (insurance consultant) shall require a license from the competent Chamber of Industry and Commerce. An insurance advisor is anyone who, without receiving an economic advantage from an insurance company or being dependent on it in any other way

1. also provides legal advice to the client on the agreement, amendment or review of insurance contracts or on the assertion of claims arising from insurance contracts in the event of an insured event,
2. represents the client out of court vis-à-vis the insurance company, or
3. assumes the brokerage or conclusion of insurance contracts on behalf of the client.

The insurance advisor may only be remunerated for his work by the client. The insurance consultant may not accept payments from an insurance company in connection with the consultation, in particular based on a referral because of the consultation. If several insurance policies are equally suitable for the policyholder, the insurance advisor shall offer the policyholder primarily the insurance policy that is available without the offer of a benefit from the insurance company. If the insurance advisor provides the policyholder with an insurance policy whose contract includes benefits in favor of the person providing the insurance, the insurance advisor shall immediately arrange for the insurance company to pay the benefits to the policyholder in accordance with Article 48c Paragraph 1 of the Insurance Supervision Act.

**DISCUSSION**

The choice of a distribution channel can significantly affect the profitability of a financial institution, e.g. insurance company (Klumpes, P., J., M., 2004) and a basic function of financial brokers can be described as their acting as information distributors (Chuang, H., 2016).

The Financial Intermediation Act distinguishes between financial advisory and financial intermediation.

Financial advisory is a business, in which only the client can provide the remuneration and it is based on an independent analysis of a sufficient number of financial services. According to Hermansson, C. et al., financial advisory meetings show positive effects on saving behavior (Hermansson, C. et al., 2016). According to Mullainathan, S. et al. financial advisors fail to override client biases toward return chasing (Mullainathan et al., 2012). Especially, financial consumers rely on financial advisors to guide their investment decisions (Linnainmamm et al., 2021). The financial advisor’s choice to hold similar portfolios may engender trust and increase client risk-taking (Gennaioli et al., 2015). Trust between financial advisors and a client is driven by a norm to trust and anticipated reciprocation (Cruciani et al., 2021). The results suggest that people use paid advice significantly more than free advice (Gino, 2008). More experienced advisors and those with wealthier clients recommend higher risk portfolios (Baeckström et al., 2021). According to W. Beggs advisers providing their services to institutional clients realize statistically and economically superior risk-adjusted mutual fund performance relative to advisers oriented on non-professional (retail) clients (Beggs, 2012).

Financial intermediation represents a business, in which the remuneration is provided by a financial institution or another broker and cannot be provided by a financial consumer. The remuneration for financial intermediation is included in the price of the financial service. However, financial agents provide only an analysis of products of entities with which they cooperate.

Independent brokers have higher costs than direct brokers (Berger et al., 1997). According to Chen, M., S. et al. suggest that a multiple distribution channel strategy performs worse than a single distribution channel strategy in terms of profitability (Chen et al., 2010).
A key function of all categories of financial agents is the balancing of information asymmetries, as well as advising on the legal consequences of entering into a financial service contract. Information asymmetries can be characterised as a type of information that is unknown to clients (Stephens et al., 2017).

The likelihood to participate (e.g. in equity markets) and buy financial products rises with the degree of financial literacy (Christelis et al., 2010, Liao et al., 2017, Van Rooij et al., 2011). Studies concerning learning about financial matters had been published by Hastings, J. S. et al. (Hastings et al., 2013). Also studies pointing out that media are increasing financial literacy and the likelihood of owning stocks and the portfolio share invested in stocks (Hermansson et al., 2022). Economically vulnerable groups are placed at further disadvantage by their lack of financial knowledge (Stolper et al., 2017). Lack of financial literacy leads unsophisticated consumers to brokerage firms specializing in misconduct (Egan, M. et al., 2019). Financial literacy also reduces cost barriers (Jappelli & Padula, 2013).

According to the reports on the activities of the Financial Market Supervision Unit of the National Bank of Slovakia concerning the protection of financial consumers, clients of financial agents repeatedly, complain about inaccurate information, misleading information, highlighting the advantages of a financial service contract and withholding essential information about its content and the legal consequences of its conclusion. This is why the legal regulation of the distribution of financial services is topical and of particular importance. The primary task of the science of financial law is to put forward de lege ferenda proposals that enhance the protection of clients, especially retail clients.

In particular, recently an increasing interaction between subordinated financial agents and retail clients, i.e. persons seeking financial intermediation for their personal use or for the use of members of their household, can be observed. The demand for the distribution of financial services dominates in particular by the insurance or reinsurance sector and lending, home loans and consumer credit sectors. In our opinion, the main reason for this is that retail clients do not have sufficient information relating to the financial products.

CONCLUSION

Recently, especially due to the impact of the pandemic crisis, we have seen a decrease in the number of independent financial agents and an increase in the number of subordinate financial agents. This phenomenon is mainly linked to the fact that entrepreneurs are trying to optimise the costs of the business in question by changing the category of financial agent in which they carry out financial intermediation. Compared to independent financial agents, subordinated financial agents are not obliged to pay the fees of the supervised financial market entities. Similarly, the cost of liability insurance for financial intermediation is not borne by subordinated financial agents, if they contractually agree that it will be borne by their proposer (independent financial agent).

In proceedings in supervisory matters, the applicant for authorisation to act as an independent financial agent shall indicate whether it intends to carry out financial intermediation through subordinated financial agents. This information shall affect the particulars and annexes of the application for the relevant
authorisation. In the licensing procedure, the supervisory authority shall examine whether the applicant has demonstrated its readiness for financial intermediation by subordinated entities. By analysing the applicable legislation, we have concluded that the operative part of the decision of the National Bank of Slovakia granting the authorisation to act as an independent financial agent does not contain information on the authorisation to carry out financial intermediation through subordinated financial agents, thus confirming hypothesis number one.

**Proposal de lege ferenda No 1**

On the basis of the above, we present a de lege ferenda proposal that would make it a mandatory element of the operative part of the individual administrative act to indicate the authorisation to carry out financial intermediation through subordinated entities. We propose to incorporate into the Financial Intermediation Act Article 18a, which would read as follows:

In addition to the general particulars of a decision pursuant to a special regulation, the operative part of a decision of the National Bank of Slovakia authorising the performance of the activity of an independent financial agent shall contain information on the authorisation to carry out financial intermediation through subordinate financial agents.

The operative part of final decisions of the National Bank of Slovakia shall be published on its website. Making this information available to clients would provide key information from a trusted source.

**Proposal de lege ferenda No 2**

The independent financial agents may perform financial intermediation through subordinate financial agents. In practice, we encounter cases where, in order to achieve higher profits, a subordinate financial agent terminates a written contract and then enters into a written contract with another independent financial agent. Its new contractual partner may potentially work with different financial institutions than the previous one. The subordinated financial agent may approach with an offer of financial services clients to whom it has already arranged a financial services contract in the past, when the previous independent financial agent was its proposer for registration. The question that arises in this context is whether the financial product in question corresponds to the needs of the clients, but rather to the subordinate financial agent's objective of making a profit.

It is not possible to abstract from the current legislation any range of notices which expressly refer to the obligation to inform the client of the fact that the subordinated financial agent has concluded a written contract with the new proposer, the independent financial agent. Meaning the second hypothesis has been confirmed. The legislation is not at a sufficient level. We see the information in question as a key motivating factor to make an informed decision (especially by the non-professional client, the financial consumer), so that the client is given an incentive to reflect on the legal consequences of terminating the financial service contract and concluding a new one.
At the same time, we draw attention to the necessity of incorporating Article 33a into the Financial Intermediation Act, which refers to the obligation of the subordinate financial agent to inform the client that there has been a change in the proposer.

If there is a change in the proposer for registration of a subordinated financial agent, the subordinated financial agent must, within 24 months from the date of its registration, demonstrably and in writing inform each client and potential client that there has been a change in its proposer for registration.

We consider that the regulation in question has the potential to detect in practice cases where a client is provided with a financial service solely in order for the subordinated financial agent to secure the sale of financial services from financial institutions with which its new promoter, the independent financial agent, is working.

We are also of the opinion that the independent financial agent is entitled to agree a contractual penalty in a written contract with the subordinate financial agent. The hedging device in question serves to protect the independent financial agent from the migration of its subordinate financial agent to another independent financial agent.

A key difference between the Slovak and Czech regulation of the conditions for the distribution of financial services (with focus on the sector of supplementary pension savings) lies in the procedural regulation. The Act No. 747/2004 Coll. on Financial Market Supervision and on Amendments to Certain Acts, as amended (hereinafter referred to as the "Financial Market Supervision Act"), in its third part called supervisory proceedings, regulates a special type of administrative procedural proceedings without subsidiary application of Act No. 71/1967 Coll. Administrative Procedure Code as amended (hereinafter referred to as the "Administrative Procedure Code"). Meaning, the Slovak legislator excludes the application of the Administrative Procedure Code in proceedings in which the National Bank of Slovakia decides on an application for a licence to act as an independent financial agent.

In comparison, the Czech regulation expressly provides for the application of Act No. 500/2004 Coll. Administrative Procedure Code as amended.

The application for authorisation to act as an independent financial agent shall be in paper form. In the context of the COVID-19 pandemic, the Act No 67/2020 Coll. on certain emergency measures in the financial sector in connection with the spread of the dangerous contagious human disease COVID-19 (hereinafter referred to as 'lex corona'). With the entry into force of the normative legal act in question, the legislator made it possible for applicants to submit applications to the National Bank of Slovakia for a licence to act as an independent financial agent electronically with a qualified electronic signature via the central portal of the public administration during the pandemic period. This is a right, not an obligation for the applicant. The possibility to submit an application for authorisation to act as an independent financial agent in paper form remains unchanged. For the applicant, therefore, there are currently two alternatives.

In the Czech regulatory framework, the Act on Supplementary Pension Savings implies that the application for authorisation to act as an independent intermediary can only be submitted electronically.
The legislation requires both the independent financial agent and the independent intermediary to be entered in the relevant register maintained by the supervisory authority. If the Czech National Bank grants the relevant license, it does not issue a written decision. In this case, the supervisory authority shall directly enter the independent intermediary in the register of persons authorised to mediate supplementary pension savings. The decision (relevant license) of the Czech National Bank shall enter into force when the independent intermediary is entered in the register of persons authorised to mediate supplementary pension savings, and the Czech National Bank shall inform the intermediary of the entry in the register.

A key difference between the Austrian, German and Slovak regulation lies in the fact, that the Austrian and German Trade Licensing Acts regulate the relevant categories of brokers, intermediaries, while in Slovakia the relevant categories of financial intermediaries are not being regulated by the Trade Licensing Act, but by a separate law.

However, an inspiration from the German legal order could be a possible legal regulation by which the authority in charge of granting license would change. It can be derived from the currently valid German legal environment that anyone who wants to broker insurance and reinsurance contracts must obtain a particular license from the chamber of industry and commerce. This would mean, the authority in charge of licensing would be the Slovak chamber of industry and commerce instead of the National Bank of Slovakia.

**Author Contributions:**
Conceptualization, M.S. and A.S; methodology, A.S. and E.H; software, E.H; validation, M.S, A.S and E.H; formal analysis, M.S; investigation, A.S; resources, E.H; data curation, A.S and E.H; writing - original draft preparation, A.S and E.H; writing - review and editing, M.S; visualization, A.S; supervision, M.S; project administration, M.S; funding acquisition, M.S.
All authors have read and agreed to the published version of the manuscript.

**Funding /Acknowledgement**
The paper was supported by IGA BUEM No. 3/2023 “Conducting business of pension management companies and supplementary pension companies in the EU: legal and managerial aspects”.

**Conflict of interests**
The authors declare no conflict of interest.

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