CENTRE DE DROIT
BANCAIRE ET FINANCIER

Retrocessions and prohibition from practicing

Comparative perspectives from criminal law and surveillance law

Par Philipp Fischer le 11 February 2026

Is an asset manager who receives retrocessions for ten years without informing his clients guilty of unfair management and can he be prohibited from practicing within the meaning of Art. 67 CP ? The Federal Supreme Court answered both questions in the affirmative in its judgment 6B_431/2024 of November 10, 2025.

In this case, an asset manager was accused of receiving retrocessions between 2006 and 2016 without informing his clients. The asset manager received 25 % of the annual deposit fees, 60 % of the brokerage fees paid, and 70 % of the gross income from currency exchange transactions from the custodian bank. The amount in question exceeded CHF 2,000,000.

In the first instance, the asset manager was found guilty of multiple counts of aggravated breach of trust (Art. 158 of the Swiss Criminal Code) and sentenced to a 17-month suspended prison term. The appellate court upheld the same charges and handed down a 24-month suspended sentence. It accompanied the sentence with a five-year ban on engaging in any activity in the fiduciary and/or financial sector (Art. 67 SCC). He then lodged an appeal in criminal matters with the Federal Supreme Court.

In his appeal, the defendant cited various procedural irregularities. He also contested the lower court's assessment of the subjective element of the offense of disloyal management. However, the Federal Supreme Court rejected all of the grounds for appeal and upheld the legal classification adopted by the cantonal court.

The Federal Supreme Court points out that clients cannot validly waive retrocessions without full information (see Fischer, cdbf.ch/1145 and cdbf.ch/773). It thus reaffirms that failure by the agent to fulfill their duty to provide information may give rise to a criminal conviction for unfair management, confirming established case law (see Fischer, cdbf.ch/1030). This ruling shows once again that, having originated in civil law (Art. 400 CO) and developed in regulatory law (Art. 26 LSFin / Art. 48k OPP2), the issue of retrocessions now also has criminal implications.

Beyond this confirmation, the ruling is of particular interest because it confirms the approach adopted by the lower court regarding the conditions for imposing a ban on practicing a profession within the meaning of Art. 67 of the Swiss Criminal Code (SCC).

As a reminder, Art. 67 para. 1 SCC allows the judge to impose a ban on practicing a

(professional) activity when : (i) a crime or offense has been committed, (ii) it was committed in the course of an organized professional or non-professional activity, (iii) a custodial sentence of more than six months has been imposed, and (iv) there is a risk of reoffending. Such a measure therefore presupposes the existence of a sufficient link between the activity carried out and the offense committed, as well as concrete evidence of a risk of reoffending.

In this case, the first three conditions were clearly met. With regard to the risk of reoffending (4th condition), the cantonal court based its decision on several factors : the particularly long duration of the offenses committed, the size of the amounts received, the lack of awareness of the illegality of the behavior, and the lack of regret or remorse expressed by the asset manager. It also noted that the financial situation of the person concerned would oblige him to resume professional activity, which would expose him—if he were to resume asset management activities—once again to the same problems that led to his criminal conviction in the present case.

In view of these circumstances, the cantonal court considered that serious doubts remained as to the appellant's prognosis and that a ban on practicing was both necessary and appropriate to prevent further offenses. This measure was also justified by the protection of public interests related to the proper functioning of financial markets and the safeguarding of the interests of a large number of potential clients. Given the extent of the damage caused and the risk of future harm, this public interest clearly took precedence over the private interests of the asset manager.

A measure based on Art. 67 SCC has certain similarities with the prohibitions provided for in Art. 33–33a FINMASA. However, a distinction must be made between the scope of application of criminal law and that of supervisory law.

The application of the criminal provision requires a custodial sentence of more than six months, whereas the measure taken by FINMA involves a serious violation of supervisory law (including violation of internal guidelines), which does not necessarily constitute a criminal offense.

The prohibition based on Art. 67 SCC has an essentially preventive purpose, aimed at preventing recidivism. The prohibition on practicing under the FINMASA sanctions breaches of supervisory law that have already occurred (punitive approach).

Finally, although none of these prohibitions takes precedence over the others and a combination of measures is legally possible, such a combination remains reserved for exceptional situations. In practice, there is a certain degree of coordination between FINMA and the criminal authorities in order to avoid a combination that could be contrary to the principle of proportionality.

The ruling reiterates—in addition to the importance for the agent to provide complete information to the principal, particularly with regard to retrocessions received—that a prohibition on practicing within the meaning of criminal law may be imposed on a person subject to financial market supervision. In such a situation, it is conceivable that a criminal ban and a ban on practicing imposed by FINMA on the basis of Art. 33 or 33a FINMASA could be applied in parallel. In practice, it is not uncommon for the same conduct to give rise to both criminal proceedings and proceedings under supervisory law.