

Federal Tribunal upholds conviction of asset manager for not disclosing retrocessions

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Introduction

On 14 August 2018 the Federal Tribunal rendered a judgment confirming an asset manager's conviction of criminal mismanagement under Article 158 of the Swiss Criminal Code⁽¹⁾ for failing to disclose retrocessions received from a custodian bank.⁽²⁾

This is the first time that the Federal Tribunal has ruled on the controversial issue of whether the failure of an asset manager to render accounts on retrocessions and similar rewards paid by third parties (eg, custodian banks or issuers of financial instruments) in connection with the asset manager's performance of their mandate would qualify as criminal mismanagement.

Federal Tribunal's decision

The accused was the sole shareholder and director of an asset management company. Said company received retrocessions and other refunds from a custodian bank amounting to approximately Sfr400,000 for transactions executed in client assets which it managed. The accused never informed the clients of these retrocessions and refunds.

The Federal Tribunal highlighted in its reasoning that without proper information from the asset manager a client was unable to enforce their right to restitution of retrocessions as provided for in statutory law and thus suffered damage. The contractual duty of information was thus a key prerequisite to the effective protection of the client's rights.

Further, the Federal Tribunal ruled that the asset manager had not been liberated from his duty of information in the present case. It deemed a clause in the mandate agreement under which the clients had waived their right to reclaim retrocessions invalid because the asset manager failed to properly inform the clients of the bearing of such waiver (ie, the potential amount of retrocessions they would forego by the waiver). Consequently, the clause did not release the asset manager from his duty of information. His alleged belief in the validity of said clause was deemed irrelevant as the Federal Tribunal had already held in 2006 that a contractual release from the obligation to render accounts about retrocessions could take effect only if given in an educated manner, based on true and comprehensive information.

The Federal Tribunal concluded that the asset manager, by breaching his duty of information in relation to the retrocessions, had become criminally liable for mismanagement.

Precautions for asset managers

Considering the risk of criminal liability, asset managers must take particular care to comply with the legal requirements surrounding retrocessions. They must render accounts of such payments on their

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own initiative and in a transparent manner.

Asset managers who have so far abstained from providing such information because their clients have signed a waiver of retrocessions must assess the validity of such waivers. Mere belief in the validity of such a contract clause will usually not shield them from criminal liability.

Asset managers who have failed to properly inform their clients about retrocessions or other refunds received should consider furnishing the required information as quickly as possible. Arguably, a mere delay in informing clients about retrocessions will be insufficient to render an asset manager criminally liable.

After all, Article 158 of the Swiss Criminal Code requires that the client suffers a financial loss. The Federal Tribunal assumed such financial loss to have consisted of the client's inability to enforce the legal right to restitution of the retrocession. However, the merely late furnishing of (true and complete) information would not prevent a client from effectively asserting their right to restitution of retrocessions.

Since criminal liability for failing to inform clients about retrocessions is generally subject to a limitation period of 15 years, asset managers should also consider reporting benefits and rewards in relation to which the contractual claims of their clients are already prescribed due to the expiry of the ordinary civil statute of limitations (10 years).

Comment

The Federal Tribunal has clarified that asset managers, unless benefiting from a valid waiver clause, become criminally liable if they fail to properly inform their clients of retrocessions or other refunds received. Asset managers are thus well advised to verify compliance with their duty of information and to act quickly if they discover respective shortcomings.

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Endnotes

(1) Article 158 of the Swiss Criminal Code (available [here](#)) states as follows:

Any person who by law, an official order, a legal transaction or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss is liable to a custodial sentence not exceeding three years or to a monetary penalty.

(2) Federal Tribunal Decision 6B_689/2016 of 14 August 2016 (available in French [here](#)).

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