CENTRE DE DROIT
BANCAIRE ET FINANCIER

Commissions and execution only

Preventing the risk of conflicts of interest

Par Fabien Liégeois le 2 March 2026

On several occasions, the Federal Court has left open the question of the obligation to return retrocessions in an execution-only relationship (see in particular Fischer, cdbf.ch/1338). In its judgment 4A_149/2025 of January 12, 2026, intended for publication, it ruled that the compensation received by a private bank in connection with the distribution of investment funds and structured products was not subject to restitution, given the circumstances. The relationship between the parties was one of execution only ; however, the disputed remuneration was not, in this case, such as to give rise to a conflict of interest. It was therefore not intrinsically linked to the performance of the mandate within the meaning of Art. 400 para. 1 CO.

In fact, the client held two accounts with the bank, which were closed in 2012 and 2017 respectively. In 2011, the bank had amended its general terms and conditions to indicate that it could receive direct or indirect payments from third parties ; the clause specified the order of magnitude of the remuneration and reserved a right of information for the client. In 2020, the client assigned the claim arising from her contractual relationship to a specialized company. After obtaining a statement of “retrocessions” between 2010 and 2017 (approximately CHF 31,000), the company took action against the bank for payment. Having been unsuccessful before the cantonal courts, it appealed to the Federal Supreme Court.

In law, the Federal Supreme Court points out that the classification of the contract determines the purpose and scope of the bank’s duties (information, advice, warning). In the area of stock market transactions, a distinction must be made between asset management, investment advice and “execution only.” In the latter case, the bank may only carry out a transaction on its client’s account on the client’s instructions or with the client’s consent, in accordance with the rules of the commission contract (Art. 425 et seq. CO). Art. 400 CO therefore applies in this case by reference to Art. 425 para. 2 CO.

With regard to Art. 400 para. 1 CO, case law distinguishes between benefits received in the performance of the mandate, which must be returned, and items received “in connection with the mandate,” which are not subject to this obligation (ATF 138 III 755, c. 4.2 ; cf. Fischer, cdbf.ch/841). In the case of third-party payments, an “intrinsic relationship” must be assumed if there is a risk that the agent may be induced by them not to take sufficient account of the principal’s interests.

Legal doctrine is divided on the application of these principles to “execution only.” After setting out the arguments on both sides, the Federal Court held that the prevention of conflicts of

interest was the key criterion.

In casu, the “retrocessions” were received in connection with the distribution of “financial products.” The distribution fees (or status commissions) were based on a prior agreement between the distributor (the bank) and the supplier of “financial products “ (e.g., an investment fund). In concrete terms, the bank received remuneration deducted annually from the fund’s assets. This remuneration, which reduces the fund’s profitability, rewarded successful product investments. It is therefore necessary to ”examine, on the basis of the specific contractual obligations, whether these retrocessions are likely to create a conflict of interest for the distributor.”

Such a risk exists in the case of asset management because the agent may be tempted “to create, maintain or increase a portfolio of certain assets without this being justified by the client’s interests.” The same applies in the case of investment advice : the bank could be tempted “to recommend products that would generate the most retrocessions for it.” On the other hand, an agent acting on an execution-only basis has no discretion over their client’s assets.

According to the Federal Court, it is not possible to define, in general terms for all mandates, the situations in which remuneration is “intrinsically linked” to the execution of the mandate. A “comprehensive assessment based on the specific circumstances” must be carried out, taking into account the “specific contractual obligations.”

In this case, the client had knowledge and experience in the field of investment. She alone chose the investments. The bank had no way of determining in advance the transactions it would be required to carry out. Consequently, the receipt of retrocessions and their amount did not depend on the bank’s behavior. “In such a constellation,” it is impossible to conclude that the financial intermediary could have been influenced by its own financial interests when executing the orders.

Distribution fees differ from traditional retrocessions (ATF 138 III 755, c. 5.4 ; cf. Fischer, cdbf.ch/841) in that they are intended to compensate the agent for the costs it incurs in connection with the network and infrastructure.

In this case, the bank could not influence the number of products placed and therefore its remuneration. In the absence of any risk that it might be “encouraged not to take sufficient account of its client’s interests,” the commissions it received were not “intrinsically linked to the execution of its mandate.” The client had also been informed of the order of magnitude of the retrocessions. The Federal Court did not have to rule on the risk of conflict of interest resulting from the choice of trading platforms or brokers, as there was no indication in the case file that the bank had any leeway in this regard.

Finally, the new features introduced by the FinSA focus on the “*cross-sector*” nature of the rules it prescribes, which apply to anyone providing financial services. However, these rules, which came into force after the disputed transactions, “do not alter the scope of the obligations to which financial service providers are subject.” Such obligations were already explicitly included in the law in force or implicitly derived from the duties of care and loyalty under civil law (Art. 398 para. 2 CO).

We would like to offer a comment by way of conclusion.

The main lesson to be learned from this ruling is that the prevention of conflicts of interest is considered to be the only relevant criterion for assessing the situation, and not an alternative or additional criterion.

We are aware that this decision will disappoint those who advocate a general obligation to return retrocessions. This position could be defended, on the one hand, on the basis of the "attribution function of Art. 400 CO" and, on the other hand, on the grounds that retrocessions would, in principle, be "intrinsically" related to the performance of the mandate. In the latter case, those in favor of the obligation to return consider that the agent receives them either "because of the position granted to him in the commercial relationship" or because the investment "triggers" the payment. Without denying this "direct natural causal link," the Federal Court considers it insufficient to conclude that the remuneration is always "intrinsically" related to the performance of the mandate.

However, opponents of the obligation to return should not rejoice too quickly. The Federal Court also rejects the arguments of principle put forward by this camp : for example, the idea that the costs incurred by dealers alone are sufficient to justify the collection of retrocessions (the so-called "economic interest" or "consideration for efforts made" argument) or the idea that they would be paid solely "in connection with the performance of the mandate," like a tip, so that the "intrinsic" relationship would always have to be disregarded.

This ruling, which concerned "state commissions," seems convincing to us both in its method and in its result. Rather than generalizing, the Federal Court applies a criterion that calls for a case-by-case assessment, in accordance with the mission of the judge who applies the law but does not legislate. Since the identification and prevention of conflicts of interest is a highly circumstantial analysis, a degree of uncertainty remains for banks, which will continue to encourage them to exercise caution. Nor will the approach come as a surprise to them, since they have been organizing themselves to prevent potential conflicts of interest since the entry into force of the FinSA. The risk is therefore now residual—or assumed. For the previous period, legal logic required an examination *in concreto* : faced with an indeterminate concept such as the "faithful" execution of the mandate (Art. 398 para. 2 CO), the judge must apply "the rules of law and equity" within the meaning of Art. 4 CC. It cannot be ruled out that the Federal Court may reach the opposite conclusion in a case where the litigants are able to establish, for example, that the choice of broker or trading platform influenced the bank's remuneration. Lawyers will therefore have to identify the factual circumstances and arguments likely to convince the court. The criterion of "preventing the risk of conflicts of interest" thus places each actor in front of their responsibilities : the bank organizes itself, the lawyer argues, and the judge decides on the basis of what is "materially fair." In a nutshell, the ground rules have been laid down, but the game is not over yet !

Finally, the Federal Court suggests that the same criterion should guide the interpretation of Art. 26 LSFin. Since the disputed remuneration was received before this law came into force, this consideration (3.6.5.3) takes on the character of an obiter dictum. Nevertheless, it is significant in that it appears to give Art. 26 para. 1 FinSA a narrower scope than the historical interpretation would suggest (see FinSA/FEA Message, p. 8164 et seq.). It is not unreasonable to see this as a form of reverse spillover effect.