FMA CIRCULAR

CONCERNING THE ADMINISTRATION OF PENSION COMPANY COMMITMENTS IN INVESTMENT AND RISK SHARING GROUPS PURSUANT TO ARTICLE 12 PARA. 6 PKG
DISCLAIMER: This circular does not constitute a legal regulation. It is intended to serve as guidance and reflects the FMA's legal interpretation. No rights and obligations extending over and above the provisions of the law can be derived from circulars.
The amendment to the Pensionskassen Act (PKG; Pensionskassengesetz) (Federal Law Gazette I No. 54/2012 entering into force on 1 January 2013) raised several questions on the interpretation of Article 12 paras. 6 and 7 PKG and the related creation, as now permitted, of sub-investment groups (sub-IGs) by Pensionskassen.

This Circular Letter summarises the views of the FMA from a supervisory perspective, developed in the context of its statutory remit, with regard to the issue of sub-IGs and available options pursuant to Article 12 paras. 6 and 7 PKG. 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

A. SUB-IGS AND SWITCH OPTIONS
(ARTICLE 12 PARA. 7 SENTENCE 1 PKG)

If the assets of the beneficiaries (entitled) are being administered in an investment and risk sharing group (IRG) pursuant to Article 12 para. 6 PKG – within which several sub-IGs are set up – switch options are to be made available in accordance with Article 12 para. 7 PKG with regard to the pension company commitments concerned. This means that the assets of beneficiaries (entitled) can only be administered in sub-IGs if an individual right to switch out of this sub-IG is granted.

This arises primarily from the policymaker's intention, as clearly expressed in the documents relating to Federal Law Gazette I No. 54/2012 (government bill in annex 1749 to the shorthand verbatim records of the National Council, 24th legislative period, pages 1, 3 and 5) to create sub-IGs for the purposes of using individual rights of beneficiaries (entitled) to choose and the direct systematic link with Article 12 paras. 6 and 7 PKG.

B. DESIGN OF SWITCH OPTIONS

Article 12 para. 7 nos. 1 to 3 defines binding basic parameters for the switch options (maximum framework) to be specified in the pension company contract in accordance with the employment law basis. Contractual designs of the switch options for beneficiaries (entitled) in line with this wording are subject to private autonomy and are therefore permitted. It is possible, for example, to grant the beneficiaries (entitled) only two contractually agreed switch options rather than three, but they may not be granted four.

This interpretation of the provision is partly derived from the wording of the law (“maximum”) and partly from its main aim with regard to the interest of beneficiaries (entitled) in a contractually agreed granting of switch options. Any systematic consideration of thePKG in

¹ It should be noted for the sake of completeness that any conceivable contractual arrangement in this regard must be permissible under employment and civil law and that this Circular Letter is only concerned with the supervisory law perspective.
relation to bilaterally binding legal provisions is contrary to the “all or nothing” principle upheld in some of the theory.”

C. “MINIMAL SWITCH OPTIONS”

Beneficiaries (entitled) whose assets that are included in a pension company commitment are managed in an IRG pursuant to Article 12 para. 6 PKG – in which several sub-IGs have been set up – must at least be offered the chance to switch to a sub-IG or IRG with a different investment strategy. The provisions of Article 12 para. 7 nos. 1 to 3 PKG apply accordingly.

This point is the logical consequence on interpretation regarding the design of the switch options (if Article 12 para. 7 nos. 1 to 3 PKG only stipulates a maximum framework, there must conversely also be a minimum degree of switch options) and should also be viewed in conjunction with observance of the rules according to Article 12 para. 7 nos. 1 to 3 PKG through existing variations of the life phase model (“life phase model old”) prior to the amendment entering into force (Federal Law Gazette I No. 54/2012).

D. TRANSITIONAL PROVISON TO ADAPT THE PENSION COMPANY CONTRACT (ARTICLE 49 PARA. 2 NO. 3 PKG)

If entire portfolios are to be transferred to an IRG pursuant to Article 12 para. 6 PKG, cover is required in the pension company contracts and employment law basis. The provisions of Article 49 para. 2 no. 3 PKG, according to which Pensionskassen have until 31 December 2015 to implement any necessary contractual changes, do nothing to change this. After the transitional period, Article 12 para. 6 PKG stipulates that IRGs may only be used to administer pension company commitments with regard to which the beneficiaries (entitled) are granted switch options as defined in Article 12 para. 7 PKG.

The transitional provision means that the contractual parties are given more time to make the necessary contractual modifications regarding the granting of individual switch options. However, this does not change the fact that any contracts that already provide for switch options for beneficiaries (entitled) must also always include a contractual basis.

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2 See for example Slezak, Erweiterung der Wahlrechte für Anwartschaftsberechtigte durch Lebensphasenmodell und Sicherheits-VRG [Extending options for beneficiaries through the life phase model and security-oriented IRGs], ZFR 2012, 262.
The administration of pension company commitments

E. BENEFICIARIES (RECIPIENTS) / BENEFICIARIES WITH NON-CONTRIBUTORY ENTITLEMENT / BENEFICIARIES (ENTITLED) WITH CONTINUED OWN CONTRIBUTIONS

The transfer of an employer’s pension company commitments to an IRG in accordance with Article 12 para. 6 PKG means that beneficiaries (recipients) and beneficiaries with non-contributory entitlement (Article 5 para. 2 no. 1 of the Company Pension Act – BPG; Betriebspensionsgesetz) and beneficiaries (entitled) paying continued own contributions (Article 5 para. 2 no. 5 BPG) may also be transferred to this IRG.

With the pension company commitments of the beneficiaries (recipients) forming a contractual and economic unit with the commitments to the other beneficiaries (entitled) from the modified contractual relationship, those beneficiaries (recipients) whose pension company commitments do not provide for any individual switch option may also be administered in the “new” IRG. This must similarly apply to beneficiaries with non-contributory entitlement and to beneficiaries (entitled) who continue to pay their own contributions only.

F. RESTRICTION TO PENSION COMPANY COMMITMENTS WITHOUT UNLIMITED OBLIGATION OF THE EMPLOYER TO MAKE ADDITIONAL CONTRIBUTIONS

In the case of an IRG according to Article 12 para. 6 PKG, no pension company commitments with an unlimited obligation on the part of the employer to make additional contributions (Article 5 para. 3 final sentence PKG) may be administered. If an individual pension company contract includes commitments both with and without an unlimited obligation of the employer to make additional contributions (mixed contract), this means that only the commitments without such an unlimited obligation may be administered in an IRG pursuant to Article 12 para. 6 PKG.

The basic statutory conditions for a switching regime within IRGs and sub-IGs clearly restrict this, in Article 12 para. 7 first sentence PKG, to pension company commitments without any unlimited obligation of the employer to make additional contributions.