

Newsletter No.

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Client Alert: Swiss Federal Supreme Court Clarifies Retrocessions in Execution-Only Relationships — No Restitution Absent Conflicts of Interest

In Decision 4A_149/2025 of 12 January 2026, the Swiss Federal Supreme Court (*La première Cour de droit civil*) held that distribution commissions (*Vertriebsentschädigungen, frais de vente* or more generally *retrocessions*) received in the context of a pure execution only relationship are not subject to restitution under Swiss civil law (art. 400 para. 1 of the Swiss Code of Obligations (CO)), provided there is no risk of conflict of interest and the remuneration is not intrinsically linked to the mandate. In light of this conclusion, the Swiss Federal Supreme Court found it unnecessary to even examine the validity of any waiver in the case at hand. The decision aligns the civil law analysis with the conflicts-based approach reflected in prior Swiss Federal Supreme Court jurisprudence and the prudential framework of the Swiss Financial Services Act (FinSA), which focuses on identifying and addressing conflicts of interest (notably art. 26 FinSA).



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A. The Case and its Outcome

The case concerned a bank-client relationship characterised as a simple account/custody account relationship, in which the bank undertook solely to execute the client's individual investment instructions without providing any advisory or discretionary services (execution-only). In the context of such execution-only relationships, there is no duty to safeguard the client's interests or to inform the client beyond the mere execution of orders. The Swiss Federal Supreme Court held that given the execution-only setting and the client's autonomous decisions, the retrocessions at issue were not capable of creating a potential conflict of interest or being intrinsically linked to the execution mandate and were therefore not subject to restitution under art. 400 para. 1 CO.

B. Legal Landscape Prior to the Decision

Swiss legal doctrine on retrocessions in execution-only settings was divided into two main camps. Part of legal scholars opposed a restitution duty, arguing that in circumstances where the client is the sole decision-maker with regard to investments and the bank possesses no discretion or advisory function, any potential of conflicts of interest is excluded. These authors further noted sectoral regulation and characterised certain payments as distribution commissions rather than retrocessions. The opposing camp favoured restitution by applying mandate rules via art. 425 para. 2 CO. It emphasised that art. 400 CO serves an attribution and non-enrichment function. They considered the intrinsic link, where benefits arise from the position in the commercial relationship, to be sufficient to give rise to the restitution obligation and flagged latent conflict of interest risks, including platform or broker selection and practices like front or parallel running.

As a result, several cantonal courts – including the Commercial Court of the

Canton of Zurich – had ruled that financial intermediaries are subject to restitution obligations in the context of execution only relationships. However, prior to its latest Decision 4A_149/2025, the Swiss Federal Supreme Court had not decided on the question of restitution obligations in execution-only mandates.

C. Holding and Clarification in Decision 4A_149/2025

The Swiss Federal Supreme Court has now held that, in the case of a pure execution-only relationship, retrocessions received by the bank were not capable of giving rise to a conflict of interest and thus were not intrinsically linked to the performance of the mandate. Therefore, they were not subject to restitution under art. 400 para. 1 CO. The Swiss Federal Supreme Court reasoned that in execution-only mandates the bank has no margin of maneuver, provides no advice and merely executes client orders. Accordingly, the receipt and amount of retrocessions depended solely on the client's decisions to place orders to buy particular financial instruments, and not on any conduct by the bank. In the absence of a risk of conflicts of interest, the intrinsic link required by art. 400 para. 1 CO is not given.

The Swiss Federal Supreme Court has explicitly noted that prior jurisprudence on restitution of retrocessions concerned asset management mandates and had left the execution-only question undecided. It resolved this uncertainty by anchoring the analysis in the existence and prevention of a conflict of interest as the central test. In other words, the Swiss Federal Supreme Court distilled from prior case law that the existence and prevention of conflicts of interest are the central criterion for the intrinsic link under art. 400 para. 1 CO and that enrichment alone does not suffice.

The Swiss Federal Supreme Court reasoned that, where retrocessions do not depend on the bank's conduct, but

solely on the investor's autonomous decisions to place specific orders and purchase specific financial instruments, it cannot be said that the financial intermediary was influenced by its own pecuniary interests. In such circumstances, there is no risk of being induced to neglect the client's interests, and there is no intrinsic link between the commissions and the mandate in the sense of art. 400 para. 1 CO.

The Swiss Federal Supreme Court further noted that there was no indication that the bank chose among platforms or resorted to external brokers in a manner that would create a risk of conflicts of interest, and it remarked that risks such as front-running or parallel-running, though inherent in the sector, are independent of the retrocessions issue addressed. The client was informed of the order of magnitude of retrocessions via the bank's general terms and conditions and remained free to compare offers, which supported the absence of a risk of conflicts of interest in the case at hand.

D. Waiver: Role and Consequences

Given the Swiss Federal Supreme Court's conclusion that there was no conflict of interest (and no related risk) and intrinsic link in the sense of art. 400 para. 1 CO, it expressly declined to rule on the grievances relating to the validity of any waiver in the civil proceedings.

This has significant practical implications: In execution-only relationships, where there is no risk of conflicts of interests, there is no restitution of retrocessions under art. 400 para. 1 CO, irrespective of whether the client had validly waived the restitution of retrocessions. However, in cases where there is a risk of a conflict of interest, a valid waiver of the restitution of retrocessions (based on informed consent) remains essential. Absent such waiver, the bank would be required to

restitute retrocessions.

In other words: If there is a risk of conflicts of interest and no valid waiver exists, the patrimonial advantage is more likely to be considered intrinsically linked to the mandate, thereby creating a restitution exposure in line with the conflicts-based criterion recognized by the Swiss Federal Supreme Court.

E. Disclosure of possible Retrocessions: Role and Importance

For a client to validly waive its right to restitution of retrocessions, comprehensive and accurate information about the expected basis and magnitude of the waiver can be fully understood. The scope of disclosure depends on the service model: in asset management, percentage ranges based on assets under management must be disclosed to allow an estimation of the total costs, whereas in investment advice and execution-only relationships, product-related ranges are generally sufficient.

In the absence of advisory services, disclosure primarily serves to provide price transparency. By announcing the existence and the order of magnitude of possible reimbursements, clients are empowered to take conscious decisions regarding the use of the service. Only an investor informed about these bandwidths can correctly estimate the total costs, compare the various offers and, by continuing the business relationship, approve the financial service provider's remuneration model. Transparent disclosure thus transforms potentially hidden commissions into a visible, contractually accepted price component, creating clarity regarding economic incentives, even when no legal duty to surrender funds exists due to the absence of a conflict of interest in the individual case.

F. Relationship with Regulatory Framework and Prior Law

Decision 4A_149/2025 is noteworthy not only for clarifying the civil law position under art. 400 para. 1 CO, but also for the way in which the Federal Supreme Court embeds its reasoning in the context of the FinSA.

At the outset, the Federal Supreme Court confirms that the supervisory provisions of the FinSA do not directly govern civil law restitution claims. Although prudential duties may have interpretative relevance in civil proceedings and may serve to concretise civil law duties of diligence and loyalty, they do not establish independent civil law claims and do not supersede the rules of mandate law.

The Federal Supreme Court further observes that the FinSA provisions on third-party remunerations form part of the statutory framework governing conflicts of interest. This systematic placement confirms that the regulatory focus (as under art. 400 CO) is the prevention of incentive-based conflicts. Retrocessions are not objectionable as such; their legal significance arises where they create a conflict between the client's interests and those of the financial service provider.

In this manner, the Federal Supreme Court ensures conceptual consistency between the supervisory regime of the FinSA and the private-law regime governing mandate relationships under art. 400 CO, while preserving their distinct legal functions.

The Federal Supreme Court's conclusion regarding mere execution-only relationships therefore acquires broader significance. If, in such a setting, no relevant conflict of interest risk arises because the intermediary has no discretion and merely executes client

instructions, then the remuneration lacks the intrinsic link required under art. 400 CO. Since the Federal Supreme Court identifies the existence of a conflict of interest risk as the decisive criterion under both art. 400 CO and art. 26 FinSA, the absence of such risk speaks against the existence of a restitution claim under either framework.

The decision thus reflects a coherent principle applicable across both the supervisory regime under the FinSA and the civil law regime of mandate: there is no absolute prohibition of retrocessions. Their permissibility and potential restitution consequences depend on a structured assessment of whether they give rise to a relevant conflict of interest risk.

This clarification may also be relevant for FINMA's supervisory practice. In its recent Circular 2025/2 on rules of conduct under the FinSA, FINMA addresses remunerations received from third parties without expressly distinguishing between discretionary, advisory, and execution-only relationships, with the result that supervisory expectations regarding retrocessions extend also to execution-only constellations without any differentiation. However, given that the existence of a relevant conflict of interest risk constitutes the decisive criterion under both art. 400 CO and art. 26 FinSA, the absence of such a risk precludes a generalised obligation to retribute retrocessions.

The overall result is a coherent framework. Retrocessions are neither *per se* unlawful nor subject to restitution as such. Supervisory law operates *ex ante* through organisational and transparency duties aimed at mitigating conflicts of interest. Civil law operates *ex post* by requiring restitution where a remuneration gives rise to a relevant conflict of interest risk within a mandate. Both regimes are structured around the management of conflicts of interest,

while retaining their distinct legal functions and consequences.

G. Criminal Law Implications

Swiss criminal jurisprudence has treated the non-disclosure and non-restitution of retrocessions in asset management mandates as unfaithful management (*ungetreue Geschäftsbesorgung, gestion déloyale*), according to art. 158 of the Swiss Criminal Code, grounded in duties of accountability and loyalty derived from arts. 400 para. 1 and 398 para. 2 CO. In BGE 144 IV 294, the Swiss Federal Supreme Court upheld a conviction of an independent asset manager for failing to inform its clients about retrocessions. Subsequent decisions have relied on this approach. Generally, Swiss criminal courts recognise that a valid waiver affects criminal liability. If the client validly waives the duty to render account, there is no breach of duty. In cases where only the duty to retribute is validly waived, the lack of pecuniary damage may preclude a criminal offence. Where there is no valid waiver and the duty to inform is breached, criminal liability for unfaithful management may arise, with the damage typically consisting in the client's loss of the ability to assert the restitution claim due to non-disclosure.

To avoid any risk of criminal sanctions, financial institutions are advised to disclose that they may obtain retrocessions and their magnitude, to allow clients to compare offers of different financial service providers and to take an informed decision.

Under Swiss criminal law, the scope of the duties of care and loyalty must be determined on a case-by-case basis, with the underlying (legal and contractual) relationship and circumstances being decisive. Given that retrocessions received in the context of a pure execution-only relationship are not subject to restitution under Swiss civil law pursuant to the latest court decision, a failure to retribute is not punishable

under Swiss criminal law. Accordingly, this decision limits the scope of the applicability of criminal law.

H. Practical Implications for Financial Services Firms

For banks and securities firms operating execution-only platforms, the decision confirms that absent discretion or advisory input and absent a risk of conflicts of interest, distribution commissions earned in connection with orders initiated by the client are not subject to restitution obligations pursuant to art. 400 para. 1 CO, because they lack the requisite intrinsic link to mandate performance. The Swiss Federal Supreme Court also observed that, where general terms and conditions disclosed the order of magnitude of third-party benefits and where clients could request further information and compare offers, this context supported the absence of a conflict of interest risk and the absence of an intrinsic link in execution-only mandates.

Operationally, financial intermediaries should therefore document that they have no choice among platforms or external brokers that could affect execution in a manner that could create conflicts of interest. The Swiss Federal Supreme Court indicated that, where the record shows no such choice, concerns regarding platform or broker selection do not arise.

Furthermore, financial intermediaries providing execution-only services should document the execution-only nature of the service, the absence of discretion or advice, and provide clear information on the order of magnitude of any distribution-linked remunerations, enabling clients to compare offers. Such transparency would benefit financial service providers both from a supervisory perspective and in substantiating the absence of a relevant conflict of interest risk under art. 400 CO.

Finally, where any element could introduce a risk of conflicts of interest (for example, choice among platforms or remuneration structures influenced by the intermediary's conduct, occasional advisory services within the context of an account/custody account relationship), financial services firms should ensure the existence of a clear and valid waiver, consistent with civil-law requirements. In such constellations, the analysis shifts from the absence of conflict risk to its proper management, both at supervisory level and under the contractual duties of loyalty and diligence.

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