CENTRE DE DROIT
BANCAIRE ET FINANCIER

Execution only

Clarifications regarding the classification of the service and conflicts of interest ?

Par Sébastien Pittet le 11 August 2026

The provision of certain information about a structured product is not sufficient to establish an investment advisory relationship, particularly if the client has in-depth knowledge and experience in the field of investment. In the absence of an advisory relationship, the choice of the issuer of the structured product within the group does not give rise to a conflict of interest (TF 4A_503/2025 of 17 June 2026).

At the end of 2005, a company opened a custody account with the Geneva branch of a Zurich-based bank. The company appointed a trusted third party to manage the assets in the account. The independent manager possessed in-depth knowledge and experience in the field of investment. In 2009, at the request of the independent manager, the bank confirmed that it could offer a certain type of structured product similar to '*Dual Currency Deposits*' and provided him with detailed information on the various possible investment alternatives. For nearly a year, the manager invested in this type of structured product. On each occasion, an entity within the bank's group was responsible for issuing the product, and the bank received a distribution commission. In 2017, several years after the banking relationship had ended, the client contacted the bank to request the return of the commissions received on the structured products.

Before analysing the obligation to refund, the Federal Court examined the nature of the contractual relationship. In view of the conduct of the independent asset manager and the bank, the Federal Court confirmed the existence of an *execution-only* relationship. On the one hand, the asset manager's requests were sufficiently specific and, on the other hand, the information provided by the bank regarding the products consisted merely of objective details that could not be characterised as advice.

The Federal Court adds that the classification of the service also depends on the client's knowledge and experience. If the client seeks information or advice where the bank is aware that the client is unaware of the risks involved, an advisory relationship must be recognised. The same applies where the bank contacts a client and recommends that they purchase securities, whilst knowing or ought to know that the client's knowledge and experience do not enable them to assess and bear the risk of such an investment. The independent asset manager's greater knowledge and experience confirm the classification adopted in this case.

Furthermore, in determining whether the commissions must be refunded, the Federal Supreme

Court relies on its judgment 4A_149/2025 (commented on *in* Liégeois, cdbf.ch/1453/). According to this case law, in order to determine whether a benefit must be refunded, it is necessary to analyse whether there is a risk of a conflict of interest. Where the agent may be tempted not to take sufficient account of their principal's interests, the benefits received must be returned (unless a valid waiver has been given). The Federal Supreme Court points out that it is not possible to rule out any conflict of interest in an *execution-only* relationship. An examination of the circumstances of the specific case is necessary.

In this instance, the use of an issuer within the bank's group was systematic and known to the manager. Moreover, the manager had never sought products issued by entities outside the group. Somewhat contradicting the party's factual submission, the Federal Court notes that there is nothing to suggest that the bank received commissions from the issuers of the products, as these were entities within its own group. Indeed, the fees remained within the group. As the client fails to demonstrate how this situation might have created a conflict of interest, the retrocessions do not have to be refunded.

This decision gives rise to several observations.

This judgement highlights the importance the Federal Supreme Court attaches to the client's knowledge and experience. Both in terms of the classification of the service and the existence of a conflict of interest, the independent manager's greater knowledge and experience played a decisive role in this case. In this regard, the decision also illustrates, in passing, the risks for a client in using the services of an independent manager. The client does, in fact, bear the consequences of their manager's knowledge and experience, which is not the case if the management relationship links the client directly to the bank.

Taking a more critical view, we believe the decision places too much emphasis on the manager's knowledge and experience when classifying the contract. Whilst the service provided in this case appears to us to be correctly classified as 'execution only', the manager's knowledge and experience should not constitute a criterion for classifying the contract (but should rather influence any duty to provide information). This interpretation nevertheless appears to be firmly established in the case law of the Federal Supreme Court (FSC 4A_593/2015, para. 7.1.4 ; 4A_54/2017, para. 5.1.4).

In our view, the decisive factor in distinguishing an advisory relationship from an *execution-only* relationship lies rather in the existence of personalised recommendations. In this regard, ESMA's information note on the definition of investment advice provides useful criteria for drawing the distinction. In particular, paragraphs 27–28 analyse the differences between recommendations and information (a distinction which, in our view, is decisive for the present case).

As regards the absence of conflicts of interest, one might first question the assumption that recourse to an external issuer was not an option (even though, admittedly, the availability of such products on the market was probably different fifteen years ago).

Secondly, as one issuer may pay a higher distribution commission than another, the choice of issuer is, in our view, likely to give rise to a conflict of interest. This conclusion holds true even if the issuers under consideration all form part of the bank's group. Indeed, as the distribution fee is deducted from the client's investment, a more lucrative issuer enriches the group at the client's expense. Contrary to what the judgement might suggest, the transaction is therefore neither neutral for the group (which stands to gain) nor for the client (who stands to lose).

In such situations, where the choice of issuer for the structured product is likely to give rise to a conflict of interest, only a valid waiver by the client should allow the bank to retain the retrocessions received. Even in the case of an *execution-only* relationship, a bank would therefore be well advised to continue to obtain a valid waiver of the requirement to return retrocessions, in particular through its general terms and conditions (see the 2nd step of the summary diagram).

NB : virtually identical facts were the subject of another decision by the Federal Supreme Court, the conclusions of which are the same (Federal Supreme Court 4A_501/2025 of 17 June 2026).
