

UFFIĊĊJU TAT-TRIBUNAL GĦAL
SERVIZZI FINANZJARJI
ĊENTRU MALTI TA' L-ARBITRAĠĠ
33, TRIQ NOFSINHAR,
VALLETTA VLT 11



OFFICE OF THE FINANCIAL
SERVICES TRIBUNAL
MALTA ARBITRATION CENTRE
33, SOUTH STREET,
VALLETTA VLT 11

Dr Ian Stafrace LL.D. Chairman

Dr. Nicholas Valenzia LL.D Membru

Mr. Joseph Azzopardi FCCA, FIA, CPA, MBA (Warwick) Membru

FST 02/19

ITC International Pensions Ltd

vs.

MFSA

Today, the 19th day of May 2021

The Tribunal

Having seen the appeal application ¹ lodged by ITC International Pensions Limited (the Appellant) on the 25th March 2019, wherein the Appellant stated:

¹ Document 1

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Whereas, following various correspondence on the matter, on the 23rd August 2018, the Malta Financial Services Authority (hereinafter referred to as 'the Authority') issued a minded letter to ITC International Pensions Limited (hereinafter referred to as 'the Company' wherein, amongst others, the Authority was minded to impose an administrative fine totalling Euro 12,000 for alleged breaches of the Pension Rules issued under the Retirement Pensions Act for failure of the Company to submit the annual audited reports of the retirement schemes administered by the Company, within the term established by the Pension Rules (attached to this application and marked Doc 'ITC1');

Whereas, the Company responded to the abovementioned minded letter by means of a written submissions to the Authority dated the 5th of September 2018 wherein it stated its reasons why such fines should not be imposed(attached to this application and marked Doc 'ITC2');

Whereas, notwithstanding the abovementioned Company submissions, the Authority decided to impose the abovementioned fine in its decision dated the 25th of February 2019 (hereinafter referred to as 'the decision'(attached to this application and marked Doc 'ITC3');

Whereas, the Company feels aggrieved by such a decision and is hereby appealing from the latter;

The Company is appealing from the abovementioned part of the decision on the grounds that according to the Company, such a decision is manifestly unfair in the light of the facts of the case;

The Company's appeal in front of this Tribunal is being lodged in terms of Article 44 of the Retirement Pensions Act on the basis that;

- A) As will be sufficiently proven during the proceedings in front of the Tribunal, the Company's late filing of the required annual audited reports in relation to the pension schemes administered by the Company and the subsequent non compliance of rule B2.3.9 in both the occupational and personal plan rules was due to external factors which were independent and unconnected with the Company, which unforeseeable external factors led to the inevitable delay in filings with the regulator;*
- B) As will be sufficiently proven during the proceedings in front of the Tribunal, any reasonable RSA would have been in the same position of the Company when faced with a number of continuous requests and regulatory discussions with the Auditors of the Schemes, who were obviously doing their job by making a number of additional queries in relation to the schemes, however this led to the inevitable result that the Company had to make late submissions;*
- C) Such late submissions did not result in any damage or loss to the pension assets of the various members of the schemes and the MFSA was fully aware of the financial position of the schemes even after the due date for the annual reports had passed (June 2018), due to the interim financial reports which were duly filed with the MFSA in the meantime;*



D) *It is humbly being submitted that when dealing with the situation, the MFSA did not delve sufficiently into the reasons that were given by the Company for the delay, and the decision is manifestly unfair since no weight was given to the fact that the auditing of retirement schemes is quite a novel subject matter which auditors and administrators alike are still getting used to;*

In addition, it is being submitted that any interim publication made by the MFSA in relation to the fine in question, should also include a mention that the Company has appealed the latter decision in front of the Tribunal.

Therefore, the Company humbly requests the Tribunal to reverse the Authority's decision of the 25th February 2019 thereby cancelling the administrative penalties imposed by the Authority in the latter decision in the light of the evidence and arguments put forward by the Company in this application and in the proceedings of the Tribunal.

Having seen the reply of the Authority ² wherein it was stated that:

1. *By means of its appeal, ITC International Pensions Ltd ("ITC" or "the Company") is challenging the decision of the Malta Financial Services Authority (the "MFSA" or the "Authority") dated 25 February 2019 (the "Decision") ('Doc ITC3' as annexed to the appeal).*
2. *In the Decision the Authority found the Company to have acted in breach of Rule B 2.3.9 of the Pension Rules for Personal Retirement Schemes and Rule B 2.3.9 of the Pension Rules for Occupational Retirement Schemes and, in view of the said breaches, it imposed on ITC an administrative penalty of twelve thousand euro (€12,000). This administrative penalty was imposed on ITC in terms of article 46(1) of the Retirement Pensions Act (Cap.514) ("RPA").*
3. *As will be explained in detail in this reply and elaborated further in the course of these proceedings, in reaching its Decision the Authority did not act in a manner that is manifestly unfair as is being alleged by the Company.*
4. *The requests and allegations of the Company are therefore completely unfounded and should be rejected by this Tribunal with all legal costs to be borne by the Company.*

Submissions on the merits

A. Background

² Document 5



5. ITC was registered as a Retirement Scheme Administrator in terms of article 6 of the RPA on 14 December 2015. The Company administers the ITC Personal Retirement Scheme, ITC Occupational Retirement Scheme, Synergy International Pension Plan, Boal & Co Malta Pension, Prosperity QROPS Malta and Infinity International Pension Plan ("the Schemes").

6. Infinity International Pension Plan, Prosperity QROPS Malta and Boal & Co Malta Pension were licenced on 3 March 2017, ITC Personal Retirement Scheme together with ITC Occupational Retirement Scheme were licenced on 21 June 2016 and Synergy International Pension Plan was licensed on the 12 August 2016, all in terms of article 4 of the RPA.

7. The above mentioned schemes were licenced as Personal Retirement Schemes under the RPA, except for ITC Occupational Retirement Scheme which was licenced as an Occupational Retirement Scheme. The Schemes are of a defined contribution arrangement.

B. Breach of the Pension Rules

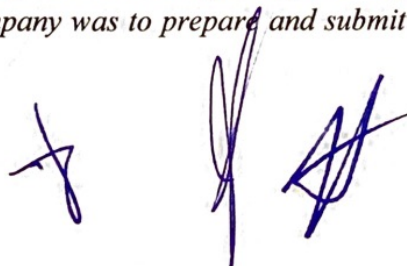
8. Rule 2.3.9 of Part B of the Pension Rules for Occupational Retirement Schemes issued in terms of the RPA provides that "The annual report, together with a copy of the auditor's management letter and the auditor's report, shall be produced and submitted to the MFSA within six months of the end of the period concerned, or at any other time as may be authorised or directed in writing by the MFSA."

9. Likewise, Rule 2.3.9 of Part B of the Pension Rules for Personal Retirement Schemes issued in terms of the RPA provides that "The annual report, together with a copy of the auditor's management letter and the auditor's report, shall be produced and submitted to the MFSA within six months of the end of the period concerned, or at any other time as may be authorised or directed in writing by the MFSA."

10. According to Rule 2.3.9 of Part B of the Pension Rules for Occupational Retirement Schemes and Rule 2.3.9 of Part B of the Pension Rules for Personal Retirement Schemes cited above (the "Pension Rules"), the annual audited reports of retirement schemes are to be produced and submitted to the Authority within six months from the end of the period concerned. Therefore, the required submission of the annual audited reports of the Schemes for the financial year ending 31 December 2017 (the "Annual Audited Reports") fell due on 30 June 2018.

11. On 25 June 2018, the Authority notified ITC that, upon the Company's request and on an exceptional basis, it was granting ITC an extension of one week for the submission of the Audited Annual Reports, i.e. the said Annual Audited Reports were to be submitted to the Authority by not later than Monday 9 July 2018.

12. However, notwithstanding the generous and lengthy six month timeframe following the end of the relevant financial year within which the Company was to prepare and submit the



Annual Audited Reports in accordance with the Pension Rules and the week-long extension granted by the Authority, the Company still failed, by a significant stretch of time, to submit the Annual Audited Reports.

13. *By means of a letter dated 23 August 2018 (the "Minded Letter") ('Doc ITC1' as annexed to the appeal), the MFSA informed ITC that it was minded to impose an administrative penalty on the Company on the basis of the breach of the Pension Rules and invited ITC to submit written representations to the Authority setting out the reasons why the proposed regulatory action should not be taken.*

14. *It was only after the issuance of the Minded Letter, specifically on the 31 August 2018, that the Company finally submitted the Annual Audited Reports of five out of the six Schemes, namely ITC Personal Retirement Scheme, ITC Occupational Retirement Scheme, Synergy International Pension Plan, Boal & Co Malta Pension, Prosperity QROPS Malta. As for the Audited Annual Report of Infinity International Pension Plan ("Infinity"), this was only submitted to the Authority on 22 November 2018 following a further reminder from the Authority.*

15. *As noted in the Minded Letter and the Decision, the failure of the Company to submit the Annual Audited Reports within the stipulated timeframe clearly constitutes a breach of the Pension Rules.*

16. *In fact, neither in its representations nor in its appeal does the Company dispute the breaches identified by the Authority as a result of the late submission of the Annual Audited Reports. On the contrary, the Company acknowledges these breaches and makes a futile attempt to justify its shortcomings which amount to a breach of the law.*

17. *In its representations the Company also states that it has "since engaged a dedicated resource to be responsible for this process and to handle expectations with the Investment Hoses in order to avoid any delays in the future." By making such a statement, the Company has clearly acknowledged the fact that with adequate resources, the Company would have avoided the late submission of the Annual Audited Reports.*

18. *In its representations, the Company further adds that "ITC is fully committed to commence the audit process at an earlier stage for the next year with prior coordination with the audit team to ensure that similar situation is not repeated in the future". Therefore, the Company also recognizes that the Annual Audited Reports would have been submitted on time had the audit process started earlier and been conducted in a coordinated and timely manner.*

19. *In fact, as noted in the Company's representations, the audit was initially planned to commence on the 7 May 2018 but had to be rescheduled for the next available date which was the 18 July 2018. The Company is well aware that, in terms of the Pension Rules, the Annual Audited Reports fall due on the 30th June 2018. Thus, by commencing the audit process so late in the day, the Company was greatly risking that it would not meet the aforementioned*



submission deadline. Moreover, by rescheduling the audit process to the 18th July 2018, the Company was consciously and blatantly ensuring that it would be in breach of the Pension Rules by failing to submit the Annual Audited Reports within the stipulated timeframe.

20. *In its representations and appeal, the Company also fails to mention that, upon the Company's request and on an exceptional basis, the Authority granted the Company an extension of one week for the submission of the Annual Audited Reports, as mentioned in paragraph 11 above. However, as previously mentioned, the Company also failed to submit the Annual Audited Reports by the extended submission deadline. Therefore, even though the Company was granted an advantage over other licence holders in the form of an extension of the submission deadline, the Company still failed to abide by its obligations as set out in the Pension Rules.*

21. *As for the justifications presented by the Company in its appeal in relation to the late submission of the Annual Audited Reports, it should be noted that the Pension Rules set out an objective obligation which is in no way subject to interpretation and applies to all subject persons equally. Therefore, irrespective of any reason or justification given by the Company, by failing to submit the Annual Audited Reports within the stipulated timeframe, ITC clearly acted in breach of its obligations which are very plainly set out in the Pension Rules.*

Conclusion

22. *In light of the above, the Authority categorically refutes the Company's claims that its Decision was manifestly unfair. Furthermore, it is clear that in terms of article 46(1) of the RPA, the Authority is empowered to impose an administrative penalty, not exceeding ninety-three thousand and two hundred euro (€93,200), on the Company for the breach of the Pension Rules.*

23. *For all the above reasons and as will be explained in greater detail in the course of these proceedings, the Authority respectfully requests this Tribunal to reject the Company's appeal and all its requests, and to confirm the Authority's Decision, with all legal costs to be borne by the Company.*

Having seen all other acts and documents of the proceedings;

Having heard the oral submissions of the Appellants and the Authority;

Having noted that both Parties informed the Tribunal by means of a verbal dated 28th April 2021 that the decision on this Appeal can be delivered in the English language;

Having seen that the case was scheduled for today for decision of the Tribunal;



Considers that:

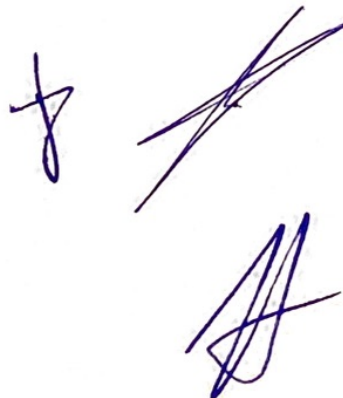
1. The Appellant is registered as a Retirement Scheme Administrator in terms of Article 6 of the Retirement Pensions Act (Chapter 514) (the “Act”) since the 14th December 2015. The Appellant administers six (6) schemes registered in accordance with the provisions of Article 4 of the Act.
2. The facts that lead to the current proceedings are related to the filing by the Appellant of the 2017 annual audit reports (for year ended 31st December 2017). According to Rule B.2.3.9 of the Pension Rules for the Personal Retirement Schemes and Rule 2.3.9 of the Pension Rules for Occupational Retirement Schemes, issued under the Act, the same annual audit reports had to be filed within six (6) months from end of the financial year, hence by the 30th June 2018.
3. The Appellant had, by means of a letter of the 21st June 2018 requested an extension for the submission of the same annual audit reports. The Authority replied to this request by means of a communication of the 25th June 2018, through which it granted an extension of one (1) week (9th July 2018). This extension was confirmed through another communication of the 28th June 2018. Further communications were held between the Appellants (explaining the difficulties in completing the annual audit reports) and the Authority (re-confirming its original position on same). The Appellants, on the 13th July 2018 submitted the managements accounts rather than the annual audit accounts. A site inspection was also held by the Authority during the month of July 2018. On the 23rd August 2018 the Authority issued a minded letter in which it informed the Appellant of the breach of Rule 2.3.9 of the Pension Rules and that it was minded to impose a total fine of twelve thousand Euro (€ 12,000) – €2000 per retirement scheme.
4. The Appellant was requested to submit any written representations to the Authority by the 6th September 2018.

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5. The Appellant replied to the minded letter by means of a letter of the 5th September 2018, through which it confirmed that the annual audit reports of 5 of the schemes had in the meantime been submitted (on the 31st August 2018) and that the annual audit report of the 6th Scheme was in the process of completion over the course of the following week. The Appellant, in its submissions reiterated the problems it encountered in completing the said annual audit reports in a timely manner.
6. By means of a decision of the 25th February 2019, the Authority issued its final decision (The Decision) through which is confirmed the imposition of the fine of twelve thousand Euro (€12,000) (the Fine). In the same decision, the Authority also noted certain matters relative to the figures in the annual audit reports (all of which had been submitted in the meantime) and the half yearly report that had been submitted for the period ending 30th June 2018.
7. The Tribunal notes that the provisions of the Pension Rules are clear and the Appellant, as a licensee is bound by these rules.
8. The finalisation of such annual audit reports pose logistic and other issues intrinsic to the nature of the activity of the Appellant. Yet, the Tribunal feels that the Authority must ensure that the Appellant, as a licensee, must abide by the Rules. The Authority must also ensure that such Rules are applied in a uniform and indiscriminate matter to ensure compliance with same by all similar licensees. Even more, the Authority must ensure that it fulfils its regulatory function and regulate the licensees, including the Appellant. Hence, the provisions of the same Rules enabling the submission of the annual audit report "at any other time as may be authorised or directed in writing by the MFSA" must be applied with caution for the above-mentioned reasons. The Appellant argues, in its First Ground of Appeal, that this delay was due to external factors which were independent and unconnected with the Company. This ground of appeal id, in the Tribunal's opinion, a sufficient reason to justify the departure from the Rules. The Appellant operates in a regulated environment. The obligation to provide annual audit reports is an intrinsic and obvious part of its operations and this obligation cannot be simply impaired simply by attributing fault onto the auditors.



9. There is no doubt that the Authority may, or possibly should have contacted the auditors to ascertain the situation in the finalisation of the annual audit reports. Yet, in the Tribunal's opinion, this would not, and possibly should not have enabled the Authority to derogate from the provisions of the Rules.
10. In this case, the request for an extension was made a couple of weeks prior to the deadline. Five of the annual audit reports were filed on the 31st August 2018 whereas the last audit report was filed in November 2018. The Appellant argues, in its Second ground of Appeal, that any reasonable entity such as the Appellant would be in the same position of the Appellant. The Tribunal does understand the complexities of the operations of the Appellant, as those of other similarly regulated entities. Yet, in the Tribunal's opinion, this does not per se justify a departure from the Rules.
11. The scope of the rules are quite clear and the deadlines therein established are intended to provide the Authority with a clear financial picture of the licensee within a time frame that is close to the end of the financial year end. The term of six (6) months is an extended term from the previously established term of three (3) months. Even though the reasonableness or otherwise of this time-frame goes beyond the remit of this Appeal, this Tribunal must however note that the time-frame for submission analysed together with the reasoning behind the imposition of such a time-frame is reasonable enough. The Appellant argues, in the Third Ground of Appeal, that the late submissions did not result in any damage or loss to the pension assets of the various members of the scheme and that interim financial statements (unaudited) had been filed. The Tribunal will not delve into an academic explanation of the value of audited financial statements. Yet, the distinction between the interim statements and the annual audit reports is clear and obvious. The fact that the delay in the submission of the said audited statements did not cause any damage or loss is not that relevant in this case. Any damage and/or loss would or could have lead to other consequences and not the imposition of the said administrative fine, and hence this cannot be considered as a justification for the deviation in the deadlines for the submission of the annual audit reports.

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12. At the time, the Authority had the right to impose a fine not exceeding € 93,200³ for each infringement. In this case, the Authority imposed a fine of € 2,000 for each of the 6 infringements for a total of € 12,000.

13. In the opinion of the Tribunal, when one considers the delay in the submission, the nature of the licensed activity and the limit of the fines that the Authority was empowered to impose, the fines imposed in this case are fair, reasonable, adequate and legitimate. Hence even the Fourth Reason for Appeal is being rejected.

On the basis of the above, the Tribunal:

1. Rejects all the Grounds of Appeal;
2. Upholds the Reply of the Authority to the said appeal.

Costs of this appeal are to be borne by the Appellant.

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³ This has been increased to € 150,000 by virtue of Act 5 of 2020 article 94