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The Change of a Pension Fund requires prior consent of the employees. In the absence of the employees' consent, the termination of an affiliation contract is, according to a recent Federal Supreme Court's decision, void. What appears to be a mere legal detail can have significant consequences in practice.



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Invalid Termination of an Affiliation Contract in the Absence of the Employees' Consent

The Swiss Federal Supreme Court has ruled that the termination of an affiliation contract with a pension fund is void if the employees were not involved in and did not give their consent prior to the decision. The Federal Supreme Court expressly ruled out the admissibility of tacit subsequent consent to such a termination.

In a recent court decision (9C_409/2019 of 5 Mai 2020), the Swiss Federal Supreme Court made an extraordinarily clear statement on the right of employees to participate in the decision on a change of pension fund. The underlying facts of the court decision were a dispute concerning the termination of an affiliation contract and the related question of whether the foundation, acting as pension institution of the pension fund, had to carry out a partial liquidation. Apart from other contentious points regarding the termination of the affiliation contract (which are not of interest for purposes of the present newsletter), it was particularly disputed whether the participation rights of the employees affected by the change of the pension fund were violated and what consequences a potential violation of these participation rights had.

Genuine Participation

Since 1 April 2004, the Occupational Pensions Act provides for a right of genuine participation for employees or the works council, if any, in the election of a pension fund or in the event of a change of the pension fund. Accordingly, the termination of an existing affiliation contract with a pension fund and the re-affiliation must take place with the consent of the employees or works council (if any). In this context, "works council" must not be confused with a pension fund's "joint administration" – the former represents the employees in accordance with the Swiss

Federal Act on Information and Consultation of Employees in Businesses (Participation Act; *Mitwirkungsgesetz*), while the latter is the top level body of a pension fund composed of equal numbers of employer and employee representatives.

The employees' right to participate in the decision on the affiliation with a pension fund and the termination of an affiliation contract, respectively, is a genuine participation right within the meaning of the Participation Act. This means that the employees do not only have a right to information or consultation, but a genuine right to participate in the decision-making process. The Federal Supreme Court undertook a detailed analysis and interpretation of the relevant legal provisions and examined the will of the legislator at the time these were enacted.

According to the reasonings of the Federal Supreme Court, the legislator aimed at a joint decision to be taken by the employer and the employees with regard to the election of the pension fund and granted the latter a special, pension-specific right of participation. It is not sufficient, according to the Federal Supreme Court, to merely inform the employees. Rather, a change of the pension fund requires the employees' consent, whereby the act of consent is to be conceived as a collective right and not as an accumulation of individual rights. Furthermore, consent must regularly be given in advance.

Invalidity of Termination in the Absence of Consent

According to the Federal Supreme Court, the termination of an affiliation contract can only be effective if the employees have given their consent. In its reasoning, the Federal Supreme Court refers to its established case law on notices of termination of employment contracts that were given by persons who were not competent to issue such notices. According to the said case law, such notices of termination given by non-authorized persons are invalid and only become effective when they are given by an authorized person. In such a case, it is (initially) not clear to the other party whether the employment relationship will be terminated or not. Only from the point in time when the notice of termination is given or approved by the duly authorized person, the termination is deemed to have been validly made. Such approval may also be tacit. However, uncertainty about the validity of the notice of termination can only be said to exist if the terminated party actually doubts the binding nature of the termination notice. In the case at hand, the lower court had applied this principle of subsequent approval – in accordance with a large part of the legal doctrine – to the termination of affiliation contracts and had ruled that the employees could tacitly approve the termination of an affiliation contract, which would have made the termination of the affiliation contract legally effective.

The Federal Supreme Court clearly rejects this approach: In contrast to the lower court, the Federal Supreme Court denies the admissibility of subsequent tacit approval by the employees in the event of termination of an affiliation contract. The Federal Supreme Court justified this by stating that as a result of its legal obligation to report the termination of the affiliation contract to the substitute institution (*"Auffangeinrichtung"*), the pension fund is obliged to ensure that the termination was made in due form – and thus that the employees have indeed

given their prior consent to the termination. This obligation would preclude any subsequent approval or tacit consent from the outset.

In the absence of the employees' prior consent to terminate the affiliation contract, the Federal Supreme Court considers the termination of such contract to be invalid. The Federal Supreme Court even considers the approach, after which the termination of an affiliation contract is deemed to become effective with retroactive effect upon subsequent approval by the employees, to be an abuse of law, because in that case the employees' right to participate in the decision on the affiliation with a pension fund would be curtailed to the extent that instead of a right to "participate" only a right to "oppose" would remain.

Impact on Practice

It is to be expected that the above-mentioned court decision will have an impact on the current practice. In our experience, the employees' right to participate has been rather overlooked in the past. More often than not the consent of the employees is simply being assumed or the employees are confronted with a *fait accompli*. In view of the present decision of the Federal Supreme Court, the consent of the employees should not (any longer) be assumed or even presumed airily in the future.

The participation of the employees requires that they have been sufficiently informed in advance. In order for the employees to be able to make a decision on whether to approve or reject an affiliation contract, they must be aware of the relevant criteria at an early stage. Usually, a change of affiliation with a pension fund is not only complex but may also be of great importance for the individual retirement planning of the persons concerned.

If a works council is established in the company, only this body needs to agree to the termination of the affiliation contract. The involvement of the works council

may be expedient because the opinion-forming process generally becomes more efficient with a smaller group. If the company does not have a works council, the employees need to be involved directly. By employees we mean all those employees who are employed by the company at the time when the consultation procedure is ongoing. Pensioners are not included.

The right of participation needs to be exercised collectively by the employees. Depending on the size of the workforce, the implementation of a collective participation process requires a more or less extensive organization. The Federal Supreme Court does not stipulate any specific modalities or procedures as to how the participation shall be implemented, but it states that the formation of an opinion takes a certain amount of time. A timely and careful planning of the involvement of the employees is therefore strongly recommended. It is conceivable, for example, to organize information events or to hold town hall meetings and/or provide detailed written information, whereby the involvement of specialists has proven to be helpful in practice, given the complexity of the subject matter. Normally, a(n) (open or secret) vote on the approval by the employees will need to be held, whereby the necessary quorum and majorities will have to be determined in advance.

Another question is whether the right of participation also applies to non-mandatory pension schemes. The Federal Supreme Court was not required to deal with that question in the present case. The lower court had left the question open and stated that the relevant legal provision must be applied in any case within the scope of mandatory pension schemes.

Implications on M&A practices

It is not yet possible to estimate what effects the present court decision will have on company acquisitions. If the

acquisition of a company results in a transfer of business in the sense of art. 333 para. 1 of the Swiss Code of Obligations – which may be the case, for example, in a merger or in a company acquisition by way of transfer of assets –, this will result in a change of employer. This change of employer triggers the duty to inform employees or, if measures are intended which affect employees, the duty to consult employees under the law governing the transfer of business.

Typically, a change of employer also leads to a change in the occupational pension plan. Generally, this does not necessarily lead to the termination of an affiliation contract. However, the acquiring employer will usually be interested in integrating the employees it assumed in the course of the acquisition into its existing pension scheme. Such a collective change of pension fund is not covered by the wording of the relevant provisions of the Occupational Pensions Act regarding the employees' participation rights as long as that change is not caused by the termination of an affiliation contract. Nevertheless, it is to be expected that more attention will need to be paid to changes of pension funds in the event of a transfer of business, as such change is more likely to trigger the duty to consult. In view of the tendency emerging also from the latest decision of the Federal Supreme Court, to simply inform employees is probably not (or no longer) sufficient in many cases.

Employment News reports on current issues and recent developments in Swiss labor law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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