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The Swiss Federal Supreme Court Rules on the Duty to Hand Over Retrocessions and Distribution Fees to Clients in Execution-Only Relationships

In a precedent setting Decision 4A_149/2025 of 12 January 2026, the Swiss Federal Supreme Court ruled that, unlike the situation with portfolio management or advisory relationships, a bank is not required as a matter of contract law to hand over retrocessions, including distribution fees, to clients in an execution-only relationship, unless they cause an actual or potential conflict of interest with the duty of loyalty to the client. This decision brings certainty and puts the controversy and contradictory rulings of cantonal courts to rest. Beyond legacy disputes, the immediate practical implication of the case will be limited. However, it should cause FINMA to rethink its practice under the Federal Act on Financial Services of 15 June 2018 (SR 950.1).

Under article 400 (1) of the Swiss Code of Obligations ("CO"), "a mandatee is obliged at the mandator's request, which may be made at any time, to give an account of his activities under the mandate and to return anything received for whatever reason as a result of such activities." In a leading case of 2007, the Federal Supreme Court held that this provision entails an obligation for portfolio managers to hand over to their clients retrocessions received from the custodian unless the client has validly waived this claim.[1]

This spanned a series of decisions holding, on the one hand, that this principle also applies to banks acting as portfolio managers that

[1] BGE 132 III 460.

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receive distribution commissions from fund management companies and issuers of structured products[2] as well as to financial institutions acting in an advisory capacity and, on the other hand, laying down the conditions under which clients may validly waive their right to receive retrocessions[3] and the duration of the statute of limitation of restitution claims by clients.[4]

In parallel, as set forth in annex 1, various regulatory provisions governing these issues were passed into law: first, in the realm of occupational pensions and related schemes,[5] then in financial services[6] and, more recently in connection with insurance intermediation.[7]

However, until the decision of 12 January 2026, the Federal Supreme Court did not need to decide on the question whether article 400 (1) CO applies to execution-only relationships where the client decides on its own which financial instrument it intends to acquire without receiving individualised advice from the financial institution or otherwise relying on the financial institution to provide a personal recommendation. Cantonal courts had issued contradictory rulings with some courts extending the restitution duty to execution-only relationships, while others were more nuanced and, until then, the Federal Supreme Court was able to resolve the dispute without ruling on the issue.[8] Therefore, many legal practitioners and scholars longed for a decision on this matter, hoping it would settle the controversy once and for all.

I. Facts of the Case

The case at hand concerned two accounts, a joint account and an individual account, one of which was closed in 2012 and the second in 2017, only the latter (the individual account) being relevant to the dispute, through which the client had invested in financial instruments (investment funds and structured products) without entering into a portfolio management agreement or an advisory relationship.[9]

Throughout the period ranging from 2010 to 2017, the bank received retrocessions (distribution fees and maintenance commissions, *commission d'états, Bestandespflegekommissionen*), in a total amount of CHF 31,477, which were the subject of the controversy that led to the Federal Supreme Court Decision.[10] By contrast, the client had not been able in front of the lower court to allege in sufficient detail or prove that the bank had to choose among different platforms or brokers or received payments from exchanges or brokers for "order-flow" and, hence, was barred from challenging the finding in front of the Federal Supreme Court.[11]

Since 2011, the bank had changed its general terms of conditions to provide a waiver of the right to reclaim third-party benefits.

[2] BGE 138 III 755.
[3] BGer 4A_355/2019, consid. 3.1. See already BGE 137 III 393, consid. 2.4 and 2.5.
[4] BGE 143 III 348.
[5] See article 48k of the Ordinance on Occupation Benefits for Old-Age, Widows and Orphans and Invalidity of 18 April 1984 ("**BVV 2**", SR 831.441).
[6] See article 26 of the Federal Act on Financial Services of 15 June 2018 ("**FinSA**", SR 950.1).
[7] See article 45b the Federal Act on the Supervision of Insurance Undertakings of 17 December 2004 ("**ISA**", SR 961.01).
[8] See BGer 4A_574/2023 of 24 Mai 2024 consid. 8.3; 4A_601/2021 of 8 September 2022, consid. 7.2.
[9] BGer 4A_149/2025 of 12 January 2026, consid. A.a and 3.5.2.
[10] BGer 4A_149/2025 of 12 January 2026, consid. A.b and 3.5.2.
[11] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.3.

II. Summary of the Legal Considerations

1. Characterisation

a) Banking Relationships

In its ruling, the Federal Supreme Court, first, restated that banking relationships are generally **made of several contractual relationships:** a current-account relationship, a so called giro agreement for payment services and for investment services, a portfolio management agreement, or an investment advisory agreement or a mere execution-only custody agreement, which combined constitute so-called mixed agreements with aspects of a mandate governed by articles 394 ff. CO.[12]

Accordingly, the specific scope of the **obligations of the bank depends on the characterisation of the specific relationship**, although they generally flow from the same statutory duty of loyalty which is specific to mandates (article 398 (2) CO) or the yet broader duty to act in good faith that applies generally in private law (article 2 (1) of the Swiss Civil Code).[13]

b) Execution-only

In an execution-only relationship, the bank **only assumes the duty to execute orders upon a specific instruction of the client**. Such order will take the form of a separate contract, a commission-agency contract governed by article 425 ff. CO, which is a specific form of mandate. In such relationships, the bank **does not assume a general duty to protect the interests of the client or to inform the client of the appropriateness or suitability of the instructions**. This characterisation and conclusion also holds when the bank communicates on request of the client the general expectation of the financial institution or third parties on the evolution of financial instruments.[14] Quite to the contrary, the client decides alone which investment it intends to make without relying on the mandatee to determine which one best meets their personal goals.[15]

c) Portfolio-Management Relationships

By contrast, the Federal Supreme Court restated that in a portfolio management agreement, the bank is **entrusted with the duty to manage the assets of the client within the limitations set by the investment strategy and objectives set by the client**.[16] In such relationships, the bank assumes as a consequence of the duty of loyalty (article 398 (2) CO) extensive duties of information and accountability, including the duty to hand over any benefit received in performance of the mandate (article 400 (1) CO).

2. Duty to Hand-Over Benefits as a Rule to Prevent Conflicts of Interest

After drawing the line between execution-only relations and portfolio management agreements, the Federal Supreme Court pointed out that, in line with its more recent precedents on the matter, the duty of accountability and the **duty to hand over benefits expressed in article 400 (1) CO does not exist in a vacuum but aims at protecting the interests of the client and preventing conflicts of interest, by ensuring that benefits that cause conflicts of interest are handed over to the client**.[17]

Accordingly, the duty to hand over benefits extends not only to any benefit created by the

[12] BGer 4A_149/2025 of 12 January 2026, consid. 3.1.
[13] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.
[14] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.1, referring to BGE 133 III 97, consid. 7.1.1; BGer 4A_54/2017 of 29 January 2018, consid. 5.1.2.
[15] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.1,
[16] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.2.
[17] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.2.

mandate but also **benefits received from third parties in connection with the performance of the mandate.** By contrast, benefits received upon the performance of the mandate (*à l'occasion du mandat*) without an intrinsic connection with the mandate such as customary presents among professionals and tips (so the court) are out of scope of the obligation to hand over benefits under article 400 (1) CO.[18]

Building on these considerations, the Federal Supreme Court repeated that the principle pursuant to which the mandatee should neither be enriched nor impoverished by the mandate and the ultimate goal of the provision which is to prevent conflicts of interest are the determining criterion to determine whether or not the duty to hand over profits applies.[19]

Until now, the purposive approach focusing on the risk of a conflict of interest had been applied mainly to determine the **conditions for the client to validly waive the right to receive benefits**: In previous cases, the Federal Supreme Court considering that for the client to waive validly this right needs to have been informed of the amount or range of payments in relationship with the assets under management as well as the nature of conflicts of interest as well as the measures taken to avoid or mitigate them.[20] Furthermore, the court had also **applied this criterion to determine if a benefit is intrinsically connected to the mandate.** It had held that benefits need to be handed over, from the moment they create incentives not to take into account the interests of the mandate, even if the mandatee did not act in a manner contrary to the interest of the client or cause an actual damage to the client.[21]

However, the Federal Supreme Court had not used this criterion to limit the scope of the principle pursuant to which the mandatee should neither be enriched nor impoverished, thus leading to a doctrinal controversy on the nature of the duty to hand over benefits. According to certain authors, article 400 (1) CO enshrines an absolute rule allocating all profits arising out of the mandate to the client, while others argue that the principle pursuant to which the mandate should be neither enriched nor impoverished applies only to the extent the benefits generate a risk of conflicts of interest.

3. Duties in Execution-only Relationships

In the case at hand, the Federal Supreme Court needed to consider this question to determine whether these principles that are well settled in connection with portfolio management agreements also extend to execution-only relationships.

After an extensive review of the legal literature on this issue, **the court decided that the prevention of conflicts of interest is the central criteria** to determine if benefits are to be handed over under article 400 (1) CO and not only a mere element to be considered. Accordingly, it is necessary to determine if the benefits lead to a conflict of interest and the Federal Supreme Court expressly held that – in contrast to prior decisions – the mere fact that the mandatee is enriched does not suffice to extend the scope of the duty to hand over benefits under article 400 (1) CO. As a consequence, absent a conflict of interest, there is no duty to hand over benefits to the client.[22]

Building on this distinction, the Federal Supreme Court held that distribution fees paid in connection with investment funds and structured products based on the volume of

[18] BGer 4A_149/2025 of 12 January 2026, consid. 3.2, referring to BGE 138 III 755, consid. 4.2; BGE 137 III 393, consid. 2.1.
[19] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.2,
[20] BGer 4A_355/2019, consid. 3.1. See already BGE 137 III 393, consid. 2.4 und 2.5.
[21] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.2, referring to BGE 143 III 348, consid. 5.1.2; BGE 138 III 755, consid. 5.3.
[22] BGer 4A_149/2025 of 12 January 2026, consid. 3.5.1.

products held in custody by the bank create a conflict of interest with the duty to manage a portfolio under a portfolio management agreement and in all likelihood with the duty to advise the client under advisory relations.[23]

By contrast, the court considered that the very fact that **the bank had no discretion in selecting the financial instructions means that the incentives created by distribution fees do not cause a conflict of interest in connection of execution-only relationships** and, therefore, do not need to be handed over to the client, even if the bank is enriched in the process. As part of its reasoning, the court expressly considered without fully explaining to what extent they were relevant that the client had the knowledge and experience to carry out the investments and therefore did not rely on the advice of the bank[24] and that distribution fees compensate costs incurred by the mandate in connection with setting up the infrastructure required to make the products available to clients.[25]

In the case at hand, the Federal Supreme Court did not, however, examine if other benefits could lead to a conflict of interest. Indeed, the plaintiff had claimed that a conflict of interest could arise in connection with the choice of trading venue or brokers. However, the court was barred from ruling on the issue because the claimant had failed to sufficiently allege or prove as a matter of fact that such a choice existed in the case at hand.[26]

Finally, the Federal Supreme Court rejected the argument that the supervisory duty to hand over benefits of article 26 (1) FinSA implied that article 400 (1) CO should also apply to benefits received in execution-only agreements. Without really addressing the fact that FinSA had not been passed into law and even less entered into force at the time the retrocessions were paid, the court considered, first, that article 26 (1) FinSA aimed at codifying the private law precedents on the topic without modifying their content and, second, concluded that considering the systematic placement of the provision in a section on conflicts of interest means, in line with the reasoning the court had presented as a matter of private law, that the duty to hand over third-party benefits only applies to the extent benefits create a conflict of interest.[27]

III. Takeaways

1. Application to Legacy Cases

The case is a **groundbreaking case for Swiss banks and their clients as it settles a controversy that overshadowed the financial industry for almost twenty years which led to contradictory rulings by cantonal courts**. In fact, the Federal Supreme Court's reasoning implies that neither disclosure nor a waiver are required in execution-only agreements absent a specific conflict of interest in a specific instance.

The **immediate practical impact will be focused on legacy cases relating to execution-only case**. Indeed, after the Federal Supreme Court handed down its successive decisions on retrocession and at the latest after FINMA-Circular 2025/2 "Rules of Conduct pursuant to FinSA/FinSO" ("**FINMA-Circ. 2025/2**") entered into force, most financial institutions should have revised their contractual documentation and their general terms and conditions to include a valid waiver of third party benefits disclosing the amounts or range of potential benefits per financial instrument and, in connection with portfolio management relations and so-called portfolio-based advisory relationships, in

[23] BGer 4A_149/2025 of 12 January 2026, consid. 3.5.3 and 3.5.4.
[24] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.1. In general, this question is important to distinguish between an advisory and an execution-only relationship. However, the court did not consider this question in the case at hand.
[25] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.2.
[26] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.3.
[27] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.5.3.

relation , in relationship to the assets in the portfolio.[28]

Therefore, the relief brought by the decision extends in practice only retrocessions that were collected before terms and conditions were modified and, even then, only to the extent the client did not validly waive retroactively its right to be handed over retrocessions and the statute of limitation did not time bar the claim. This means that the immediate effect of the case is likely to be limited except for legacy cases.

2. Limitations of the Precedent

However, the scope of the decision should not be overstated: the Federal Supreme Court did not hold generally that article 400 (1) CO did not apply to execution-only relationships, but only that it presupposes a conflict of interest.

While the Federal Supreme Court clearly held that it did not see a conflict of interest arise in an execution-only relationship, when the bank collects distribution commissions,[29] it did not go so far as to hold that conflicts of interests could not arise in such relationships generally.

Therefore, a careful examination of the facts and circumstances should be carried out before excluding the duty to hand-out benefits in execution-only relationships: in practice, if the benefits are likely to create incentives that may affect the quality of execution, they remain in scope. This would, for example, be the case if the bank receives payments from order flows from some brokers or trading venues.

3. Impact on the Interpretation of FinSA

Beyond legacy cases, the case may have broader implications for financial market regulations: first, generally the case determines to a certain extent the interplay between the private law duties and the supervisory duties under FinSA and, second, it also puts in jeopardy the view that the regulatory duty to hand over third-party benefits anchored in article 26 FinSA applies in execution-only relationships.

a) Reverse Radiation Effect

This decision is one of the first decisions in a civil dispute, where the Federal Supreme Court considers in detail the implications of the FinSA on private law relationships between a financial service provider and its client. As expected under the so-called radiation theory (*Ausstrahlungstheorie*) and in line with the legislative materials,[30] the court held that FinSA does not provide for so-called dual norms anchored in both public, supervisory law and in private, contractual law, but for supervisory law duties[31] that may be considered to understand and interpret private law duties.[32]

Notably, but again unsurprisingly, the Federal Supreme Court went one step further in the context of the duty to hand over benefits and rules that in the context, the statutory duties provided for in article 26 FinSA did not even aim to shape private law, but actually only aspired to codify the existing duties under the law of mandate as interpreted by the Federal Supreme Court.[33] In other words, instead of considering that FinSA should influence the interpretation of private law, the Federal Supreme Court determined that article 26 FinSA should be applied in line with its

[28] See FINMA-Circ. 2025/2, N 26-29.
[29] See BGer 4A_149/2025 of 12 January 2026, consid. 3.6.3.
[30] See Botschaft zum Finanzdienstleistungsgesetz (FIDLEG) und zum Finanzinstitutsgesetz (FINIG), BBl 2015 8901, 8966.
[31] See article 7 (1) FinSA.
[32] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.5.2.
[33] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.5.2.

precedents in private law matters. While this approach may seem doctrinally surprising, it is in line with the legislative intent as expressed in the legislative materials which purport expressly to codify the private law case law[34] and FINMA's practice when it decided to codify private case law in FINMA-Circular 2025/2.[35]

This being said, this statement applies in the specific context of article 26 (1) FinSA, where the legislative materials explicitly refer to the precedents of the Federal Supreme Court.[36] We would, therefore, caution against extending this view to other duties under FinSA, where legislation was passed to create new duties for financial service providers or at least to clarify and settle the contours of issues that were until then left to evolving case-law, such as the information duties of financial service providers (articles 8 and 9 FinSA) as well as to a lesser extent the suitability and appropriateness test (articles 10-14 FinSA).

b) Interpretation of Article 26 (1) FinSA

Second, and more importantly, the Federal Supreme Court expressed a strong view on the scope of article 26 (1) FinSA. Considering that notwithstanding the language of the provision which addresses financial services generally and the legislative materials, the systematic placement of the provision in a section on conflicts of interest implies that it only applies to benefits that cause a conflict of interest with the financial service provider.[37] This means that the considerations of the court on the nonapplication of the duty to hand over benefits in connection with execution-only relationships should extend beyond private law into administrative law and FinSA.

Although the Federal Supreme Court was not called upon to rule on a matter of administrative law, this statement is more than a mere *obiter dictum*: the appellant had pleaded that article 400 CO needed to be construed in the light of article 26 FinSA. The Federal Supreme Court needed to turn down this argument and rule instead that article 26 FinSA does not require anything more or less than article 400 CO and, referring to the materials on article 29 of the Ordinance on Financial Services of 6 November 2019 ("**FinSO**", SR 950.11), pointing out that, to apply, this provision also requires that a conflict of interest exist.[38] This makes this issue a part of the *ratio decidendi*.

Therefore, in the light of this decision, one would expect that FINMA should seriously consider revising FINMA-Circular 2025/2 and carve-out distribution commissions in the context of execution-only relationships from the scope of article 26 (1) FinSA.

4. Importance of the Distinction between Advisory and Execution-only Relationships

Taking a broader look at the law and regulation of financial services, the Federal Supreme Court Decision 4A_149/2025 of 12 January 2026 deepens the gap between portfolio management and advisory

[34] Botschaft zum Finanzdienstleistungsgesetz (FIDLEG) und zum Finanzinstitutsgesetz (FINIG), BBl 2015 8901, 8966.

[35] See FINMA, Rundschreiben 2025/2 "Verhaltenspflichten nach FIDLEG/FIDLEV" Erläuterungen, 31 October 2024, 19-20; Federal Department of Finance, Finanzdienstleistungsverordnung (FIDLEV), Finanzinstitutsverordnung (FINIV) und Aufsichtsorganisationenverordnung (AOV) – Erläuterungen, 6 November 2019, 33.

[36] See Botschaft zum Finanzdienstleistungsgesetz (FIDLEG) und zum Finanzinstitutsgesetz (FINIG), BBl 2015 8901, 8966; Federal Department of Finance, Finanzdienstleistungsverordnung (FIDLEV), Finanzinstitutsverordnung (FINIV) und Aufsichtsorganisationenverordnung (AOV) – Erläuterungen, 6 November 2019, 33.

[37] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.5.2.

[38] BGer 4A_149/2025 of 12 January 2026, consid. 3.6.5.2 referring to Federal Department of Finance, Finanzdienstleistungsverordnung (FIDLEV), Finanzinstitutsverordnung (FINIV) und Aufsichtsorganisationenverordnung (AOV) – Erläuterungen, 6 November 2019, 33.

relationships on one hand and execution-only relationships on the other.

Both as a matter of private law and under FinSA, the former are subject to suitability (article 12 FinSA) or, at least, in connection with transaction-based advisory services, appropriateness requirements (article 11 FinSA), whereas the latter are not.[39] With the Federal Supreme Court Decision 4A_149/2025 of 12 January 2026, distribution fees paid in connection with execution-only relationships will not be subject to the duty to hand-out third-party benefits, whereas they are when paid out in connection with a portfolio-management or advisory relationship.

As a consequence, the distinction between advisory and execution-only relationships becomes all the more important. In this respect, the case at hand did not move the boundaries but confirms some important principles:

As a matter of principle, in an execution-only relationship the client decides which investments it wants to make and does not need or want advice from the bank.[40] Therefore, a bank acting on an execution-only basis does not need to ensure the general protection of its client's interests, nor to assume a general duty to provide information regarding the orders given by the client, the probable development of the chosen investments, or the measures to be taken to limit risks.[41] This conclusion also applies when the client has the necessary knowledge and experience and thus does not need to be informed, because it is already aware of the risks associated with the investments and can financially bear the risks they carry.[42]

Notably, this also holds when a relationship manager communicates to its clients, upon request, the general expectations of its institution or third parties regarding the performance of certain financial instruments.[43] This implies – in line with FinSA[44] – that general information on products and services and general recommendations to invest in a given product do not constitute investment advice.

Past case-law in private law recognized, however, that in certain circumstances, the parties may enter implicitly into an advisory relationship, without following a specific form.[45] This is the case if the bank developed a special relationship of trust, from which the client can expect advice and warnings in good faith, even without requesting them.[46] This also applies in particular if the bank realised or should have realised, by exercising the care required by the circumstances, that the client did not identify the risk associated with the investment,[47] thus implying that even under

[39] As a matter of supervisory law, indeed, execution-only relationships are not explicitly defined as a financial service and are subject to the FinSA only to the extent the financial service provider acquires or disposes financial instruments (article 3 (c)(1) FinSA), or receives and transmits orders in relation to financial instruments for clients (article 3 (c)(2) FinSA), leaving custodial services entirely out of scope of the FinSA. Art. 3 (2) FinSO extends the definition of financial services to activity addressed directly at certain clients (as opposed to for certain client in the act) that is specifically aimed at the acquisition or disposal of a financial instrument, which is somewhat called distribution, although the term is no longer used in the regulations.

[40] BGE 133 III 97, consid. 7.1.1.

[41] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.1 referring to BGE 133 III 97, consid. 7.1.1.

[42] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.1 referring to BGer 4A_54/2017 of 29 January 2018, consid. 5.1.4.

[43] BGer 4A_149/2025 of 12 January 2026, consid. 3.2.1 referring to BGer 4A_54/2017 of 29 January 2018, consid. 5.1.4.

[44] See the definition of investment advice in article 3 (c) (4) FinSA which emphasizes the personal nature of the recommendation.

[45] BGE 133 III 97, consid. 7.2.

[46] BGE 133 III 97, consid. 7.1.1.

[47] BGer 4A_54/2017 of 29 January 2018, consid. 5.1.4. Private law decisions also considered that a bank extending a loan to carry out investments should inform its clients of the risks associated with the investments, applying an appropriateness test in sch circumstances. FinSA does not provide for such a requirement in those cases although granting of loans to finance transactions with financial instruments is a financial service (article 3 (c)(5) FinSA).

an execution-only relationship the bank could need to ascertain the appropriateness of the investment to a certain degree, unless it accepts the risk of unwittingly slipping into an advisory relationship.

IV. State of Play after the Federal Supreme Court Decision

1. In Financial Services

The Federal Supreme Court Decision 4A_149/2025 of 12 January 2026 settles an important controversy. In the light of this decision the situation can be summarised as follows and in annex 1:

- The duty to hand over benefits applies to third-party benefits received in connection with a mandate, such as retrocessions and, in particular, fees for the distribution of collective investment schemes and structured products, received by a financial institution acting as a **portfolio manager** or as **investment adviser**, unless the client validly waives its right to receive them on the basis of appropriate information.

- As a matter of private law, it does not apply to benefits such as distribution fees in **execution-only relationships**, including situations where the financial service provider provides general information on its views on specific financial instruments without providing personalised recommendations, to the extent distribution fees do not in the specific case create a conflict of interest.

- As a matter of supervisory law, it remains, however, to be seen if FINMA will adjust its practice to align it with Decision 4A_149/2025 of 12 January 2026 or take the view that it is not bound by this precedent.

- Stricter rules will, furthermore, continue to apply to occupational benefit schemes and similar institutions under article 48k BVV 2, which provide that benefits must be handed over to the occupational benefit scheme and this right cannot be waived.

2. In Insurance Intermediation

Beyond the scope of financial services, an interesting parallel needs to be drawn with insurance intermediation:

- **Tied intermediaries**, who act in the interest of the insurance undertaking and do not owe a duty of loyalty to clients, such as insurance agents, are allowed to take on third party benefits and do not need to disclose them or obtain a waiver (article 45b ISA *a contrario*).

- **Untied intermediaries** who owe duty of loyalty to the client, such as insurance brokers, by contrast, are required to disclose third-party benefits they receive in connection with their services (article 45b (1) ISA).

- However, **only untied intermediaries who are compensated by the client** directly are required to hand over their compensation, unless their client waived this right in advance (article 45b (2) ISA). The rationale for this rule is that such third-party benefits create a conflict of interest for untied intermediaries.

- By contrast, **untied intermediaries who are not directly compensated by their clients** are entitled as a matter of supervisory law to keep the compensation they receive from third parties, such as insurance companies (article 45b (2) ISA *a contrario*).[48] In such cases, the insurance

[48] The legislative materials explain that, as with the FinSA, the ISA does not constitute a dual-norm, but provide for supervisory rules that should be taken into account to construe private law rules. See Botschaft zur Änderung

> intermediaries are entitled to keep their benefits without a waiver as they constitute the basis of their compensation system, although they create an inherent conflict of interest.[49]

In our view, this approach strikes a balance between transparency and duty to hand-over benefits that is preferable from a policy perspective than the one resulting from the Decision of the Federal Supreme Court, which implies that a client is not entitled to information on third-party benefits as a consequence of holding that retrocessions do not cause a conflict of interest and do not need to be handed over.

V. Conclusion

While we do not expect the Federal Supreme Court Decision 4A_149/2025 of 12 January 2026 to have an immediate practical impact beyond legacy cases, this case is likely to send a shock-wave through the regulatory environment by emphasizing that an actual conflict of interest is the central criteria for the duty to hand over benefits received in connection with a mandate to apply.

From a practical point of view, although the Federal Supreme Court's reasoning implies that a waiver is not required in execution-only agreements absent a specific conflict of interest in a specific instance, we would continue to advise banks and financial service providers to continue providing for a waiver in their contractual documentation. Indeed, from a supervisory point of view, a waiver remains necessary as long as FINMA has not revised FINMA-Circular 2025/2. Moreover, it can also be prudent to include a waiver in the contractual documentation to cover special situations where a conflict of interest could arise in an execution-only relationship or cases where an execution relationship slips into an advisory one.

Indeed, banks acting on an *execution-only* basis should be cautious as for the time being at least FINMA-Circular 2025/2 implies that article 26 (1) FinSA continues to apply and, more generally, the Decision of the Federal Supreme Court could also apply to execution-only relationships, where accepting benefits from third parties may create a conflict interest, e.g. when benefits are paid for order-flow by brokers or trading venues.

In summary, this decision is a landmark precedent. However, it is probably not the last chapter of the saga of retrocessions in banking law and regulation.

des Versicherungsaufsichtsgesetzes ("VAG"), BBl_2020_8967, 9012.

[49] Botschaft zur Änderung des Versicherungsaufsichtsgesetzes ("VAG"), BBl_2020_8967, 9012.

Annex 1: Overview of the Regulatory Framework

Relationship	Regulatory Framework and Definition	Duty to Disclose Benefits	Duty to Hand-over Benefits
Portfolio Management	Article 400 (1) CO / article 26 FinSA, article 29 FinSO and FINMA-Circ. 2025/2, N 28 and 29. Discretionary asset management	Yes, as a matter of private law and under article 26 FinSA as interpreted by FINMA-Circ. 2025/2, N 28 and 29.	Yes, unless validly waived as a matter of private law under article 26 FinSA as interpreted by FINMA-Circ. 2025/2.
Advisory	Article 400 (1) CO / article 26 FinSA, article 29 FinSO and FINMA-Circ. 2025/2, N 28 and 29. Advisory services (both when considering the client's portfolio and when considering the transaction)	Yes, under article 26 FinSA as interpreted by FINMA-Circ. 2025/2, N 28 and 29; uncontroversial in private law, although no precedents.	Yes, unless validly waived under article 26 FinSA as interpreted by FINMA-Circ. 2025/2, N 28 and N 29.[50]
Execution-Only	Article 400 (1) CO / article 26 FinSA, article 29 FinSO and FINMA-Circ. 2025/2, N 28. Executing an order to acquire or dispose of a security (either directly or by transmitting the order), including general information on the product offering, sharing house or third-party views on financial instruments.	No, not following 4A_149/2025. Yes, under article 26 FinSA as interpreted by FINMA-Circ. 2025/2, N 28.	No, not following 4A_149/2025. Yes, under article 26 FinSA as interpreted by FINMA-Circ. 2025/2.
Service Providers to Occupational Benefit Plans	Private law and article 48k BVV 2. External management companies, asset managers, investment advisers and other persons providing services to occupational benefit schemes, including by extension 3a benefit schemes and vested benefit foundations.	Yes	Yes (not waivable)

[50] A valid waiver supposes information on fees in relationship to the assets of the clients, when in connection with a portfolio-based advisory-service and in any event per category of financial instrument (FINMA-Circ. 2025/2, N 28 and 29).

Relationship	Regulatory Framework and Definition	Duty to Disclose Benefits	Duty to Hand-over Benefits
Tied Insurance Intermediaries	Art. 45b ISA *a contrario* Intermediaries acting in the interest of the insurance undertaking (e.g., insurance agents).	No	No
Untied Insurance Intermediaries (not directly compensated by the policyholders)	Article 45b ISA/ (relationship to article 400 (1) CO is unsettled). Intermediaries acting in the interest of the policyholder (e.g. brokers) who do not charge fees to the policyholders.	Yes	No, as a matter of supervisory law and, presumably, as a matter of private law, based on market practices.
Untied Insurance Intermediaries (directly compensated by the policyholders)	Article 45b ISA/ (relationship to article 400 (1) CO is unsettled). Intermediaries acting in the interest of the policyholder (e.g. brokers) who charge fees to the policyholders.	Yes	Yes, unless waived in accordance with article 45 (2) ISA.

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