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## M&A transaction and pension funds

**Company sales and restructuring of a company have consequences not only for the persons directly affected, but also for the pension institution with which the employees are insured. Under certain circumstances, this can lead to an organizational alteration – a partial liquidation.**

**In order to avoid inequalities, pension institutions are legally bound to lay down the conditions and procedure for such a partial liquidation in a regulation. The affected employees are primarily interested in the withdrawal benefit and want to have a share in the profit and reserves. However, the pension institution pursues precisely opposing interests and wants to keep the substance as far as possible. From the employees point of view, the following special features have to be taken into account in the case of partial liquidation of pension institutions.**

### 1. Purpose of a partial liquidation

Within the scope of restructuring, entire teams or multiple employees often leave a company. In most cases, they also change their pension fund and their accumulated benefits are transferred to the new pension institution (PI). Depending on the setting, the beneficiaries are not only entitled to the paid contributions, but also to a share of the profit of the respective PI at the time of their departure, since the contributions paid by the beneficiaries enable the PI to invest them profitably in real estate, securities and foreign currencies.

The partial liquidation (PL) of a PI thus aims to prevent the PI from being either over- or undercapitalised and to ensure that the remaining and existing beneficiaries are treated equally. The exiting beneficiaries and the PI have fundamentally opposite interests: While the formers want to participate in the profits of the PI as much as possible, the latter wants to keep as much capital as possible.

### 2. Conditions

Individual withdrawals from a PI normally result in only minor changes in the pension capital and a PL is not required. This measure is only triggered if certain specific conditions are met.

According to Art. 53b of the Federal Act of Occupational Old Age, Survivors' and Invalidity Pension (OPA), it is provided that the PIs must set out the conditions and procedure of a PL in a regulation (PL regulation). A PL is presumed if one of the following three conditions is fulfilled:

- (1) there is a significant/material reduction of staff;
- (2) a company is restructured; or
- (3) the affiliation contract is terminated.

These conditions must be further specified in the PL regulation, although for practical reasons additional criteria may also be provided. It is therefore not surprising that the Federal Supreme Court often comments on the legality of individual PL regulations.

(1) What is meant by a significant reduction (i.e. the "materiality" threshold)? In practice, this is deemed to be the case when at least 10% of the staff leaves a company, although this figure/threshold may vary, in particular for very large or very small companies. However, a general threshold of 15% has been considered as too high by the Federal Supreme Court. It is important to note that voluntary resignations are not taken into account. As opposed to where the reduction is due to the employer or where there is a progressive staff reduction within a period of up to five years. If such waves of dismissals are due to the same economic event, a PL may also be triggered.

(2) The concept of corporate restructuring is broad. It includes, for example, the closure of a part of a company, the merger of departments, the sale of a subsidiary or outsourcing. However, a mere change in the management structure is not sufficient. Restructuring must also lead to a change in the staff, which in practice can be set at 1–5% of the workforce.

(3) The termination of an affiliation contract is always made with the explicit consent of the staff; mere notification is not sufficient. As with the first two conditions, an additional criterion such as a minimum number of beneficiaries (e.g. 7–10% of the total number of beneficiaries and/or pension capital) can be taken into account. The Federal Supreme Court emphasised as well that it is not possible to set a fixed amount in general, but that the analysis is to be carried out on a case by case basis.

### **3. The amount of the claim**

Depending on whether an individual or collective withdrawal takes place, the entitlement is measured differently. One speaks of a collective withdrawal when several beneficiaries jointly transfer to the same PI. In this case, in addition to the claim to the freely available funds, the exiting beneficiaries are entitled to the reserves and value fluctuation reserves. Freely available funds arise, for example, from transfer profits, i.e. actuarial reserves that are released when a beneficiary leaves the company. Reserves, in turn, are formed as security measures for benefit commitments that are not sufficiently covered by the contributions of the beneficiaries or are subject to risk variations. These include, for example, provisions for death and disability or increases in life expectancy. Finally, value fluctuation reserves serve to hedge against the variations risks of investments such as shares or other securities.

In contrast to overcapitalisation, where the beneficiaries can participate in the profits of the PI, as shown above, shortfalls can be deducted if there is an undercapitalisation. Due to the principle of equal treatment, such amounts must be deducted because otherwise the beneficiaries remaining in the PI would be disadvantaged. However, within the framework of the PL, contributions paid in by the beneficiary may not be reduced (OPA minimum benefit).

### **4. Appeal procedure**

Generally, a PL is carried out independently by the PI. However, it can happen that it is not carried out at all, despite the given conditions, or the beneficiaries and the PI will not agree on the amount of the claims. In this case, in addition to the beneficiaries, the accepting PI or the new employer, who will stand up for the departing beneficiaries, can take action.

In such disputes, the PL regulations normally provide for an "internal" appeal procedure first. If this does not lead to a solution, the conditions, the procedure and the specific distribution plan can be reviewed by the competent cantonal supervisory authority. Its decision can then be appealed to the Federal Administrative Court and finally to the Federal Supreme Court.

## 5. Conclusion

These remarks have shown that in the case of a possible PL of a PI, it must be carefully examined whether the legal requirements are met and if so, how the claims of the beneficiaries are calculated.

The following points should be considered:

- A PL of a PI occurs if one of the following three conditions is met:
  - (1) A significant reduction in the workforce exists if it is reduced by at least 10% for economic reasons, whereby the individual case must be analysed. Voluntary resignations are generally excluded.
  - (2) Restructuring is assumed if the workforce changes by 1–5% and the company is restructured or reorganised in the process.
  - (3) The dissolution of the affiliation contract may be subject to conditions, e.g. that a minimum number of beneficiaries or a certain portion of the actuarial reserve must be affected.
- The PL regulations of the PI concretise the legal requirements. Practice shows, however, that PLs are implemented rather hesitantly by PIs and the respective supervisory authorities are not even solicited or do not perform sufficiently critical reviews. The conditions and the resulting claims must therefore be determined precisely, especially in respect of the leaving beneficiaries and the new employer.

The table below provides an overview of the different claims.

|   | free resources |       | reserves and value variation provisions |       | shortfall in case of undercapitalization |       |
|---|----------------|-------|---|-------|--|-------|
|   | indiv.         | coll. | indiv.                                  | coll. | indiv.                                   | coll. |
| <b>case of freedom of movement</b>                          | x              | x     | x                                       | x     | x  | x     |
| <b>individual withdrawal in case of partial liquidation</b> | ✓              | x     | x                                       | x     | ✓  | x     |
| <b>collective withdrawal in case of partial liquidation</b> | ✓              | ✓     | x                                       | ✓     | ✓  | x     |

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