FMA

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FMA CIRCULAR

CONCERNING PARALLEL PENSION PRODUCTS

APRIL 2013

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INTRODUCTION

This Circular Letter is directed at all *Pensionskassen* (pension companies) that are supervised by the FMA and at all insurance undertakings supervised by the FMA that offer occupational pension group insurance products. The Circular Letter sets out the FMA's view from a supervisory perspective, developed in the context of its statutory remit, with regard to "parallel pension products".[1]

For the purposes of this Circular, the concept of "parallel pension products" refers to the design of occupational retirement provision (second pillar in the pension system) whereby an employer enters into agreements with several pension providers. The amendment to the *Pensionskassen* Act (PKG; *Pensionskassengesetz*), which entered into force on 1 January 2013 (Federal Law Gazette I No. 54/2012), has recently resulted in numerous queries on this matter. Based on the questions raised by the market participants, this Circular Letter focuses on the interplay between arrangements concluded with a *Pensionskasse* (PK) and/or occupational pension group insurance (OI), and in particular on the available options and restrictions regarding changing/terminating an existing PK commitment and creating an (additional) OI commitment.

The legal basis is in no way affected by this Circular Letter. No rights or obligations beyond those defined in the statutory provisions may be deduced from this Circular Letter.

1. NUMBER OF FRAMEWORK AGREEMENTS WITH PENSION PROVIDERS

There is no expressly defined statutory limit on the number of framework agreements that an employer may choose to conclude with different pension providers.

Similarly, there is nothing in supervisory law, and nothing in Article 17 para. 1 PKG in particular, to prevent employers from dividing their employees up from the outset into two or even several groups for which the employer then pays contributions to different pension providers. The purpose and intention of Article 17 para. 1 PKG is to ensure that any entitlement (parts of the assets to be transferred pursuant to Article 17 para. 4 PKG) of all beneficiaries is in fact transferred[2] (with an express exception made for beneficiaries (recipients) and, with effect from 1 January 2013, beneficiaries (recipients) and beneficiaries with non-contributory entitlement regarding remaining in the PK) and that no group is placed at a disadvantage. However, this is not only guaranteed in the case of a simple transfer to

[1] It should be noted for the sake of completeness that any conceivable contractual arrangement in this regard must be permissible under labour and civil law and that this Circular Letter is only concerned with the supervisory law perspective.

[2] Evidence of the guaranteed transfer of the assets is provided in practice in the form of a binding declaration from the new pension provider(s) confirming that the assets have been taken over. This declaration is attached to a notification pursuant to Article 36 para. 1 no. 9 PKG.

another pension provider but also in the event of a transfer to several of the pension providers referred to in Article 17 para. 1 PKG.

The following second point should however be noted:

2. EXCEEDING OF THE MAXIMUM LUMP SUM PER PENSION PROVDER AND PER BENEFICIARY

For the purposes of upholding the collective system of occupational retirement provision, there are limits on the scope of any parallel pension product to the extent that the limit on the lump sum payable pursuant to Article 1 para. 2 no. 1 PKG and/or Article 18f para. 1 no. 2 of the Insurance Supervision Act (VAG; *Versicherungsaufsichtsgesetz*) is designed to ensure that beneficiaries (entitled) of every pension provider can expect to be paid a lifelong pension. This is indicated in the documents relating to Article 3 para. 1 no. 2 of the Company Pension Act (BPG; *Betriebspensionsgesetz*) (option of paying variable contributions), according to which the mere financing of the benefit commitment through fixed contributions should ensure that the capital value of the entitlement exceeds the lump sum (387 annex to the shorthand verbatim records of the National Council, 20th legislative period, page 12, transposed in Federal Law Gazette No. 754/1996; Administrative Court 2005/17/0239 of 20 March 2006).

3. CONTINUOUS PAYMENT OF CONTRIBUTIONS REQUIRED

The occupational retirement provision system is a collective system designed for the long term.

In accordance with Article 1 para. 2 PKG, Article 17 para. 1 PKG and Article 6 BPG, contributions must be paid to the *Pensionskasse* for as long as the pension company contract is in place, in other words until the expiry of the period of notice or until such time as the pension company contract is terminated by common consent. Moreover, contributions must be paid to the pension provider continuously throughout the entire contract term.

With regard to the “parallel pension products” being considered here this means the following: From the perspective of supervisory law, it is not permissible to enter into or maintain one or more arrangements with a PK and/or OI while at the same time permanently ceasing by common consent the payment of contributions in relation to a valid PK contract. Contributions may as a general rule only be stopped subject to the narrowly defined conditions in Article 6 BPG, according to which the employer may unilaterally suspend or stop contributions for the period specified.

Emphasis should be placed here on the wording of Article 1 para. 2 PKG, which clearly creates a direct link between the guarantee/provision of a pension and the acceptance and investment of pension company contributions. With regard to the payment of variable contributions into defined contribution plans, reference is made to the fact that Article 3 para. 1 nos. 2 and 2a PKG, Article 6 para. 1 no. 2 PKG and Article 2a BPG contain definitive rules in this regard. Reference is also made to Article 15 para. 3 no. 1 PKG, stipulating the amount of the contributions to be paid by the employer as a mandatory component of any pension company contract.

4. INDIVIDUAL SWITCH OPTIONS; NO SPLITTING OF AN INDIVIDUAL BENEFICIARY'S ENTITLEMENT

Individual switch options are now, as intended by the policymaker, definitively regulated by the amendment in Federal Law Gazette I No. 54/2012 (1749 annex to the shorthand verbatim records of the National Council, 24th legislative period, page 6: "The switch options should be definitively governed by the terms of the PKG, with no granting of any switching rights not covered by the statutory provisions."). It is the FMA's view that this consideration also applies generally and decisively to any switch between different pension providers.

Both the PKG and the BPG continue to make provision for the simple switch by an individual employee, with that employee's total assets, to a new pension provider.[33] Even in cases in which there is a move away from the original pension provider following termination by the employer or the *Pensionskasse* or in the event of the contract being ended by common consent pursuant to Article 17 para. 1 PKG, there are no provisions for splitting/it is not possible to split the existing or any future entitlement of an individual beneficiary.

5. INDIVIDUAL RIGHT TO SWITCH TO OCCUPATIONAL PENSION GROUP INSURANCE

According to the clearly worded statutory provisions (Article 5a para. 1 BPG being the mandatory rule), the individual right to switch to occupational pension group insurance is linked to reaching the age of 55, with the result that agreeing an earlier switching age in the context of an individual right to switch is judged by the FMA to be inadmissible. There is also no applicable transitional provision, as is the case for beneficiaries (recipients) (see Article 49 para. 2 no. 1 PKG).

[3] Where the employee has disposal options after termination of the employment relationship, there are no provisions in place for splitting up the assets of that individual beneficiary (Article 5 para. 2 and Article 6c para. 2 BPG).

6. ONE-OFF “SYSTEM CHOICE”

To this extent there are no supervisory objections to a one-off “system choice” as in the case of an entirely new occupational retirement provision scheme being set up with, for example, the simultaneous arrangement of a PK and an OI commitment, the option for the individual employee to select whether to be included in the PK and/or OI commitment appears to be an integral part of the system. Splitting up the assets of the individual employee is, as shown under point 4, not permitted.

The acceptance of a system-related, one-off switch option also appears justified in cases where a PK commitment already exists and an (additional) OI commitment is to be added. Here, however, the existing pension company contract must be cancelled/terminated by common consent and a parallel pension product agreed. In other words, this genuinely means starting from the beginning, with the beneficiary being given a choice between two systems. Even though the PKG/BPG now stipulates an upper limit with regard to the granting of individual switching rights, the possibility of a one-off “system decision” on the part of the individual beneficiary appears to be permissible to the extent that the beneficiary should be able to choose a PK and/or OI product in cases where a parallel pension product is being established.

7. PARTIAL TERMINATION

It is the FMA’s view that the wording of Article 17 para. 1 PKG makes partial termination inadmissible, stating that termination shall only be legally effective if applicable to all beneficiaries and if involving the transfer of all of the assets; with an express exception made for beneficiaries (recipients) and, with effect from 1 January 2013, beneficiaries (recipients) and beneficiaries with non-contributory entitlement regarding remaining in the PK.