



# Partial liquidation of pension funds

Vincent Carron, LL.M.

## Key Take-aways

- 1.** Multi-employer non-segregated pension funds may provide for special conditions for opening partial liquidation proceeding. These conditions must be linked to the number of departing insured persons or the outflowing pension capital.
- 2.** The review of provisions has to be carried out in relation to the balance sheet date (financial situation on the reference date). There is no room for an ex post review.
- 3.** The partial liquidation deals with the distribution of existing funds, not with funds that are wrongly no longer available in the pension fund at the relevant date for the partial liquidation.

## 1 Introduction

The Swiss Federal Supreme Court has recently published a number of decisions relating to partial liquidations of pension funds. Partial liquidations of pension funds are **regulated** by law, in particular by the Art. 53b ff. of the Federal Act on Occupational Retirement, Survivors' and Disability Pension Provision ("**LPP**") and Art. 27g ff. of its implementing ordinance ("**OPP 2**"). In addition, they are subject to monitoring by the supervisory authority.

## 2 Partial liquidation cases

### 2.1 General conditions

Even before an actual case of liquidation arises, the pension fund must lay down the conditions and proceeding for partial liquidations in a **regulation**. The aim is to provide in advance for the cases of application and the rules of the game in order to avoid "tailor-made" decisions on the occurrence of an actual case. In order to define the liquidation cases, the law presumes that the **conditions for a partial liquidation** are fulfilled when the number of employees is considerably reduced, when a company is restructured or when the affiliation contract is terminated. The partial liquidation regulation has to specify these conditions.

### 2.2 Additional conditions for multi-employer non-segregated pension funds

For a multi-employer pension fund that does not keep segregated accounts it is often inappropriate that the termination of any affiliation contract leads to a partial liquidation, as this could mean that these institutions find themselves in a **situation of permanent partial liquidation**. Therefore, these institutions may provide for **additional conditions**. Two decisions have recently been published by the Swiss Federal Supreme Court on this topic.

In the Swiss Federal Supreme Court decision 145 V 22, the partial liquidation regulations provided for a partial liquidation case in the event of termination of the affiliation contract resulting in the departure of at least 2% of the insured persons. The partial liquidation condition was fulfilled in this case, so the question arose as to whether, in the context of this liquidation, the termination of affiliation contracts that were below the 2% trigger threshold should also be taken into account. The Swiss Federal Supreme Court ruled in the affirmative, holding that affiliations of companies with a very small number of employees must be **included** in the partial liquidation of a multi-employer non-segregated pension fund where their affiliation agreement had been **terminated due to the same economic event** that led to the partial liquidation. This also applied where the termination of the affiliation contract of one of these companies as a standalone event would not have triggered a partial liquidation.

In the Swiss Federal Supreme Court decision 143 V 200, the court had to consider the validity of a partial liquidation regulation of a multi-employer non-segregated pension fund which had added as an additional condition to proceed to a partial liquidation a minimum threshold of 10% of affiliated companies terminating their affiliation contracts. The Swiss Federal Supreme Court ruled that this condition placed the threshold much too high, since it would have required the departure of 35 companies, an event that was remote given

the usual fluctuations in that pension fund. On the other hand, setting the threshold lower would have implied the risk of a permanent liquidation situation. The condition was problematic with regard to equal treatment of insured persons, since the departure of 34 companies with a significant number of insured persons would not have triggered a partial liquidation, whereas the departure of 36 companies with very few insured persons each would have triggered such liquidation. Therefore, the "additional condition" the multi-employer non-segregated pension fund may provide for must be linked to the **number of departing insured persons** or the **outflowing pension capital**, but not to the percentage of terminated affiliation agreements.

---

**Provisions must reflect the financial situation on the balance sheet date.  
There is no room for an ex post review.**

---

## 3 General principles

The partial liquidation must follow two cardinal principles: firstly, **recognized technical principles** must be followed; secondly, the principle of **equal treatment** must be complied with. The basic idea is that the free funds follow the staff or, conversely, that the staff also participate in the underfunding. The entitlement to free funds is individual in the event of individual departure. In the case of a collective departure, the entitlement to free funds can be individual or collective. When several insured persons migrate together to another pension fund (collective departure), there is a collective right to proportional participation in the provisions and fluctuation reserves. If there is a shortfall on the relevant day of the partial liquidation, the vested benefits of the departing insured persons will be reduced by the technical underfunding, as long as this does not affect the retirement savings capital in accordance with Art. 15 LPP. Therefore, it is not in the employer's interest to terminate the affiliation contract and thus to create a partial liquidation case if the pension fund is underfunded, as its employees are at risk of receiving diminished **vested benefits**, unless the employer provides special funding.

## 4 Technical provisions

The collective right to proportional participation in the provisions only exists if the relevant **actuarial risks** are also transferred. The Swiss Federal Supreme Court decision 144 V 120 pointed out that, even if the actuarial risks covered by the

provisions could no longer concern the first pension fund after the partial liquidation, the corresponding part of the provisions must be turned over to the receiving pension fund to the extent these provisions had also been created in favour of the transferring insured persons. A simple reversal of these provisions would indeed favour the remaining staff.

In the Swiss Federal Supreme Court decision 144 V 264, the court confirmed that in the course of a partial liquidation a provision could be created on the basis of a provision regulation adopted before the balance sheet date but after the decision on the partial liquidation. This is especially true since the **creation of a provision** could even be justified **in the absence of any regulatory basis**. Indeed, the risk capacity of a pension fund can change suddenly and fundamentally, making it necessary to reassess the need for provisions. Thus, creating provisions on the occasion of a partial liquidation may be justified, for example if the pension fund faces a serious risk of ending up with only pensioners. This point of view was also confirmed in the Swiss Federal Supreme Court decision 145 V 22.

In some cases, appellants argued that the provisions were not justified, as (later) proven by the development of the pension fund's situation during the months following the closure of the relevant balance sheet. The Swiss Federal Supreme Court decision 144 V 264 made it clear that the review **must be carried out in relation to the balance sheet date** (financial situation on the reference date) and that there is **no room for an ex post review**. In the Swiss Federal Supreme Court decision 145 V 22, the court also made it clear that a retrospective review is not allowed. What matters are the circumstances as they stand (current and plausible – prospective view) at the balance sheet date.

In the event of significant changes in assets or liabilities between the relevant date for the partial liquidation and the date of transfer of the funds, the provisions and fluctuation reserves to be transferred are adjusted accordingly. On the other hand, as stated in Swiss Federal Supreme Court decision 144 V 369, if the underfunding existing on the relevant date for the partial liquidation is fully compensated for the departing insured persons and the pension fund is still underfunded at the time of the transfer of funds, the departing insured persons **are not entitled to any additional amounts** related to the reduction in underfunding. OPP2 does not grant any additional rights to the insured persons in this respect.

## 5 Procedures

Insured persons and pension beneficiaries must **be informed** fully and in a timely manner of the partial liquidation and have the right to inspect the distribution plan.

The partial liquidation regulation sets out the procedures to be followed. In general, the regulation also provide that insured persons and pension beneficiaries who do not agree with the distribution plan must first follow an internal opposition process, which they must initiate within 30 days from receipt of the information. If the opposition is not successful, the regulations provide in practice either for a direct transfer of the opposition by the supreme organ to the supervisory authority or for the start of a new 30-day period for the opponants to

bring the matter before the supervisory authority. In a decision 9C\_15/2019 of 21 May 2019, the Swiss Federal Supreme Court confirmed that pension funds are entitled to set such **time limits**. It is then possible to appeal the decision of the supervisory authority before the Federal Administrative Court. The appeal will have suspensive effect only if the Federal Administrative Court decides so, either *ex officio* or at the request of the appellant. In the absence of suspensive effect, the decision of the Federal Administrative Court shall only have effect to the advantage or detriment of the appellant, but not with respect to other insured persons. Finally, the decision of the Federal Administrative Tribunal may be appealed to the Swiss Federal Supreme Court.

With regard to the **standing to challenge** the partial liquidation, the Swiss Federal Supreme Court decision 145 V 343 clarified that a person with only an indirect expectation to receive a survivor's pension in the future has no standing. Thus, if the entitlement to a survivor's pension arises only after the reference date for the partial liquidation and after the closure of the administrative proceedings concerning the examination of the partial liquidation decision, the person concerned has no standing to participate in the subsequent appeal proceedings.

In the case decided by the Swiss Federal Supreme Court decision 143 V 321, the appellants submitted that there should have been more assets to be shared in the partial liquidation. They argued that the pension fund had allowed an outflow of funds in violation of the regulatory provisions. However, the partial liquidation deals with the **distribution of existing funds**, not with funds that are (wrongly) no longer present in the pension fund at the relevant date for the partial liquidation. Issues that are contentious and which are inseparably and directly linked to issues of possible liability of directors are not for the supervisory authority to decide and therefore cannot be taken into account in the partial liquidation proceedings.

## 6 Conclusion

Partial liquidations require significant attention, especially since they typically take place at delicate turning points in the history of the company (collective redundancies, transfer of part of the business, etc.), which can crystallize resentments between ex-employees and employer, in circumstances where large sums may be at stake.



**Vincent Carron, LL.M.**  
Partner Geneva  
Certified Specialist SBA  
Labor Law  
vincent.carron@swlegal.ch



**Dr. Catherine Weniger**  
Counsel Geneva  
Certified Specialist SBA  
Labor Law, CES HEC  
catherine.weniger@swlegal.ch



**Dr. Christine Beusch-Ligenstorfer**  
Of Counsel Zurich  
christine.beusch@swlegal.ch



**Michael Hess, LL.M.**  
Counsel Zurich  
Certified Specialist SBA  
Labor Law  
michael.hess@swlegal.ch

The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer Ltd liaison or one of the persons mentioned above.

Schellenberg Wittmer Ltd is your leading Swiss business law firm with more than 150 lawyers in Zurich and Geneva, and an office in Singapore. We take care of all your legal needs – transactions, advisory, disputes.



**Schellenberg Wittmer Ltd**  
Attorneys at Law

**Zurich**  
Löwenstrasse 19  
P.O. Box 2201  
8021 Zurich / Switzerland  
T +41 44 215 5252  
www.swlegal.ch

**Geneva**  
15bis, rue des Alpes  
P.O. Box 2088  
1211 Geneva 1 / Switzerland  
T +41 22 707 8000  
www.swlegal.ch

**Singapore**  
Schellenberg Wittmer Pte Ltd  
6 Battery Road, #37-02  
Singapore 049909  
T +65 6580 2240  
www.swlegal.sg