

## Retrocessions: When should I contact the Banking Ombudsman?

The Swiss Federal Supreme Court has handed down two landmark decisions on the subject of retrocessions that are particularly important for bank clients. In the first decision of 30 October 2012, it made it clear that clients with a discretionary asset management agreement can demand accountability and payment not only of retrocessions but also of so-called trailer fees, provided they have not waived them. Trailer fees are performance-related sales compensation that banks have received from providers of the products purchased for their clients. In its decision of 17 June 2017, the Federal Supreme Court also clarified the previously highly controversial issue of the limitation period for claims for the return of retrocessions and trailer fees.

### What questions has the Federal Supreme Court clarified?

- **Obligation to surrender under a discretionary asset management agreement**

Clients who have commissioned the bank to manage their assets and have concluded a discretionary asset management agreement with the bank in this regard have a right vis-à-vis the bank to the disclosure and surrender of the remuneration received by the bank from third parties within the scope of the discretionary asset management mandate.

- **Obligation to surrender also for trailer fees**

The Federal Supreme Court has ruled that banks must also surrender to their clients the trailer fees that they receive in connection with discretionary asset management agreements.

- **Waiver of claim for surrender**

The customer may waive the right to retrocessions and trailer fees in advance. The prerequisite is that he knows at least the magnitude of the expected compensation. The Federal Supreme Court expressly permits the naming of a range "from ... to ..." percent.

- **Limitation of the right to reimbursement**

Claims for surrender of retrocessions and trailer fees are subject to a limitation period of ten years. The limitation period for each individual remuneration begins on the day on which the Bank receives it.

### What questions has the Federal Supreme Court not yet clarified?

#### Duty of disclosure and surrender in the advisory relationship

The decisive factor is whether there is an internal connection between order execution and payment flow. The Federal Supreme Court affirmed this in the case of the discretionary asset

management agreement, since a conflict of interest on the part of the bank is manifested by the fact that it decides autonomously and solely on the selection of securities. The Federal Supreme Court explicitly leaves open other relationships, i.e. advisory relationship and execution only.

One doctrine sees this internal connection - as a result of a comparable conflict of interest - also in the advisory relationship, while another denies it. In the case of a long-term consultancy agreement, the Zurich Commercial Court demanded the disclosure of remunerations from third parties within the limits of appropriateness and expediency, irrespective of any obligation to surrender, in order to be able to decide whether there is any internal connection at all. However, the question of disclosure has not yet been decided by the highest court i.e. the Swiss Federal Supreme Court in connection with an advisory relationship, nor has the obligation to surrender.

## Conclusion

- If you have entrusted the bank with the management of your assets (discretionary asset management agreement), you may demand that your bank file accounts of retrocessions, including trailer fees, and that they be surrendered, unless you have legally and validly waived these claims.

**If a bank is not prepared to do so, the Banking Ombudsman will accept corresponding customer complaints.**

- Banks are generally not prepared to reimburse retrocessions to advisory clients. In view of the situation described above, especially in the absence of a decision by the Swiss Federal Supreme Court, the Banking Ombudsman will not be able to influence the bank's position in such cases. He must therefore refer the customers concerned to the courts.

**If the bank has only advised you on specific points or in isolated cases or has not advised you at all, the Banking Ombudsman cannot help or mediate.**

### The Banking Ombudsman

The Swiss Banking Ombudsman is a neutral and free information and mediation body. It deals with specific complaints from clients against a financial institute domiciled in Switzerland. The institution began its activities in April 1993. Its sponsor is the "Swiss Banking Ombudsman Foundation", which was founded by the Swiss Bankers Association.

The procedure to be followed in order to submit a complaint to the Banking Ombudsman is described on the Banking Ombudsman's website at [www.bankingombudsman.ch/en](http://www.bankingombudsman.ch/en).