

# Advance waiver of the surrender of retrocessions, sales remunerations and other pecuniary benefits from third parties

Topic: **Stock exchange / securities account** Case number: **2022/18**

The client's bank renewed their contract documents and presented them to him for signature. He had various questions about this and corresponded with the bank. The question of who owns the "retrocession fees", as he put it, was not answered satisfactorily in his opinion. He was of the opinion that these belonged to the clients due to a Federal Court decision of 2012. According to his interpretation, however, he had to assign these and other "fees" to which he might be entitled to the bank. He asked the Ombudsman whether this understanding was correct and how he should proceed.

The subject area commonly referred to as "retrocessions" continues to preoccupy clients. The few cases that are currently still submitted to the Ombudsman mostly involve issues relating to provisions on the advance waiver of retrocessions, sales remunerations and other pecuniary benefits from third parties that banks receive in connection with clients investment products. Clients often become aware of such provisions in connection with the periodic updating of contracts by the banks and contact the Ombudsman in the opinion that they are fundamentally unlawful. They usually overlook the fact that the bank's existing contracts already contain comparable provisions.

The Ombudsman informed the client that, according to the case law of the Federal Supreme Court, a bank who acquires certain financial products for the client within the scope of an asset management mandate or holds them in the client's custody account, must account for monetary benefits it receives from third parties on this basis, and must pass these on to the client concerned.

However, according to the Federal Supreme Court, the obligation to pass on the received benefits to the client does not apply in the event that the client has waived them in advance. Such a waiver is only valid if the client can estimate the extent to which he will waive such benefits. This requirement is met if the bank informs him of the amount of the expected benefits in a percentage range of the assets under management.

The Federal Supreme Court has not yet clarified whether these principles also apply if the bank does not act for the client within the framework of an asset management mandate, but if the client acquires the investment products concerned within the framework of an investment advisory relationship or completely independently, or even if he merely holds investment products acquired via third parties in his custody account with the bank. There are cantonal court decisions that have answered some of these questions in the affirmative and others that have answered them in the negative. The questions are disputed in legal doctrine. Against this background, according to the Ombudsman's observations, the banks have for some time been moving towards regulating the issue of pecuniary benefits from third parties even for clients who have not concluded an asset management mandate with them.

In the Ombudsman's understanding, this is perfectly permissible. Both the Swiss Code of Obligations and the Financial Services Act allow for such regulations. The Code of Obligations gives the parties a

great deal of leeway in the drafting of contracts but provides standard rules in case they have not regulated certain points. If the parties make use of this leeway, this is not a violation of the law, but is possible on the basis of the principle of contractual freedom.

For the question of what monetary benefits the bank specifically receives from third parties in the client's case, it referred him to its internal specialist unit. The Ombudsman recommended that the client inform himself accordingly and then decide whether he wants to accept the arrangement presented to him. Should he reject it, he would probably have to look for another offer, as it can hardly be assumed that the bank will change its business model in an individual case.