

INSURANCE & PRIVATE PENSION LAW – UPDATE

November, 2004

Issue no 2.

Welcome to our *Insurance & Private Pension Law – Update* issue No.2

Back Issues

Back issues of the *Insurance & Private Pension Law – Update* will be available on our website at www.jmganado.com in the main 'Publications' section under the 'Insurance Law' sub-heading.

1. LATEST NEWS

Legislation

- ❑ Legal Notice 311 of 2004 – Insurance Business (Supplementary Supervision of Insurance Undertakings in an Insurance Group) Regulations, 2004.
- ❑ Legal Notice 322 of 2004 – Insurance Business (Companies Accounts) (Amendment) Regulations, 2004
- ❑ Amendments to the Insurance Business Act, 1998 published together with the amendments to the Trusts Act, 1988.

White Papers

- ❑ The Government published a white paper on Pensions Reform in Malta on the 24th November, 2004.

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2. New MFSA Authorisations & Licences

- i. *Island Insurance Brokers Limited* was granted a licence by the MFSA to accept business of insurance under an underwriting agreement entered into with GasanMamo Insurance Limited, Atlas Insurance Limited and Middlesea Insurance plc in the following classes of general business : 1(d), 3, 7 and 10.
- ii. AON Malta Limited was granted authorisation by MFSA to accept business of insurance under an underwriting agreement entered into with Lloyd's Syndicate (2488) in the following general classes of business : 8 and 9.
- iii. A number of insurance sub-agents have been enrolled in the sub-agents' list.

3. Articles & Analysis

i. OVERVIEW OF PENSIONS REFORM WHITE PAPER

The Government is resolute to reform the pensions system in order to ensure its long-term sustainability. Social demographic patterns in Malta are alerting and the government has often reiterated its concerns that unless reform is implemented soon we may be unable to safeguard even a basic level of pension in the long term. It is estimated that the Maltese population will fall up to 14% by the year 2050 and the proportion of 60 year old persons in relation to the population will increase steadily from the current 18% to 22% by 2010, 26% by 2020 and 31.2% by 2050.

On the 24th November, 2004 the Government published a White Paper titled '*Pensions – Adequate & Sustainable*' which provides a comprehensive overview of the issues and concerns of the current pension system and suggests bold recommendations for reform.

We are preparing a memorandum on the various recommendations and suggestions made by Government in the White Paper and will circulate it to our readers shortly.

Meanwhile, we are pleased to provide you with a brief analysis of the main recommendations and principles enunciated in the White Paper:

General Principles

- The process of pension reform should be all encompassing and holistic in its design and the implementation of reforms should be staggered and phased.
- Government pension should provide a minimum pension guarantee that acts as a safety-net against social exclusion and a fair mechanism needs to be put in place to automatically assure the value of the minimum pension guarantee against inflation.

Second & Third Pillar Pension Provision

- The new pensions system should include a mandatory Second Pillar Pensions Scheme (SPPS) to increase a retiree's pension income. An employee should have the right to choose the provider of the SPPS. This should apply both to employed persons and self-employed persons. SPPS pension provision should be voluntary initially and become compulsory for all by 2010.
- The new pensions system should also provide for a Third Pillar Pensions Scheme (TPPS) which will be a voluntary option directed to complement the pensions income.
- SPPS funds should be rigorously separated from the those of the employer and they should be managed on the prudent-person principle together with (a) the inclusion of specified limitations to determine the diversification parameters of the investment portfolio, and (b) restrictions to limit the private sector insurance firm managing the portfolio to invest in its own assets or subsidiaries.
- Funds under the SPPS should be portable and a person should not have the option to liquidate the fund.
- MFSA will regulate second and third pillar pension provision.
- MFSA and Government will work with private sector financial firms to encourage them to introduce a scheme that allows owners of life endowment and profits related policies to convert such policies into the SPPS.

Taxation

- The annual contributions into a SPPS should not be taxed on an annual basis. A maximum tax, established at a fixed percentage rate, should be paid upon the maturity of the Scheme.
- The annual contribution to the TPPS should be non-taxed up to a capped limit. The income derived on the maturity of the TPPS will be subject to income tax based on the individual's PAYE rate.
- The statutory retirement age of 65 years will be for both men and women.
- The revenue base line for the determination of the First Pillar should remain two-thirds of the basic wage.

ii. PROTECTED CELL COMPANY REGULATIONS, 2004

The use protected cell companies (PCC) is certainly one of the most significant developments in the field of corporate finance, and this is particularly true in the world of insurance and captive insurance - but it is wrong to assume that the PCC model is exclusive to captive insurance companies.

As we reported in our previous *Update*, Maltese law has recently introduced regulations which allow the PCC model to be adopted by regular Insurance Companies, Insurance Brokers and Insurance Managers alike.

The Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2004ⁱ ('PCC Regulations') provide that any insurance company, insurance broker of insurance manager licenced by the Malta Financial Services Authority may be either constituted or

converted into a 'Cell Company' provided the necessary regulatory approvals are sought and the relevant statutory requirements are observed by the company.

In terms of the PCC regulations a 'Cell Company' is a company constituted or converted into a cell company having within itself one or more 'cells' for the purposes of segregating and protecting the cellular assets of the company in accordance with the Regulations. A cell company is a single legal person.ⁱⁱ

A 'Cell' is in turn a class of shares within a cell company designated as a cell and created for the purpose of segregating and protecting cellular assets belonging to the company in the manner provided by the Regulations. A cell is not bestowed with separate legal personality.

Applicability of PCC Regulations

The Regulations are applicable to all licenced;

- Insurance Companies (including captive insurance and re-insurance companies);
- Insurance Brokers; and
- Insurance Managers.

A prospective insurance company, broker or manager wishing to be constituted as a protected cell company or an existing company wishing to be converted into a PCC must, prior to its formation or conversion, apply to the MFSA for its approval to be so formed or converted. The MFSA should grant its approval to any companies which when formed or converted will be licenced insurance companies, insurance brokers or insurance managers.

Nature & Features of Protected Cell Companies

A protected cell company is, in broad terms, a company that operates in two parts – (i) the company core (the non-cellular part) and (ii) any number of cells (distinct classes of shares in the company) formed for the purpose of segregating and protecting cellular assets.

The core part comprises all non-cellular assets including the company's core share capital, investments, liabilities and so forth. The extent of the company's 'core' varies largely and depends on the structure promoted by the company's sponsors.

For instance, the core share capital may be the minimum required at law or it may be much larger – as is often the case when a regular insurance company, broker or managers converts from an ordinary company to a protected cell company. In the process of conversion the company will ordinarily retain all its share capital and its assets and liabilities all of which will comprise the cell company's core assets and liabilities.

A cell company may have any number of 'cells'. Cells are represented by a class of shares in the company. These are termed 'cell shares' in the Regulations and they subscribed to by the shareholders of the particular cell (or class of shares). The 'cell share capital' is accordingly the amount of the proceeds of the issue of the cell shares to the cell shareholder/s. A cell's share capital constitutes the initial cellular assets attributable to the cell.

Profits earned by a cell or capital reserves belonging to it may be distributed to its shareholders by the cell company as 'cellular dividends'. Such dividends may be paid in respect of cell shares by reference only from the profits attributable to the cell and only by reference to the

cellular assets and liabilities of the cell in respect of which the cell shares were issued. When distributing cellular dividends no account will be taken of any non cellular profits or losses, or to any profits or losses attributable to any other cell of the company.

Statutory Requirements

- Memorandum & Articles

The name of a cell company must include the words “Protected Cell Company” or “PCC”, and the memorandum of association of the company must state unequivocally that the company is a cell company. Each cell in a cell company must be given its own distinct name or designation. The memorandum and articles of the company should indicate the name of each cell besides the number of shares in each cell and the names of the subscribers thereto.

- MFSA Approval

A company may not be formed or constituted as, or converted into a cell company unless it has previously sought and obtained written approval of the MFSA. The same rule applies to the creation of new cells in an existent cell company.

A copy of the cell company’s Memorandum and Articles of Association (or a copy of resolution amending the company’s M&A in case of a conversion) must be delivered to the Registrar of Companies for registration of the company together with evidence of the MFSA’s approval.

- PCC Transacting with Third Parties

A cell company must inform all persons who it transacts business with that is a cell company and if the third party is transacting with a particular cell, the cell company must also identify and specify the ‘cell’ in its dealings.

4. Queries & Suggestions

We trust that the this issue of our Insurance & Private Pension Law – Update was of interest to all our readers but should you wish to stop receiving any further issues of this electronic publication or should you have any queries or suggestions to make please feel free to contact Dr. Matthew Bianchi at mbianchi@jmganado.com. We will pleased to hear from you.

Disclaimer: This update is not intended to impart advice; readers are advised to seek confirmation of statements made herein before acting upon them; specialist advice should always be sought on specific issues.

ⁱ Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2004; Legal Notice 218 2004

ⁱⁱ PCC Regulations; Article 2(1)