

Article 26 FinSA

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FinSA has codified the case law for all financial service providers. Under Article 26 FinSA a provider may accept remuneration from third parties in connection with a financial service only if it has expressly informed the client in advance and the client has waived the remuneration, or if it passes the remuneration on to the client in full. The information must state the type and scope of the remuneration before the service is provided. If the amount cannot be determined in advance, the provider must disclose the calculation parameters and ranges, and on request it must disclose the amounts actually received. The law defines remuneration from third parties broadly as all benefits that the provider receives from third parties in connection with the provision of a financial service, in particular brokerage fees, commissions, discounts and other financial benefits.¹ FINMA had already incorporated the case law into its Circular 2009/1 in 2013, so that the self-regulatory codes of the asset managers had to require disclosure from 2014 onwards.²

The practical consequence in Lugano was a change in the fee model. Many independent managers who had financed a low management fee with retrocessions from banks and fund providers moved to fee-only models, with all-in fees charged to the client and retrocessions passed on, or to models in which the client signs a waiver after receiving a precise table of ranges. Legacy claims remain. An Italian client or the heirs of a client who discover that a manager retained retrocessions for years may claim them back for the last ten years. In such disputes the question of whether an earlier waiver met the standard of BGE 137 III 393 is often decisive.³

Common misconception. Retrocessions are sometimes said to be prohibited in Switzerland. They are not. Under Article 400 CO as interpreted since BGE 132 III 460 and under Article 26 FinSA, a portfolio manager may keep remuneration from third parties if the client, after being informed in advance of its type, calculation parameters and expected range,

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has expressly waived it. Without such a waiver the manager must pass the remuneration on to the client in full. The client may claim retrocessions retained without a valid waiver for ten years from each payment (BGE 143 III 348).

1 Notes

1. FinSA (above), Art. 26, consulted in the English and Italian versions on droit-bilingue.ch. ↩
2. FINMA, press release of 27 June 2013 (above). ↩
3. BGE 143 III 348 (above) on the limitation period; the description of fee models is based on market practice. ↩

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