

Performing The Activities Of The Commercial Investment Advisor In Austria And Of The Financial Advisor in Slovakia

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Abstract

Financial advisory means providing advice concerning various financial products such as loans, insurance and investments. The commercial investment advisor and the financial advisor develop individual analyses and concepts for their clients, in the sense of a comprehensive financial planning, about the type, construction, protection, maintenance, retention and possible uses of assets and financing. They respond to the special needs of their customers. Despite these common elements, there exist important distinctions in the regulation of the commercial investment advisor in Austria and of the financial advisor in Slovakia.

Keywords

commercial investment advisor, financial advisor, trade license, single license

JEL Classification codes: K2, K22

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Introduction

The financial market can be defined as a system of relationships, instruments, entities and institutions enabling the collection, concentration and distribution of temporarily available funds on the basis of supply and demand (Bakeš et al., 2012). The financial market can be also defined as a place where the supply of free funds in the form of savings of various economic entities meets the demand of various economic entities for these funds, which are being used for investment (Chovancová et al., 2006).

The financial market offers various products, tools and services. These are characterized by complexity and impose requirements on the knowledge of clients. Therefore, in practice, more and more natural and legal persons are using the service of commercial investment advisors and financial advisors in order to obtain information, recommendations and professional assistance in choosing the appropriate financial service. In Austria, commercial investment advisory relates to financial matters and the mediation of various financial products such as loans, insurance and investments. Commercial investment advisors work out individual analyzes and concepts for their clients. In Slovakia, financial advisory is mainly providing expert assistance, recommendations and personal financial plans related to one or more financial products. The paper deals with common elements and differences in the regulation of the commercial investment advisor and

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financial advisor. On the basis of comparative analysis the paper provides a proposal for the improving of the Slovak legislation.

1 Literature review

The activity of the commercial investment advisor involves partially the rules of administrative law. Administrative law regulates a part of the social relations in the part of public administration, namely those that arise between administrators acting through public authorities and natural persons, administrators acting through public authorities and legal entities and those arising between administrators and public authorities acting on their behalf (Vrabko et al., 2012). Administrative law is a set of public-law rules that govern the organization and the activity of public administration, including the behavior of persons in its performance (Machajová et al., 2009). Administrative law is a set of legal rules regulating the position, organization and competence of public administration (Košíčiarová, 2015).

The most basic division of administrative law is its division into the part of administrative substantive law and administrative procedural law and the general part of administrative law and a special part of administrative law (Cepek et al., 2018). Commercial investment advisory mainly includes rules of the special part of administrative law, including the area of trade licensing. There exists the right to freedom of earning activity anchored in fundamental rights, but it is subject to a legal reservation (Frölichsthal et al., 1998). The trade regulations apply to all commercial activities that are not prohibited by law (Grabler et al., 2011). The Gewerbeordnung, GewO 1994, BGBl. Nr. 194/ 1994 (hereinafter "Trade Licensing Act") builds a substantial part of public economic law and, despite many exceptions, covers the majority of the commercial economy (Diregger et al., 2010).

In Austria, the Trade Licensing Act distinguishes in terms of the prerequisites for obtaining a trade license: regulated trades, partial trades and free trades (Aigner et al., 2017). According to Article 94 of the Trade Licensing Act, the performance of the activity of a commercial investment advisor is a regulated trade. Anyone who wishes to pursue this trade must file the trade registration in the district administrative authority of the location.

The activity of the financial advisor is being regulated by the rules of the financial market law. The financial market law can be defined as a set of legal rules governing the conditions for carrying out the activities of financial intermediaries, financial instruments, the protection of the consumer to whom financial market services are provided, regulation and supervision of the financial market (Sidak et al., 2014). The financial market law is a set of legal regulations governing relations regarding the authorization of entities' entry into the financial market and the conditions for carrying out their activities, financial market instruments, securities management, including their legal records, trading of financial instruments and related information obligations of issuers and other persons, financial consumer protection, regulation and supervision of the financial market (Čunderlík et al., 2017). The determining features of relations arising under financial market law and distinguishing it from other legal relationships are:

- the object of financial market law relations is money, respectively relations arising in connection with it,
- the content of financial market law relations is built by the rights and obligations of the entities established by law or by their agreement, the content of these relationships is being property
- related, arising from the application of monetary relations (Babčák et al., 2017). On the basis of a contractual relationship for his client, the financial advisor analyzes the financial market and searches for the most suitable product and is obliged to proceed objectively (Sidak et al., 2014).

In Slovakia, the financial advisor must obtain a license to perform the activities of a financial advisor, from the National Bank of Slovakia. Financial advisory can only be provided on the basis of a written contract concluded between the financial advisor and the client (Kubincová & Leitnerová, 2015). In financial advisory, the fee for the providing of this service is paid directly to the financial advisor by the client (Čunderlík et al., 2017).

2 Methodology

In order to compare the Austrian and Slovak legal order the comparison method will be used. Comparison assumes that the objects of comparison will be placed in relation to each other by reference to the question under investigation (Kischel, 2019). An important part of the legal comparative activity is the individual comparison also called micro - comparison which deals with special legal rules and legal institutes (Kischel, 2015). The legal rules regulating commercial investment advisory in Austria and the financial advisory in Slovakia will be compared.

The rules anchoring the providing of the services of the commercial investment advisor and of the financial advisor will be analyzed. The analysis makes it possible to divide the research into individual parts, which become the subject of further research.

While comparing selected legal rules from the legal order of Austria and Slovakia, the methods of induction and deduction will be used. Induction makes it possible to derive general conclusions from empirical material on the basis of knowledge of particularities. It is a process from individual to general (from individual facts to general statements) and thus generalizations. Induction is a thought process where more general knowledge is logically derived from a more specific knowledge (i.e., individual is derived from the general knowledge). Induction leads to theoretical generalizations based on the examination of individual phenomena from practice; on the contrary, the theoretical conclusions are verified by deduction in practice (Gonda, 2012).

3 Results and discussion

The legislation of commercial investment advisory in Austria and financial advisory in Slovakia, can be defined a set of standards that have a regulatory function. In principle the regulation of the activities of the commercial investment advisor and of the financial

advisor is represented by a group of mandatory rules. The application of these mandatory rules cannot be excluded. The only exemption is when the law is expressly permitting it.

The public-law aspect of performance of commercial investment advisory and financial advisory services is manifested in relation to these service providers, particularly by the requirements and obligations imposed upon them and by the creation of derogations from the general business law.

3.1 Scope of the activity of the commercial investment advisor

The currently valid regulatory frame enables the commercial investment advisor to perform advisory and mediation. According to Article 136a Paragraph 1 of the Trade Licensing Act the activities of a commercial investment advisor are defined when it comes to advising and encompasses any advice that is related to building, securing and maintaining assets and financing. The only exception to this is the advice on financial instruments defined by Article 3 Paragraph 2 of the Wertpapieraufsichtsgesetz, WAG 2018, BGBl. I Nr. 107/2017 (hereinafter "WAG 2018"). That is subject to licensing under the WAG 2018. These financial instruments include consistently with Article 1 WAG 2018 stocks, bonds, investment and real estate funds, money market instruments and commodity derivatives. To be able to provide consulting on financial instruments, a license as an investment firm must be granted or the provision of investment services is performed in the name and on behalf of a legal entity (investment firm, investment service company, credit institution).

According to Article 136a Paragraph 1 of the Trade Licensing Act, mediation covers

- investments, with the exception of financial instruments,
- Personal loans and mortgage loans (presenting, offering and other preparatory work on loan contracts and their conclusion for the lender) and
- Life and accident insurance.

The scope of activity of the commercial investment advisor is partly overlapping with some other trade licenses, mainly: business consulting (Article 136 of the Trade Licensing Act), real estate trustee (Article 117 of the Trade Licensing Act), securities broker (Article 136b of the Trade Licensing Act), intermediaries of insurance (Article 137 of the Trade Licensing Act).

3.2 Forms of the activity of the commercial investment advisor

From the regulation it is clear that the commercial investment advisor can have different forms. Firstly, it is the commercial investment advisor (according to Article 136a Paragraph 1 of the Trade Licensing Act), secondly the commercial investment advisor as a securities broker (in accordance with Article 136a Paragraph 3 of the Trade Licensing Act in conjunction with Article 1 Number 45 WAG 2018) and thirdly the commercial investment advisor as a tied agent (in accordance with Article 136a Paragraph 8 of the

Trade Licensing Act in conjunction with Article 1 Number 44 WAG 2018). Further, on the activity of the securities broker and the tied agent is being focused.

Securities broker

The securities broker is a regulated business. The entry in the Austrian business information system is constitutive for the activity of brokering securities (Paliege – Barfuß, 2017). The securities broker must pass a proficiency test, demonstrate regular training and may work for a maximum of three investment firms or investment service companies (Brandl et al., 2018). The respective investment firm or investment service company is in any event liable for the fault of the securities broker, whom it uses to provide the investment services, regardless of whether the securities broker discloses the respective investment firm/investment service company or not.

The scope of the use of securities brokers is limited to advice and brokering in relation to transferable financial instruments and certain fund units. Investment firms or investment service companies are required to monitor the activities of the securities brokers who work for them. These entities must ensure that the securities broker, when contacting the client or before entering into transactions with the client, tells the client what he is doing and what firm or company he represents.

In Austria, investment firms or investment service companies may only use investment brokers who are entered in a public register which is kept by the Financial Market Authority (a public authority supervising banking, insurance, capital market and pension savings). The register must be updated continuously. Investment firms or investment service companies must register the securities brokers immediately and are responsible for ensuring that they are properly checked. Working as a securities broker does not constitute an employment relationship within the meaning of federal labor, social or tax law provisions.

Commercial investment advisors who act as securities brokers are not authorized to act as tied agents.

Tied agent

According to Article 1 Number 44 of the WAG 2018 a tied agent is any natural or legal person who, as a vicarious agent or otherwise under complete and unconditional liability of a single investment firm, a single investment services company or a single credit institution, performs investment services or ancillary services, accepts and transmits orders from customers via investment services or financial instruments, places financial instruments or provides the service of investment advice.

Tied agent is based on the transposition of Article 4 Paragraph 1 Number 29 of the MiFID II - directive which stipulates that the tied agent must act under the unlimited and unconditional liability of a single investment firm. The Austrian regulation differs. The variety of kinds of companies with which the tied agent can conclude a contract is higher. In addition to investment firms, also investment service companies and credit institutes may also use tied agents.

Investment services companies cannot participate in the free internal market, which is why the tied agents they use, cannot exercise their freedom of establishment and freedom to provide services.

According to the law, the tied agent is not an investment firm. The tied agent may not use other tied agents or securities brokers.

3.3 Scope of the activity of the financial advisor

In Slovakia, an entity, before filing an application, must decide whether it will perform financial intermediation or financial advisory and in which sectors of the financial market according to the Act No. 186/2009 Coll. On Financial Intermediation and Financial Advisory amending and supplementing certain acts as amended (hereinafter "Act on Financial Advisory") the activity is going to be performed. The Act on Financial Advisory differentiates sectors within which a financial advisor can operate. These are:

- capital market,
- insurance or reinsurance,
- credits and loans, including housing loans and consumer loans,
- deposit-taking,
- supplementary pension saving,
- old-age pension saving.

An important distinction in comparison with the Austrian legal order is that the activity of financial advisor is not a trade. Article 3 of the Act No. 455/1991 Coll. On Trade Licensing Entrepreneurship as amended is excluding it. The regulation of financial advisory as a trade would not be proper because it demands special supervision and a stricter legislation (Kunštáková et al., 2019). In this context, it is important to notice that it might seem that financial advisory has some common features with the trade license – "Business, organizational and economic consultants". In practice, the Act on Financial Advisory could be circumvented by providing financial advisory through this free trade license. In order to prevent the abuse of law, the Ministry of Interior of the Slovak republic has published a list of recommended denominations of free trades and the definitions of their content which states that the scope of a trade license "Business, organizational and economic consultants" does not include advisory services under the Act on Financial Advisory.

3.4 Form of financial advisory and special regulation of the single license in selected sectors

An entity entitled to perform financial advisory is a natural or legal person to whom the respective license has been granted. Unless the Act on Financial Advisory does not provide otherwise, only the financial advisor may perform financial advisory. The Act on Financial Advisory is providing otherwise, when reflecting on the single license principle. A single license or single passport is a principle applied in the EEA, where the licensed activity carried out by a subject established in one EEA country (home Member State)

can also be carried out in the territory of another EEA country (host Member State) through its unlicensed branch, provided that the subject has been granted authorization to perform this activity in the home State (Jílek, 2013). Meaning there are entities from other Member States entitled to perform financial advisory without a license from the National Bank of Slovakia. Since the creation of the internal market for financial services, the principle of a single license has been reflected in the selected legal rules, underlying the idea to remove administrative barriers and to enable business on the basis of an authorization granted by the home Member State.

In accordance with Act on Financial Advisory a financial intermediary from another Member State in the sector of insurance or reinsurance and a financial intermediary from another Member State engaged in the provision of housing loans may perform financial advisory. The activities these two categories is not connected with the filing of an application within the licensing procedure. As already mentioned there is no need for a license to perform the activities of a financial advisor. In the beginning the supervisory authority of the home Member State notifies the National Bank of Slovakia. The activity may be performed in the same scope as in the home Member State.

3.5 Distinction between advisory and mediation

In Austria, the commercial investment advisor is entitled to advisory and mediation. This is an important difference between the two legal orders. In Slovakia, the distinction of financial intermediation and financial advisory is a dominant feature of the regulation. The simultaneous conduct of financial intermediation and financial advisory is forbidden by the Act on Financial Advisory. The reason for the prohibition is a conflict of interest that could potentially arise in the simultaneous pursuit of both activities.

The source of remuneration for the financial advisor is the client according to Article 10 of the Act on Financial Advisory. The financial agent, providing financial intermediation is paid by the contractual partner – a financial institution or an independent financial agent according to Article 7, Article 8 and Article 9 of the Act on Financial Advisory. The different entity that pays remuneration for financial intermediation and financial advisory reflects the fundamental difference between the two activities. It is the diverse distribution of financial products and services by financial intermediation and by financial advisory. In this context the conflict of interests between the financial agent and the potential financial consumer can be seen as the most significant problem of financial advisory (Čunderlík et al., 2017). The financial advisor is obliged to provide an impartial analysis of a sufficient amount of financial services available according to Article 3 of the Act on Financial Advisory. The financial agent provides expert assistance, information and recommendations to the client for the purposes of finding the optimal financial product, but only from the offer of the contractors with whom cooperation is given. If both activities would have been accumulated in one entity, the impartiality of the analysis of available products could be compromised, as the recommendation to the client might favor the financial institutions providing the entity with higher remuneration. This potential conflict of interests leads to the regulatory ban of the simultaneous performance of financial intermediation and financial advisory.

As already mentioned, the key difference of the legal order in Austria in comparison with Slovak law is in the absence of the distinction between advisory and intermediation. The commercial investment advisor may perform mediation and advisory, while the financial advisor is obliged to carry out only advisory.

Conclusion

The legislation, in both countries, is represented by a set of standards that have a regulatory function and are in principle mandatory rules. The public-law aspect is manifested in relation to service providers in particular in the requirements imposed on them and the establishing of derogations from the general business law and the regulation of the obligations when performing their activity.

A key distinction between the regulation in Slovakia and Austria is the difference in the scope of business of the commercial investment advisor in Austria and of the financial advisor in Slovakia. While the commercial investment advisor is entitled to provide advisory and mediation, the financial advisor can only perform advisory.

A major difference of the regulation in Slovakia and Austria lies in the fact, that the Slovak legal order is based on a single statute. It is the Act on Financial Advisory. Before this regulation entered into force, the sphere of advisory and intermediation has been anchored in many acts. The differences in legislation created unequal conditions for the performance of advisory and intermediation, so the legislator introduced a new model of regulation which entered into force on 1 January 2010. The Act on Financial Advisory has its roots in the idea of integration of the various sectors of financial market in order to secure equal conditions for the performance of financial intermediation and financial advisory in the sectors of the financial market. In Austria, the current situation is similar to the one which existed in Slovakia until 31 December 2009. The regulation of mediation and advisory can be found in many different acts. The Austrian regulation can be an inspiration for Slovakia. Since various Austrian legal acts take into account the specialties typical for the sector in question.

An example for the need of change of Slovak regulation is the sector of the capital market. Financial advisory is being performed in this sector in accordance with the Act on Financial Advisory as it comes to obtaining of a license. As far as the rules in relation to clients are concerned, the Act No. 566/2001 Coll. On Securities and Investment Services amending and supplementing certain acts as amended (hereinafter "Securities Act") is being applied. Meaning the currently valid legislation is clearly making differences between the sectors, as the one of the capital market, is being partially regulated by the Securities Act. As the sector of capital market shows distinctions, this regulation is a logical consequence. But the original idea of the legislator concerning the creation of equal conditions in Slovakia is not fulfilled anymore as the regulation can be found in two different acts. Another argument for excluding the sector of capital market from the scope of the Act on Financial Advisory is the MiFID II – regulation which is vanishing the line between financial intermediation and financial advisory. What the Slovak legal order could derive from the Austrian is the separate regulation of financial advisory (and also financial intermediation) on the capital market. As far as the capital market is concerned, a *de lege ferenda* proposal seems appropriate. This would introduce a major change.

We suggest changing the currently valid legal frame in the way that its rules governing financial intermediation and financial advisory would be transformed into the Securities Act.

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