Switzerland

BÄR & KARRER

Peter Hsu, Daniel Flühmann and Florian Steiner
peter.hsu@baerkarrer.ch; daniel.fluehmann@baerkarrer.ch; florian.steiner@baerkarrer.ch

1. Insurance intermediation activities

1.1 Is the distribution of insurance products (hereinafter referred to as 'insurance intermediation activities' or 'insurance intermediation') limited to insurance intermediaries in your country?

Insurance intermediation within the scope of the Swiss Federal Act on Insurance Supervision ('ISA') by untied insurance intermediaries (usually insurance brokers, see 3.1 below) in Switzerland triggers a requirement to register with the Swiss Financial Market Supervisory Authority ('FINMA') (Article 43, paragraph 1, ISA). In contrast, tied insurance intermediaries (usually insurance agents, see 3.1 below) are not subject to any registration requirement in Switzerland but have a right to register with FINMA (Article 43, paragraph 2, ISA).

The term 'insurance intermediation' in Swiss insurance regulation is very broad and includes both concluding insurance contracts as well as offering insurance contracts, both in the interests of an insurance undertaking or of a (prospective) client/insured person (Article 40, ISA; see 1.2 below).

Furthermore, insurance intermediaries have certain information obligations vis-à-vis the client, irrespective of whether they are registered with FINMA or not (see 4.1). In particular, they must provide the insured with information regarding the intermediary's identity and address and disclose their contractual relationships with the insurance undertakings on whose behalf they act, as well as the names of these insurance undertakings (Article 45, ISA).

1.2 What does the term 'insurance intermediation' include? Is there any definition set forth by statutory or case law? In any case, please indicate which activities/services are included in the above definition, for example, presentation or proposal of insurance products, assistance or consultancy aimed at drafting the agreement. Are collaboration activities that relate to the administration or execution of the contracts drafted, even in the case of accidents, included in the definition? Does the drafting of contracts or insurance agreements in a collective form on behalf of insured individuals also form part of insurance intermediation activities?

The term 'insurance intermediation' in the meaning of ISA is very broad and includes both concluding insurance contracts as well as offering insurance contracts, acting either on behalf or in the interest of an insurance undertaking or on behalf or in the interest of another person (usually the prospective client/insured) (Article 40, ISA; see also 3.1 below).

An insurance intermediary 'concludes' an insurance contract in the meaning of ISA, for example, by entering into an insurance contract as the representative of one party to that contract (ie, the insured or the insurance undertaking) under a power of attorney.

The term 'offering insurance contracts' is not clearly defined by statutory and case law and is therefore subject to interpretation. Swiss legal scholars have qualified as relevant any activities that influence the client in respect of his willingness/readiness

to enter into a specific insurance contract or otherwise support the conclusion of such a contract by the client. Such activities include, in particular, advising on insurance products as well as preparatory activities such as risk analysis, tariff analysis, gathering information necessary for the drawing up of an insurance policy and preparing and passing on insurance documentation.[1] In addition, activities carried out during the term of an existing insurance contract or insurance portfolio may be considered relevant to the extent they include advice regarding the renewal or amendment of insurance contracts or of the entire portfolio.[2] As the notification and/or settlement of insurance claims to/with the relevant insurer regularly do not specifically aim at the renewal or amendment of existing insurance contracts, they should not qualify as insurance intermediation.[3]

Activities on a more general level, such as the discussion of insurance needs/requirements with a client by type or category of insurance product (as opposed to a discussion regarding specific insurance products) and also with respect to the range of required coverage should in our view not yet qualify as offering of insurance contracts.

1.3 Are insurance intermediation activities allowed as ancillary activities for other professional activities (eg, travel or rent-a-car services, etc) and to what extent? Furthermore, are there exceptions that allow actors, other than insurance intermediaries, to carry out insurance intermediation activities? Is it a matter related, for example, to the risk covered, the duration or the cost of the policy premium, etc?

In principle, any person offering or concluding insurance contracts on behalf of an insurance undertaking or another person (see 1.2) qualifies as an insurance intermediary (Article 40, ISA), irrespective of whether insurance intermediation activities are conducted as ancillary activities or on a stand-alone basis.[4] However, only so-called untied insurance intermediaries (as opposed to tied insurance intermediaries) are required to register with FINMA (Article 43, paragraph 2, ISA; see 2.1 below). Both untied and tied insurance intermediaries are subject to information obligations (Article 45, ISA; see 4.1 below).

2. Insurance intermediaries' requirements

2.1 In order to act as an insurance intermediary, is there need for an authorisation and/or to be enrolled in a register? If yes, what are the requirements to be authorised/enrolled in the register as an insurance intermediary (individual or legal entities, integrity and/or professional requirements, etc)? Briefly explain how it works.

Untied insurance intermediaries must register in the register of insurance intermediaries with FINMA (Article 43, paragraph 1, ISA). Tied insurance intermediaries are not subject to a registration requirement but have the right to register with FINMA (Article 43, paragraph 2, ISA).

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[1] BSK VAG-Alois Rimle, Art. 40 N 10; Martin Kessler, Die Stellung der gebundenen und ungebundenen Versicherungsvermittler nach Inkrafttreten des neuen VAG am 1. January 2006, Diss. Zürich 2009, N 77.

[2] BSK VAG-Alois Rimle, Art. 10 N 12; Martin Kessler, N 78 f.

[3] However, in particular the settlement of insurance claims by an insurance intermediary on behalf or in the interest of an insurance undertaking might be considered as outsourcing of an essential function of an insurance undertaking and thus require an outsourcing agreement, to be included in the regulatory business plan of the insurance undertaking, which has to be filed with FINMA (art. 4, para. 2 lit. j ISA; BSK VAG-Alois Rimle, Art. 40 N 12).

[4] Stephan Fuhrer, Schweizerisches Privatversicherungsrecht, Zürich 2011, N 7.26.

Insurance intermediaries qualify as tied if they are legally, economically or in other ways tied to an insurance undertaking, in particular if they generate, in the course of a given calendar year, more than 50 per cent of their commission volume with one or two insurance undertakings (eg, an insurance intermediary who intermediates insurance products of up to three insurance undertakings is always a tied insurance intermediary as it generates more than 50 per cent of its commission volume with one or two insurance undertakings by definition), if they have a direct or indirect participation of more than ten per cent of the equity capital in an insurance undertaking, or if they have a management function in an insurance undertaking or otherwise exercise influence on the business of an insurance undertaking (Article 183, paragraph 1 Ordinance on the Supervision of Private Insurance Companies (ISO)).

To be able to register, an insurance intermediary has to fulfil the following requirements:

- proof of sufficient professional qualifications (Article 44, paragraph 1a, ISA);
- proof of professional indemnity insurance with an annual policy limit for all damages up to at least CHF 2 million or equivalent financial security (Article 44, paragraph 1b, ISA and Article 186 of the ISO);
- capacity to act (Article 185 (lit. a), ISA);
- no criminal record involving activities incompatible with the business of an insurance intermediary (Article 185 (lit. b), ISA);
- no outstanding certificates of unpaid debts based on activities that are incompatible with the business of an insurance intermediary (Article 185 (lit. c), ISA).

Under Swiss regulations, both the insurance intermediary firm as well as the responsible individual persons working for the insurance intermediary firm are subject to registration requirement.[5] However, the insurance undertaking itself, including its directors and senior officers, is not considered an insurance intermediary regarding the intermediation of its own insurance products.[6]

2.2 In what form can anyone access and verify the registration/authorisation or verify the fact that the insurance intermediary is a professional (eg, via the web)?

The register maintained by FINMA can be accessed online (Article 42, paragraph 2, ISA and Article 188, ISO).[7] Tied insurance intermediaries have the right to register but are not subject to a registration requirement (Article 43, paragraph 2, ISA). It is therefore possible for tied insurance intermediaries not to be registered in the register of insurance intermediaries even though they are allowed to conduct insurance intermediation activities.

2.3 Are insurance intermediaries with a registered office in another country allowed to operate in your country and how (eg, under the right of establishment or freedom to provide services in your country, as in the EU)? If yes under which conditions? In such a case, are they bound by the same obligations as the insurance intermediaries with registered office in your country? Please describe.

Registration requirements for insurance intermediation activities of untied insurance intermediaries in Switzerland (see 2.1) can be triggered irrespective of whether the relevant insurance intermediary has its registered office in Switzerland or in another

[5] BSK VAG-Alois Rimle, Art. 40 N 14.

[6] BSK VAG-Alois Rimle, Art. 40 N 14.

[7] http://register.vermittleraufsicht.ch/search.aspx?lng=en (last accessed 17 July 2015).

country.[8] In addition, the place where the insurance intermediation activity is (physically) conducted is not relevant either for the determination of whether such activity is relevant under Swiss regulations. Rather, one has to look at the products that the insurance intermediary plans to offer to prospective clients.

Where insurance products of foreign domiciled insurance undertakings are to be intermediated (and the insurance product is within the scope of ISA), a registration requirement applies, in principle, if: (i) insurance intermediation activities are conducted towards a natural person or a legal entity domiciled in Switzerland as the policyholder or as the insured; or (ii) insurance intermediation activities are conducted regarding insurance coverage of risks in connection with assets located in Switzerland (Article 1, paragraphs 1 and 3, ISO). An insurance intermediary may, in any case, only intermediate insurance products that, from a Swiss regulatory perspective, an insurance undertaking is permitted to write.

The intermediation of products of insurance undertakings domiciled in Switzerland, in principle, always triggers a registration requirement. As a general principle, insurance intermediation is not subject to a Swiss registration requirement if it refers to any insurance business outside the scope of ISA (eg, *de minimis* insurance activities below the materiality threshold of ISA or reinsurance business of foreign reinsurers cross-border into Switzerland).[9]

As Switzerland is not a member of the European Union, the right of establishment and the freedom to provide services as outlined in the Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation are not applicable. Furthermore, the treaty between the Swiss Confederation and the European Community regarding the free movement of persons does not provide for any facilitation regarding the registration requirement for insurance intermediaries. Currently, Switzerland only maintains a treaty on this matter with the Principality of Liechtenstein. Under this treaty, in principle, insurance intermediaries only have to register with the relevant supervisory authority of one country in order to be permitted to engage in insurance intermediation activities in the other country territory.[10]

3. Different types of insurance intermediaries

3.1 Please list the different types of insurance intermediaries acting in your country such as agents, brokers, banks, financial intermediaries or financial advisers.

Swiss insurance supervisory law, in principle, only differentiates between tied insurance intermediaries (Article 43, paragraph 2, ISA) and untied insurance intermediaries (Article 43, paragraph 1, ISA).

Tied insurance intermediaries are customarily described as insurance agents, and untied insurance intermediaries as insurance brokers,[11] referring to the typical set-up of the contractual relationship between the respective insurance intermediaries and the insurance undertakings and/or the insured (see 3.4.1.3 and 3.4.2.1). However, the contractual categorisations based on Swiss private law do not always correspond with the qualifications according to Swiss insurance supervisory law. Consequently, some insurance agents qualify as untied insurance intermediaries and some insurance

[8] BSK VAG-Helmut Heiss/Ulrike Mönnich, Art. 2 N 120.

[9] BSK VAG-Helmut Heiss/Ulrike Mönnich, Art. 2 N 103 and 110; BSK VAG-Alois Rimle, Art. 41 N 10; Sybille Käser/Helmut Studer, Versicherungsvermittlung, in: Waldmeier (Hrsg.), Versicherungsaufsicht, Zürich/Basel/Genf 2007, p. 293.

[10] Treaty between the Swiss Confederation and the Principality of Liechtenstein regarding direct insurance and insurance intermediation, SR 0.961.514.

[11] BSK VAG- Helmut Heiss/Ulrike Mönnich, Art. 2 N 120.

brokers qualify as tied insurance intermediaries.[12] Insurance intermediaries may also be active in the financial market in other functions (eg, as banks, financial intermediaries or advisers). However, this does not, in principle, affect their qualification under Swiss insurance supervisory law.

Please note that a bill for a new Financial Services Act ('FFSA') is expected to be debated in Swiss Federal Parliament in the course of 2015 and might enter into force as early as 2017 or 2018. Under the current draft FFSA, the existing register of insurance intermediaries would be combined with a new register for 'client advisors' in the financial sector and, in addition, not only untied but also tied insurance intermediaries would be required to register. As a consequence, the distinction between tied and untied insurance intermediaries would no longer be significant with regard to the registration requirement. Furthermore, under the current draft FFSA, insurance intermediaries would only be allowed to designate themselves as 'independent' if (i) they consider a sufficient range of insurance products offered on the market; and (ii) do not accept any benefits in association with the provision of third-party services, or, if they do, pass them on to the clients (Article 9, FFSA *per analogiam*).[13]

3.2 Do insurance intermediaries need to enter into a written contract with the insurers (or receive a mandate from the insurers)?

In principle, neither Swiss insurance regulation nor mandatory civil law oblige insurance intermediaries to enter into a written contract with the insurer. The Code of Conduct of the Swiss Insurance Brokers Association (SIBA) recommends but does not require insurance brokers to enter into a written contract with the insurance undertaking.[14] In any case, it is customary to do so. In addition, for example, where the insurance intermediary acts as an insurance agent, it may, depending on the legal type of contractual relationship between the insurance intermediary and the insurance undertaking, be required to enter into a written contract, as certain types of agreements are only valid when executed in writing.[15]

3.3 Can an insurance intermediary enter into a contract with the insurers (or receive a mandate from the insurer) and in turn enter into one or more agreements with other insurance intermediaries (the so-called horizontal distribution)?

Yes, it is in principle possible for an insurance intermediary to enter into a contract with the insurer and in turn enter into one or more agreements with other insurance intermediaries.

However, the main intermediary (ie, the one in a direct relationship with the insurance undertaking) should ensure that the other intermediaries with whom he enters into agreements comply with registration requirements and other regulatory duties, if applicable.

3.4 The insurance intermediaries more in detail:

3.4.1 *The agent*

[12] Stephan Fuhrer, N 7.9.

[13] Federal Department of Finance, Explanatory Report of 25 June 2014 on the consultation draft bill of the Financial Services Act and on the Federal Act on Financial Institutions Act, p. 119, et seq.

[14] Swiss Insurance Brokers Association, Code of Conduct as of 29 October 2008, as amended 21 January 2015, N 48.

[15] This applies, for example, to certain specifics of an agreement when the contractual relationship is qualified as a commercial travellers' contract (article 347a, CO).

3.4.1.1 Does the role of insurance agent exist in your country? If yes, describe the agent's functions.

The insurance agent (primarily) maintains a contractual relationship with an insurance undertaking, his task being to intermediate insurance products in the interest of the insurance undertaking to prospective policyholders.[16]

3.4.1.2 In particular, does an agent act on behalf of the insurer or the insured? Who pays the agent's remuneration? To what kind of remuneration is the agent entitled?

An insurance agent is usually a tied insurance intermediary acting in the interests and/or on behalf of the insurance undertaking(s) with which he maintains contractual relationships. His remuneration is paid by the insurance undertaking as specified in a contractual arrangement between the insurance agent and the insurance undertaking.

3.4.1.3 If an agent acts on behalf of the insurer, describe the type of work relationship with the insurer (eg, subordinate, para-subordinate or freelance, self-employed, etc). Does the 'principal-agent model' exist, that is, is one appointed by the insurer to manage a particular branch or subsidiary?

Typically, the contractual relationship between the insurance agent and the insurance undertaking qualifies either as an employment contract (Article 319 et seq. of the Swiss Code of Obligations (the 'CO')), as a commercial travellers' contract (Article 347 et seq., CO), as a mandate agreement (Article 394 et seq., CO) or as an agency agreement (Article 418 et seq., CO) if the contractual arrangement between the insurance agent and the insurance undertaking is structured as an employment contract or as a commercial travellers' contract, the insurance agent is subordinated to the instruction authority of the relevant insurance undertaking that is the employer.[17] If the contractual arrangement is structured as a mandate agreement or as an agency agreement, the relationship is one between a principal and an agent.[18] However, we would expect an employment relationship with the relevant person where the management of a branch or subsidiary of an insurance undertaking is concerned.

3.4.1.4 What type of organisation does the agent have? Can he have staff working for him (eg, sub-agents)?

The insurance agent is not required by law to establish a particular type of organisation. For instance, he or she can work alone or, alternatively, have staff working for him or her, for example, in an employment relationship, in a commercial travellers' contract relationship, in a mandate relationship, or in an agency relationship. While employees and commercial travellers are embedded in the organisation of the insurance agent, we would expect sub-agents to set up their own organisation.

3.4.1.5 Is the relationship between the insurer and the agent regulated by a collective bargaining agreement? If yes, what does it mainly cover? Can the relationship be exclusive to a particular area? Is the remuneration established by the collective bargaining agreement? Can the provisions be waived by the parties' mutual agreement?

[16] Martin Kessler, N 112 ff.
[17] CHK-Frank Emmel, Art. 319 OR N 6.
[18] Stephan Fuhrer, N 7.53.

The relationship between the insurer and the agent is, as a general matter, not regulated by any collective bargaining agreement in Switzerland. However, there is an agreement between the Swiss Insurance Association and the Swiss Commercial Association regarding basic employment terms for insurance sales representatives.

3.4.1.6 Does the termination of the work relationship between the agent and insurer provide for the agent's obligation to return the portfolio of contracts? In such a case would the agent be entitled to an indemnity?

Swiss law does not address these questions specifically with regard to insurance agents. Consequently, this has to be reviewed from the perspective of the general provisions of Swiss civil law regarding commercial travellers' contracts, employment agreements, mandate agreements and agency relationships (depending on how the contract is structured).

The portfolio of insurance contracts, in principle, belongs to the relevant insurance undertaking, even after termination of the professional relationship between the agent and the insurance undertaking. However, in the case of an agency relationship, the agent may have a claim for adequate compensation if the agent's activities have resulted in a substantial expansion of the principal's clientele and considerable benefits accrue even after the end of the agency relationship to the principal from his business relations with clients acquired by the agent (Article 419u, CO).

3.4.2 *The broker*

3.4.2.1 Please describe the broker's services. In general terms, do the services consist of intermediation or are they similar to consultancy/advisory activities? Is the broker an independent actor?

The term 'insurance broker' is customarily used to refer to an insurance intermediary acting (primarily) in the interests and/or on behalf of the insured, but is defined in neither Swiss private law nor in Swiss insurance supervisory law.[19] Typically, an insurance broker not only engages in the initial insurance intermediation activities (see 1.2), but often also provides additional services, for example:

- monitoring and administration of the insured's insurance portfolio;
- advising the insured regarding the adjustment of the insurance portfolio in the case of changing market situations;
- supporting the insured regarding claims settlement.[20]

3.4.2.2 Who pays for the broker's remuneration (please specify case by case for the different services, if any)? Is the broker allowed to retrocede a portion of his remuneration to the insurer or to the insured?

Typically, an insurance broker maintains a contractual relationship with both the insured (brokerage agreement) and the insurance undertaking (cooperation agreement). Under such agreements, it is typically provided that the insurance

[19] Christoph Graber, Diener zweier Herren?, in: Luterbacher (Hrsg.), Versicherungen und Broker, Versicherung in Wissenschaft und Praxis, Bd. 10, Zürich/St. Gallen 2015, p. 2.

[20] Peter Hsu, Versicherungsmakler – insbesondere ihre Entschädigung, in: Schnyder (Hrsg.), Gesamtrevision des Versicherungsvertragsgesetzes: Erste Analyse der bundesrätlichen Botschaft, Zürich 2012, p. 144.

broker receives his remuneration from the insurance undertaking, not from the insured.[21] The insurance broker is in such cases usually entitled to commissions, depending, for example, on the amount of the insurance premiums paid by the insured to the insurance undertaking.[22]

However, it has to be noted that in the cases where the insurance broker receives his remuneration from the insurance undertaking, the remuneration of the insurance broker is typically already included in the insurance premiums owed by the insured to the insurance undertaking. Therefore, from an economic perspective, the insurance broker is ultimately paid by the insured.[23]

In a recent decision of the cantonal court of Basel-Stadt, the court decided that insurance broker commissions paid by an insurance undertaking to the insurance broker must be passed on by the insurance broker to the insured unless it has obtained an informed waiver by the client. Such a waiver requires, in particular, transparent disclosure of the calculation parameters of the expected insurance broker commissions. The court based its reasoning on the case law of the Swiss Federal Supreme Court regarding retrocessions (ie, inducements, distribution fees and similar arrangements) received by asset managers and banks in the context of asset management and asset advisory services. The decision of the cantonal court of Basel-Stadt has not yet become legally effective and potential future developments in this regard might need to be considered.

The parties can agree on other forms of remuneration of the insurance broker as well, for example, on a 'net quoting system' in which the insurance broker receives his remuneration from the insured directly.[24]

Under Swiss law, the insurance broker is, in principle, allowed to pass on a portion of his remuneration to the insurer or to the insured. However, some restrictions must be taken into consideration. First, the contract entitling the insurance broker to the commissions may include a contractual prohibition to pass on commissions to third parties. Furthermore, it is one of FINMA's objectives to protect insured persons from the abusive activities of insurers and insurance intermediaries (Article 46, paragraph 1 (lit. f), ISA), whereas substantially unequal treatment or discrimination of individual insured persons or beneficiaries without any legal or insurance related justification is deemed abusive (Article 117, paragraph 2, ISO). Consequently, if due to the incentive of a commission, an insured person is treated as substantially unequal to other insured persons, the granting of such commission would contravene basic principles of insurance supervisory law and would therefore not be admissible. However, if a rebate of part of the commission only leads to minor preferences in favour of certain insured persons, it does not qualify as abusive and is thus, in principle, allowed.[25]

3.4.3 *Banks, financial intermediaries, financial advisers and others allowed to act as insurance intermediaries*

3.4.3.1 Can banks, financial intermediaries and/or financial advisers act as insurance intermediaries?

[21] Markus Müller-Chen/Felix Uhlmann, Zusammenarbeitsverträge zwischen Versicherern und Brokern, HAVE 2005, p. 224 et seq.

[22] Markus Müller-Chen/Felix Uhlmann, p. 226.

[23] Swiss Insurance Brokers Association (SIBA), Berufsbild Schweiz Versicherungsbroker und Code of Conduct vom 29. Oktober 2008 mit Anpassungen vom 21. January 2015, p. 13.

[24] Federal Council of the Swiss Confederation, Dispatch on the total revision of the Insurance Contract Act of 7 September 2011, BBl 2011, p. 7720.

[25] BSK VAG-Shelby du Pasquier/Valérie Menoud, Art. 46 N 53.

Banks, financial intermediaries or financial advisers can, in principle, act as insurance intermediaries if they comply with the registration requirement when acting as untied insurance intermediaries (Article 43, paragraph 1, ISA; see 2.1 above) as well as with the other regulatory requirements (eg, information duty).

3.4.3.2 Please define a financial intermediary. Are there particular requisites for the profession of financial intermediary? Does the financial intermediary have to be enrolled in another register (eg, a register of financial intermediaries)?

The term 'financial intermediary' is of importance, for example, in the context of Swiss anti-money laundering regulation. Under Article 2, paragraph 2 of the Swiss Federal Act on Combatting Money Laundering and Terrorist Financing in the Financial Sector (Anti-Money Laundering Act; 'AMLA') the following are deemed to be financial intermediaries:

a) banks as defined in the Banking Act of 8 November 1934;
b) fund management companies, provided they manage share accounts or themselves distribute shares in collective investment schemes;
c) investment companies with variable capital, limited partnerships for collective investment, investment companies with fixed capital and asset managers within the meaning of the Collective Investment Schemes Act of 23 June 2006, provided they themselves distribute shares in collective investment schemes;
d) insurance institutions as defined in ISA that write direct life insurance or offer or distribute shares in collective investment schemes;
e) securities dealers as defined in the Stock Exchange Act of 24 March 1995;
f) casinos as defined in the Gambling Act of 18 December 1998.

Furthermore, in addition to these per se financial intermediaries (ie, financial intermediaries that qualify as such based on their regulatory status), financial intermediaries are also persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets (Article 2, paragraph 3, AMLA); they include in particular persons who:

a) carry out credit transactions (in particular in relation to consumer loans or mortgages, factoring, commercial financing or financial leasing);
b) provide services related to payment transactions, in particular by carrying out electronic transfers on behalf of other persons, or who issue or manage means of payment such as credit cards and travellers' cheques;
c) trade for their own account or for the account of others in banknotes and coins, money market instruments, foreign exchange, precious metals, commodities and securities (stocks and shares and value rights) as well as their derivatives;
d) manage assets;
e) make investments as investment advisers;
f) hold securities on deposit or manage securities.

Financial intermediaries within the meaning of Article 2, paragraph 3 of AMLA are obliged to either: (i) join a recognised self-regulatory organisation for anti-money laundering purposes; or (ii) must obtain a license from FINMA (Article 14, paragraph 1, AMLA).

3.4.3.3 Please define a financial adviser. Are there particular requisites for the profession of financial adviser? Does the financial adviser have to be enrolled in another register (eg, a register of financial advisers)?

The term 'financial adviser' is not specifically defined in Swiss civil law or financial market regulation. However, a financial adviser may be likened to an investment adviser providing investment advice to clients, it being understood that the decision-making power regarding proposed investments remains with the client. An investment adviser does not have to be enrolled in a register and is not subject to anti-money laundering regulation provided that his activity is limited to mere advice, meaning, in particular, that he cannot hold a power of attorney to manage the assets on behalf of the client.

3.4.3.4 Can financial intermediaries and/or financial advisers distribute any insurance and/or financial products? If yes, under what conditions or with what limitations?

Financial intermediaries and financial advisers can, in principle, act as insurance intermediaries if they comply with the registration requirement when acting as untied insurance intermediaries (Article 43, paragraph 1, ISA; see 2.1 above) as well as with the other regulatory requirements (eg, information duty).

The distribution of financial products might require, for example, a licence as distributor of collective investment schemes (Article 13 of the Swiss Federal Act on Collective Investment Schemes) or a securities dealer licence (Article 10 of the Swiss Federal Act on Stock Exchange and Securities Trading), depending on the type of the relevant financial product.

3.4.3.5 With reference to insurance intermediaries other than agents, brokers, banks, financial intermediaries and financial advisers, as indicated under question 2.1 above (if any), please describe what kind of products they can distribute and under what conditions.

Any person can, in principle, act as an insurance intermediary and distribute insurance products if the relevant person complies with the registration requirement when acting as an untied insurance intermediary (Article 43, paragraph 1, ISA; see 2.1 above) as well as with the other regulatory requirements (eg, information duty).

4. Rules of conduct and responsibilities

4.1 Are there rules of conduct that insurance intermediaries should comply with (eg, duties in relation to the obligation of utmost care, correctness, utmost good faith, information, adequacy, transparency, conflict of interests, filing of documentation, separate accounting or other accounting obligations)?
Please describe the above duties, specifying if they apply to all the different insurance intermediaries (eg, agents, brokers, banks, financial intermediaries, financial advisers, etc) and whether the content differs – with particular reference to responsibility – according to the type of actor/activity and person (insurer or insured) receiving the activity.

The rules of conduct for insurance intermediaries towards (prospective) policyholders/insured persons stem in particular from the contractual relationship between the involved parties. As regards insurance brokers, their contractual relationship with the policyholder is typically governed by mandate law.[26] The insurance broker must, therefore, apply a high standard of professional care in providing his services towards the policyholder and is, furthermore, subject to a duty of loyalty towards the policyholder. Conflicts of interest must be avoided. In particular, the insurance broker has to analyse and clarify the background and insurance needs

[26] Stephan Fuhrer, N 7.77.

of the insured to be able to advise him or her in the best way possible.[27] An insurance broker is liable towards the policyholder for the faithful performance of its obligations.[28] The liability of the insurance broker towards the insurance undertaking is usually addressed in the relevant cooperation agreement and, if not, subject to the general rules of statutory law as applicable to the agreement.

Insurance agents, on the other hand, do not usually maintain a contractual relationship with the insured, as they act as representatives or auxiliary persons of the insurance undertaking.[29] However, certain rules of conduct result from their contractual relationship with the relevant insurance undertaking. If an insurance agent is employed by the insurance undertaking or if he or she is active under a commercial travellers' contract in the meaning of Article 347 of the CO, the insurance agent must, according to the relevant rules of Swiss contract law, carry out the work assigned to him with due care and loyally safeguard the insurance undertaking's legitimate interests. He is, in principle, liable to the insurance undertaking for any loss or damage he causes, whether wilfully or by negligence.[30] If the contractual relationship between the insurance agent and the insurance undertaking qualifies as a mandate agreement or as an agency agreement in the meaning of Article 418 of the CO, the insurance agent must apply a high standard of professional care in providing his services towards the insurance undertaking and is furthermore subject to a duty of loyalty towards the insurance undertaking. Conflicts of interest must be avoided. The insurance agent is, in this case, liable to the insurance undertaking for the faithful performance of his or her obligations.[31] If the insurance agent acts as a representative or auxiliary person of the insurance undertaking but without having been duly authorised as such by the insurance undertaking, the insurance agent is, in principle, liable towards the insured for any damage unless the insurance agent proves that the insured knew or should have known that he lacked the proper authority (Article 39, CO).[32]

The ISA further provides that all insurance intermediaries, irrespective of whether they qualify as insurance brokers or as insurance agents, must provide the insured with the following information upon first contact:

a) the intermediary's identity and address;
b) whether the insurance coverage in a specific insurance segment is provided by one or several insurance undertakings;
c) their contractual relationships with the insurance undertakings on whose behalf they act, as well as the names of these insurance undertakings;
d) the person liable for negligence, mistakes or incorrect advice in connection with insurance intermediation activities;
e) the processing of personal data, in particular its purpose, the scope and recipient(s) of the data as well as data retention practice (Article 45, paragraph 1, ISA). The information according to Article 45, paragraph 1 of ISA has to be handed over to the insured on a durable medium (eg, a printout) that is accessible for the insured (Article 45, paragraph 2, ISA).

Furthermore, industry organisations have laid down rules of conduct as well, for example, the Swiss Insurance Brokers Association (SIBA)[33] and the Swiss

27 Stephan Fuhrer, N 7.77.
28 Art. 398 CO.
29 Stephan Fuhrer, N 7.39.
30 Art. 321e CO.
31 Art. 398, CO.
32 Stephan Fuhrer, N 7.71.
33 SIBA, Berufsbild Schweizer Versicherungsbroker und Code of Conduct vom 29. Oktober 2008 mit Anpassungen vom 21. January 2015.

Association of General Insurance Agents[34]. Even though such rules of conduct only qualify as 'soft law', they are often referred to by courts as a guidance when interpreting duties laid down in Swiss private law.

4.2 Does the insurance intermediary represent the insurer? By way of example, is the agent also the insurer's representative vis-à-vis the customer, and if so, does this also apply during trial before a court? Is there a matter of imputation of knowledge? What happens when a broker has information on matters relevant to the insurer's decision to insure which the broker fails to disclose to the insurer? Is the insured deemed to have breached its duty of disclosure in such circumstances? In which cases? Can the insurance intermediary be accountable for the contracts he executed on behalf of the insurer?

An insurance agent regularly acts for the insurance undertaking as representative or as an auxiliary person.[35] He can represent the insurance undertaking according to the terms of the relevant agreement with and power of attorney granted by the insurance undertaking.[36] The knowledge of the insurance agent is, in principle, attributed to the insurance undertaking.[37] Even if the insurance agent fails to disclose information to the insurance undertaking, the insured bears no additional disclosure obligations (except in exceptional cases, eg, a conspiracy with the insurance agent to the detriment of the insurance undertaking).[38]

An insurance broker, on the other hand, acts in the interests and/or on behalf of the insured (although an insurance broker normally maintains, in addition, a cooperation agreement with the insurance undertaking). His knowledge is, in principle, attributed to the insured,[39] not to the insurance undertaking. In particular, prior to the conclusion of the insurance contract, both the insurance broker (as the representative of the insured) and the insured must disclose to the insurance undertaking any fact known to them that is material to the risk to be insured.[40] If the broker fails to disclose such information to the insurance undertaking, the insurance undertaking is, in principle, entitled to terminate the insurance contract within four weeks upon gaining knowledge of the fact not or incorrectly disclosed.[41]

The insurance agent is, in principle, only accountable towards the insurance undertaking for the insurance contracts he executed on behalf of the latter, since he only maintains a contractual relationship with the insurance undertaking. Such liability is subject to the qualification of the relevant type of contractual relationship (eg, employment contract, commercial travellers' contract, mandate or agency contract).[42]

4.3 Is the insurer jointly liable for damages caused by the insurance intermediary, appointed by the same, when executing intermediary activities? Who is liable vis-à-vis the insured person? Is it always the intermediary or the insurer?

In terms of contractual liability, if an insurance agent acts as an auxiliary person within the meaning of Article 101 of the CO and the policyholder, as is normally the case, only maintains a contractual relationship with the insurance undertaking, only the

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34 Schweizerischer Verband der Versicherungs-Generalagenten SVVG, Standesregeln 2015.

35 Stephan Fuhrer, N 7.39.

36 Stephan Fuhrer, N 7.43.

37 Art. 34 Insurance Contract Act ('ICA').

38 Swiss Federal Supreme Court Decision 96 II 204, E. 6.

39 Art. 5, para. 1 ICA; Christoph Graber, p. 12 ff.

40 Art. 5, para. 1 ICA.

41 Decision of the Swiss Federal Supreme Court of 30 September 2005, 5C.61/2005, E. 3.4.

42 Stephan Fuhrer, N 7.71.

insurance undertaking is, in principle, liable for damages caused by the insurance agent (if the requirements of liability are fulfilled; Article 34, ICA).[43]

In the case of damages caused by an insurance broker, in principle only the broker and not the insurance undertaking is liable vis-à-vis the policyholder.

4.4 Are there particular regulations or specific forms of compensation for damages caused to the insured person?

The policyholder is usually compensated for the damages by payment of money. Punitive damages are inadmissible.

5. Supervision and sanctions

5.1 Regardless of the requirement of an authorisation and/or enrolment, are insurance intermediaries subject to the control of supervisory bodies? Does the supervisory body have powers/duties of prudential supervision on the insurance intermediary's activities, and if so, in what way does it act?

FINMA does not exercise prudential supervision over insurance intermediaries, even if they are registered, and, in principle, only intervenes in cases of abuse to the detriment of insured persons.[44] However, FINMA can revoke the registration of a registered insurance intermediary if it no longer fulfils the registration requirements or if it seriously violates regulatory provisions (Article 37, paragraph 1 of the Federal Act on the Swiss Financial Market Supervisory Authority ('FINMASA').

Furthermore, FINMA can initiate regulatory enforcement procedures and apply protective measures or sanctions under Article 29 et seq. of FINMASA. The protective measures or sanctions may include, for example:

a) a reprimand in a declaratory decree (Article 32, FINMASA);
b) specific orders to restore compliance with and preclude further breaches of the law or regulation (Article 31, FINMASA);
c) application of an industry ban for up to five years on individuals acting in a senior function at a supervised institution (Article 33, FINMASA);
d) publication of the supervisory decree (Article 34, FINMASA);
e) disgorgement of illegally generated profits and avoided costs (Article 35, FINMASA)[45];
f) specific orders to limit or terminate certain business activities;
g) revocation of the registration in severe cases (Article 37, FINMASA).

The ISA and the FINMASA also provide for the following criminal sanctions that are investigated by prosecutors and sentenced by criminal courts:

a) anyone who wilfully carries out an activity requiring a licence, recognition, or registration under Swiss financial market laws without first obtaining a licence, recognition or registration is liable to a custodial sentence of up to three years or to a monetary penalty (Article 44, paragraph 1, FINMASA);
b) persons acting negligently are liable to a fine of up to CHF 250,000 (Article 44, paragraph 2, FINMASA).

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43 Stephan Fuhrer, N 7.67 ff. The insurance agent, however, may be liable towards the insured due to illicit actions in the meaning of article 41 et seq. of the CO (as opposed to contractual liability).

44 Explanatory report of 25 June 2014 on the Financial Services Act, p. 121.

45 FINMA, in principle, does not have the competence to impose monetary fines. However, the possibility of the disgorgement of illegally generated profits and avoided costs under article 35 of FINMASA can be a very effective alternative measure.

5.2 Are there fines for violations of the insurance intermediaries' obligations? If yes, please describe.

Insurance intermediaries that intentionally conclude or broker insurance contracts on behalf of an insurance undertaking that is not licensed to conduct insurance activities in Switzerland are liable to imprisonment of up to three years or a monetary penalty. In cases of negligence, a fine of up to CHF 250,000 can be imposed (Article 87, paragraphs 1a and 2, ISA).

Insurance intermediaries violating a disclosure obligation towards the insured under Article 45 of the ISA are liable to a fine of:

a) up to CHF 500,000 in cases of wrongful intent; and
b) up to CHF 150,000 in cases of negligence (Article 86, paragraphs 1e and 2, ISA).

5.3 Do sanctions also apply to foreign intermediaries who operate in your country?

Yes. The application of sanctions to insurance intermediaries does, in principle, not depend on the place of domicile of such insurance intermediaries.

5.4 Is there a consultation procedure with the insurance intermediary before the fine is applied?

Neither ISA nor FINMASA explicitly provide for a consultation procedure before a sanction is applied. However, the right to be heard as set out in Article 29, paragraph 2 of the Swiss Constitution and Article 6, paragraph 1 of the European Convention on Human Rights assures the consultation of the insurance intermediary by FINMA or a court prior to the application of a sanction.

5.5 Could the application of more fines, or the breach of particular regulations, result in the revocation of the authorisation, or in the intermediary being struck off the register (if any), or in the prohibition to act as an insurance intermediary? If so, which are the most relevant circumstances?

Yes. FINMA may revoke the registration of an insurance intermediary (Article 37, FINMASA) and/or ban individuals responsible for serious violations of supervisory law from acting in a senior function at a supervised institution for up to five years (Article 33, FINMASA). In particular, FINMA might revoke the registration of an insurance intermediary if the latter has been convicted for a criminal act incompatible with the business of an insurance intermediary. However, these sanctions are only applied to insurance intermediaries in severe cases.