

SEPARATE REGULATIONS ON MEDIATION WITHIN THE FINANCIAL MARKET LEGAL FRAMEWORK

Ing. Slavomír Šťastný, PhD., MBA

The performance of activities related to the mediation of financial instruments and services and to the provision of financial advice is currently regulated by separate statutes on the fields of insurance and reinsurance, investment services, supplementary pension saving, and, until the end of 2006, on retirement pension saving. This article offers an overview of the conditions under which mediation and advisory activities are carried out in these financial market fields and draws a comparison between them. It also provides some information and comments based on the practical exercise of supervision over intermediaries.

General regulations on mediation as a business activity are laid down in Sections 642 to 651 of the Commercial Code (mediation contract). This regulation stipulates that under a mediation contract, an intermediary undertakes to engage in activities aimed at enabling his client to conclude a contract with a third party and the client undertakes to pay the intermediary remuneration (commission) for these activities.

Given the individuality of mediation activity in certain financial market fields, separate legislation has been made for them. It has emerged gradually upon a diverse range of practical experience – a consequence being that the objectively comparable particulars and their definitions are addressed in different ways from one field to another.

The subsequent commentary on the separate statutes make use of the following abbreviations:

AoIMRM	Act no. 340/2005 Coll. on insurance mediation and reinsurance mediation and including consequential amendments;
AoS	Act no. 566/2001 Coll. on securities and investment services and including consequential amendments (the Securities Act), as amended;
AoRPS	Act no. 43/2004 Coll. on retirement pension saving as amended;
AoSPS	Act no. 650/2004 Coll. on supplementary pension saving and including consequential amendments, as amended.

Mediation of insurance and reinsurance

The activities of persons carrying out the mediation of insurance or mediation of reinsurance, as well as the conditions for the issuance of a licence for such activities, or for the registration of intermediaries, are regulated by the AoIMRM and Decree of the Ministry of Finance of the Slovak Republic (MF SR) no. 417/2005 Coll., implementing certain provisions of the AoIMRM.

Under Section 2(a) of the AoIMRM, for the purposes of

that Act, the mediation of insurance is understood to mean:

1. presenting offers for the concluding of insurance contracts, presenting draft insurance contracts, and performing other activities aimed at concluding insurance contracts;
2. concluding insurance contracts;
3. cooperation in the administration of insurance;
4. cooperation in arranging insurance claims and insurance benefits under insurance contracts, especially in relation to insurance events;
5. investigating and evaluating insurance risks, and processing analyses thereof;
6. providing professional advice in the field of insurance.

The mediation of insurance is therefore not restricted to activities aimed at enabling a client to conclude an insurance contract and activities related to the administration of insurance and the payment of insurance benefits, but it also includes professional investigation, evaluation, analysis and advisory activities throughout the field of insurance, and not necessarily related to a mediated contract. At the same time, the law does not give further details on the scope or content of such professional advice.

The mediation of reinsurance is, under Section 2(b) of the AoIMRM, for the purposes of that Act, understood to mean:

1. presenting offers for the concluding of reinsurance contracts, presenting draft reinsurance contracts, and performing other activities aimed at concluding reinsurance contracts;
2. concluding reinsurance contracts;
3. cooperation in the administration of reinsurance;
4. cooperation in arranging claims arising under reinsurance contracts.

Therefore the mediation of reinsurance explicitly does not include general professional advice on reinsurance matters, although it could be construed from the provision of indent (4) that a reinsurance intermediary can arrange claims under any reinsurance contracts and not only one which he himself has arranged.



Intermediaries of insurance and reinsurance are categorized under Sections 3 to 9 of the AoIMRM as follows:

- **Exclusive intermediary of insurance** – a natural person who carries out insurance mediation on the basis of a contract with only one insurance company.

- **Subordinate intermediary of insurance** – a natural person who carries out insurance mediation on the basis of a contract with an insurance agent, insurance broker, or an insurance intermediary from another Member State of the EU or EEC.

- **Insurance agent** – carries out insurance mediation on the basis of a contract with one or more insurance companies.

- **Insurance broker** – carries out insurance mediation on the basis of a contract with a client. He may also perform insurance mediation on the basis of a contract with one or more insurance companies. If agreed in the contract with the client, the following may not be agreed in a contract with an insurance company: the presentation of offers for the concluding of the insurance contract, the presentation of the draft insurance contract, the performance of other activities related to the concluding of the insurance contract, the concluding of the insurance contract, or the performance of other insurance mediation activities.

- **Reinsurance intermediary** – carries out reinsurance mediation on the basis of a contract on the mediation of reinsurance, which provides for reinsurance mediation with one or more insurance companies or with one or more reinsurance companies.

Under Section 10 of the AoIMRM, an insurance intermediary or reinsurance intermediary is required to carry out mediation with professional care and so as to protect the client's interests, and he must not withhold information related to the mediated insurance or reinsurance. In regard to the mediation of insurance (reinsurance), the intermediary may not offer the client benefits of a financial nature or intangible nature to which the client is not entitled. Prior to the concluding of the insurance contract, and upon any amendment thereto, the intermediary is required to fulfil his information obligation towards the client as laid down by law.

An intermediary is liable for any damage he causes in carrying out insurance (reinsurance) mediation, unless such damage could not have been prevented even if he had done all that could have been required of him. An intermediary must be insured against liability for damage caused by the performance of such activities. An intermediary's liability may, in fulfilment of the statutory conditions, be assumed by the insurance company or other intermediary on whose behalf the intermediary acts. The amount of the insurance benefit must not represent less than EUR 1,000,000 for each insurance event, nor less than EUR 1,500,000 in total for all insurance events in a single calendar year.

For each type of entity that carries out insurance mediation or reinsurance mediation, the AoIMRM distinguishes three levels of professional qualification: basic, medium and highest. Professional qualification is to be evidenced by a document confirming educational attainment and experience in the field, or the passing of a professional examination. For the verification of professional qualification, entities fulfilling the medium and highest levels, i.e. insurance agents, insurance brokers, and reinsurance intermediaries, are required to pass the professional examination within three years after first proving the respective level of professional qualification and every five years thereafter.

The AoIMRM has introduced a registration system for entities performing insurance mediation and reinsurance mediation. The register is divided into records according to type – an insurance intermediary may be entered in only one of the register's records, as an exclusive intermediary, subordinator intermediary, insurance agent, or insurance broker. The information stated in register of insurance intermediaries and reinsurance intermediaries is publicly accessible on the website of the National Bank of Slovakia.

In order to carry out the mediation of insurance as an insurance agent or an insurance broker or to carry out the mediation of reinsurance, the approval of the NBS is required.

An insurance intermediary or a reinsurance intermediary from another Member State may carry out their activity in the territory of Slovakia through a branch or, without a branch, on the basis of the right of freedom to provide services, provided that the intermediary is registered in the home Member State. An insurance intermediary or reinsurance intermediary who is domiciled or has its registered office in the territory of Slovakia may carry out insurance mediation or reinsurance mediation in the territory of another Member State provided that he is entered in the register maintained by the NBS.

The exercise of supervision over insurance mediation and reinsurance mediation is regulated by Section 18 of AoIMRM. If the NBS identifies shortcomings in the activities of an insurance intermediary or reinsurance intermediary who is domiciled or has its registered office in the territory of Slovakia or in the territory of a non-Member State, it may impose sanctions on such a person under Section 19 of the AoIMRM.

Brokerage of investment services

The activity of an investment broker is defined in Section 61(1) of the AoS. Under this provision, an investment broker is a legal or natural person who may provide a stipulated range of selected investment services – the reception and transmission of client orders concerning fungible securities, units/shares in open-end investment funds, and securities issued by foreign asset management companies, and the procurement of the issuance and return of units/shares in open-end investment funds



or securities issued by foreign asset management companies; such a person may transmit orders concerning the respective securities only to a restricted group of financial institutions, laid down in Section 61(1)(c) of the AoS.

An investment broker cannot, despite his name, broker or provide simply any of the investment services listed in Section 6 of the AoS, but only those covered by his licence to provide investment services (in other words, where the broker is not, for example, a securities dealer). An investment broker in the meaning of the AoS is a de facto "investment agent" of one or more financial institutions.

Where an investment broker is expected to perform his activities with professional care, he must provide the client with all important information relating to the brokered service, though he cannot provide general investment advice. Advisory activity in matters of investment in investment instruments is in fact one of the non-core investment services (Section 6(3)(e) of the AoS) that an investment broker is not entitled to provide. Experience shows, however, that it is difficult to lay down a precise boundary between the provision of information on a financial product or financial service and general advisory activity.

A legal or natural person may carry out the activities of an investment broker only if licensed to do so by the NBS (this separate licence is not required by a securities dealer whose licence to provide investment services includes the investment services mentioned in Section 61(1)(a) of the AoS). Applicants for the licence must meet the conditions laid down in Section 61(4) and (5) of the AoS.

Natural-person applicants must, in addition to meeting the condition of trustworthiness, being at least 18 years of age and having legal capacity, fulfil the condition of professional qualification – they should have completed secondary education and have at least three years' experience in the financial market sector, though the requirement of experience can be waived if they have passed the professional examination, the particulars of which are regulated in more detail by Decree of the Ministry of Finance of the Slovak Republic no. 8/2002 Coll. concerning the content of the professional examination for investment brokers, how it is to be held, and the examination fee. Where the applicant is a legal person, the same conditions for professional qualification must be met by at least one member of its statutory body or one of its management employees.

The Act also stipulates the minimum registered capital of an investment broker that is a legal person, namely, SKK 1,000,000. A broker whose registered capital is less than SKK 2,500,000 may begin to perform the licensed activity only if it is insured against liability for damage caused during the performance of the licensed activity, with the minimum limit of the insurance benefit set at SKK 5,000,000. Fulfilling this statutory obligation is not necessarily a simple matter in practice – the current insurance market in Slovakia does not offer brokers a standard sta-

tutory insurance against liability for damage caused in the performance of their activities. That said, if a broker fails to carry out its activities with professional care and causes damage to a client or financial institution, this will more likely than not relate to its unprofessional or, as far as the client is concerned, inappropriate recommendation. The scope for embezzlement of client funds is largely restricted by the fact that brokers may not receive client funds or investment instruments and may not in any circumstance get themselves in the position of owing funds or securities to their clients.

The extent of investment brokers' obligations towards clients is comparable with the obligations of securities dealers – insofar, of course, as they concern the activities that the investment broker carries out. The Act requires investment brokers to comply with Section 73 of the AoS (operational rules of a securities dealer in relation to clients), Section 75 of the AoS (business documentation), Sections 112 to 134 of the AoS (financial market protection), and their activity is subject to supervision under the AoS. The termination of the licence is subject, as appropriate, to the provisions of Section 60 of the AoS. If in the course of exercising supervision, the NBS finds shortcomings in the activities of an investment broker, it may impose sanctions on him under Section 144(3) of the AoS.

In regard to the provision and brokerage of investment services, it should be noted that the draft amendment to the AoS, which is already in the legislative process, introduces the entity of a tied agent within the legal framework for capital market business. Under draft provision Section 61a, a tied agent is a natural or legal person who carries out for a securities dealer, under the full responsibility and unconditional liability thereof, on the basis of a contract, activities including the promotion of services provided by the securities dealer, the identification of business opportunities, receiving and transferring orders from clients or potential clients, the placement of financial instruments, and the provision of investment advice related to these financial instruments and to services provided by the securities dealer. A tied agent may carry out these activities for only one securities dealer.

The activity of a tied agent as here defined means that such an agent is an exclusive business representative of a particular securities dealer. Securities dealers may use only tied agents who are entered in the register of tied agents, which will be maintained by the NBS.

Mediation of retirement pension saving

The intermediary of retirement pension saving was introduced as an entity within Slovakia's legal framework as of 1 January 2005, with the entry into force of the AoRPS. Under Section 111(1) of the AoRPS, the mediation of retirement pension saving is understood to mean activities aimed at ensuring that potential clients for a retirement



pension saving contract have the opportunity to conclude such a contract. Mediation also includes the provision of services related to preceding activities and the provision of professional advice in the field of retirement pension savings in accordance with the AoRPS.

An intermediary must be an exclusive intermediary, meaning that he may not simultaneously perform activities for more than one pension fund management company (PFMC). An intermediary is in the position of an entrepreneur who, on behalf of a PFMC, offers contracts on retirement pension saving to potential clients of the PFMC. It is the PFMC that bears liability for damage caused by the intermediary in the performance of his activities.

The Act stipulates that an intermediary of retirement pension saving must be a natural person who is licensed by the NBS to carry out this activity. Applicants for the licence must, in addition to meeting the condition of trustworthiness, being at least 18 years of age and having legal capacity, fulfil the condition of professional qualification – they must have completed secondary education and have passed the professional examination, for which it is required to demonstrate knowledge of the legal regulations in the field of retirement pension saving. Details of the professional examination are regulated by Decree of the Ministry of Labour, Social Affairs and Family no. 184/2004 Coll. on the professional examination of an intermediary of retirement pension saving.

For intermediaries of retirement pension saving, the AoRPS does not include provisions on client protection like those found in the AoIMRM and AoS. That said, Section 112 of the AoRPS does define rules for promotional activities and advertising which apply to both pension fund management companies and intermediaries. The activities of an intermediary of retirement pension saving are subject to supervision by the NBS. If the NBS find shortcomings in the activities of an intermediary, it may impose sanctions on him in accordance with Section 115 of the AoRPS.

The separate regulation of the mediation of retirement pension saving is to be abolished as of 1 January 2007, with the repeal of Section 111 of the AoRPS under Act no. 310/2006 Coll. At the time of writing this article, another draft amendment to the AoRPS was in the legislative process, according to which only pension fund management companies themselves, and their employees, would be allowed to perform activities aimed at concluding retirement pension saving contracts, providing services related to this activity, and providing professional advice in the field of retirement pension saving. If this bill is approved, the role of the intermediary of retirement pension saving will cease to exist.

The two-years of having intermediaries of retirement pension saving has been a problematic episode in Slovak financial law, an experiment that has had both positive and negative features. The Act takes a very strict position

on the authorization for such activity – all intermediaries, even though they could work exclusively for only one PFMC, require a licence for their activities from the supervisory authority, while for exclusive intermediary activities in the fields of insurance or supplementary pension savings, registration suffices (though in both cases, the respective regulation was not implemented until 2005). Notwithstanding that intermediaries cannot be legal persons and that the natural-person intermediaries can perform activities for no more than one PFMC, the Act does not bar the creation of organized networks of such intermediaries, and these have consequently sprung up freely and without restriction in legal form.

As for proving professional competence, the requirement of passing the professional examination has been a satisfactory feature – although the actual organization of the examinations burdened the capacities of the former Financial Market Authority. To date, the professional examination has been sat by more than 45,000 natural persons and the pass rate is over 70%.

As at 13 November 2006, the NBS had on record 26,293 valid, 4,247 returned, and 3 revoked licences for the activity of an intermediary of retirement pension saving.

Mediation of supplementary pension saving

In the original system of supplementary pension insurance, the mediation of its products was not separately regulated. Since the transformation of the system into supplementary pension saving, the mediation of this saving has been regulated by Sections 68 to 68c of the AoSPS (after the latest amendment entered into force on 1 August 2006).

Under Section 68(1) of the AoSPS, the intermediation of supplementary pension saving means:

- a) presenting offers for the concluding of participant contracts or employer contracts, presenting draft participant contracts or employer contracts, performing other activities aimed at concluding participant contracts or employer contracts, or amendments thereto;
- b) the provision of expert advice in the field of supplementary pension saving for the purposes of concluding participant contracts or employer contracts, or amendments thereto, in return for financial or non-financial remuneration.

The legal definition of mediation of supplementary pension saving is close to the legal regulation of insurance mediation laid down in Section 2(a) of the AoIMRM. The content of Section 68(1)(a) of the AoSPS is identical to the provision laid down in Section 2(a)(1) of the AoIMRM, though different to Section 2(a)(2). Absent from the AoSPS's definition of the mediation of supplementary pension saving is the actual concluding of the participant contract or employer contract.



Mediation of supplementary pension saving also includes professional advice on the field of supplementary pension saving, though the purpose of its provision is restricted to the concluding of a participant contract or employer contract, or an amendment thereto. Such advice is included in the mediation of supplementary pension saving on condition that it is given for financial or non-financial remuneration.

Whereas, under Section 2(a)(3) and (4) of the AoIMRM, the mediation of insurance includes cooperation in the administration of insurance and cooperation in arranging insurance claims and insurance benefits under insurance contracts, there is no corresponding provision of similar content in the definition of the mediation of supplementary pension saving, a fact that reflects the specific nature of supplementary pension saving.

The provision of Section 68(2) of the AoSPS proscriptively defines the content of supplementary pension saving. Among what is expressly stipulated here is that mediation does not cover activities performed by the actual financial institution (the supplementary pension company), or the employees thereof, on behalf of and for the account of the institution vis-à-vis its own products.

The regulation of the actual performance of mediation of supplementary pension saving is in several ways similar to the regulation of mediation in the insurance industry. Only an intermediary of supplementary pension saving may carry out mediation of supplementary pension saving, and this intermediary must be either an exclusive intermediary for one supplementary pension company or

an intermediary for two or more supplementary pension companies. The intermediary may be a natural or legal person. Liability for damage caused by an exclusive intermediary of supplementary pension saving in the performance of his activities attaches to the supplementary pension company, in accordance with Section 68b(9) of the AoSPS.

Intermediaries of supplementary pension saving are entered in a register as laid down by Section 68b of the AoSPS. In order to carry out the mediation of supplementary pension saving for two or more supplementary pension companies, a person must have been issued a licence for this activity by the NBS.

The conditions for the professional qualification of persons responsible for carrying out the activities of an intermediary of supplementary pension saving are stated in Section 68a(2) and (3) of the AoSPS and they are similar to the conditions applicable to insurance agents and brokers. The Act does not, however, allow the passing of the professional examination to be a substitute for insufficient experience.

The activities of an intermediary of supplementary pension saving is subject to supervision by the NBS. If the supervisory authority finds shortcomings in the activities of an intermediary, it may impose sanctions on him under Section 71 of the AoSPS.

In mid-November 2006, three valid licences for the activities of an intermediary of supplementary pension saving were on record at the NBS, and all three of which were issued to legal persons.

Table 1 Number of insurance intermediaries and reinsurance intermediaries (data for the situation as at 15 November 2006)

Intermediaries entered in the register of insurance intermediaries and reinsurance intermediaries under Act no. 340/2005 Coll. on insurance mediation and reinsurance mediation (including consequential amendments)		Insurance intermediaries issued with a licence under Section 13 of Act no. 95/2002 Coll. on insurance (including consequential amendments) as amended	
Exclusive intermediary of insurance	11 253	(the deadline for submitting the licence application or a petition for entry in the register under the applicable legal regulation is 31 December 2006)	
Subordinate intermediary of insurance	13 442		
Insurance broker – natural person	2	Insurance broker – natural person	123
Insurance broker – legal person	3	Insurance broker – legal person	193
Insurance agent – natural person	51	Insurance agent – natural person	66
Insurance agent – legal person	143	Insurance agent – legal person	52
Reinsurance intermediary	1		
Insurance intermediary from another Member State of the EU or EEC	5 224		
Reinsurance intermediary from another Member State of the EU or EEC	0		

Source: NBS – Financial Market Supervision Department

Table 2 Summary of decisions issued in connection with the performance of the activities of an investment broker for the period 2002–2006

	2002	2003	2004	2005*	2006**	Spolu
Total natural persons	23	33	44	624	104	828
– of which: licences returned	2	3	4	1	2	12
Total legal persons	9	15	11	13	15	63
– of which: licences returned	0	3	1	2	2	8
licences revoked	0	0	0	0	1	1

Notes:

* The upsurge in the number of licence holders in 2005 was affected by a change in approach of legal-person investment brokers, in which preference was given to cooperation with natural persons holding a valid licence for the performance of an investment broker's activities.

** Data for 2006 is for the period 1 January to 15 November.