

MFSA Note for Consultation on Draft Incorporated Cell Companies Regulations

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The Malta Financial Services Authority (the “MFSA”) has recently issued a note for consultation on the draft Companies Act (Incorporated Cell Companies Carrying on Business of Insurance) Regulations (the “Draft ICC Regulations”) on the 30th March 2010, which are set to provide the legal framework for the establishment of Incorporated Cell Companies in Malta, offering a new corporate vehicle for insurers, building upon the now well-established Protected Cell Company (“PCC”) regime originally introduced in Malta in 2004 by virtue of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations. Malta is the only full EU member state with PCC legislation and is looking to continue to lead in the innovative field of cell legislation following further international developments in the area.

The Incorporated Cell Company (“ICC”) Concept

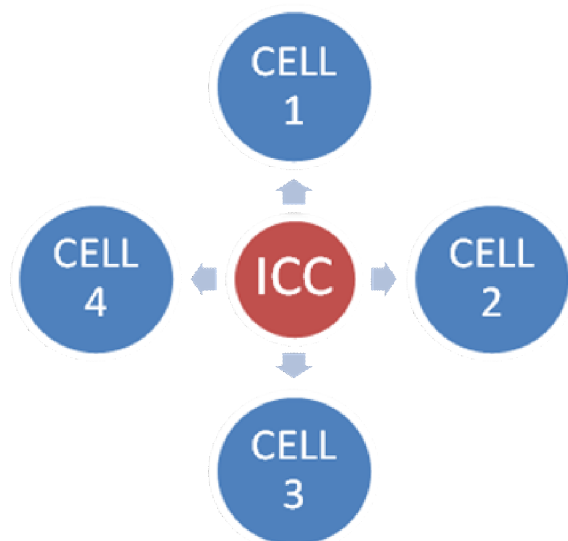
The Draft ICC Regulations allow for the establishment of ICCs to carry on insurance business. ICCs may in turn form what are referred to as ‘incorporated cells’ and provide that each incorporated cell shall have the status of a limited liability company. Incorporated cells therefore have their own separate legal personality as opposed to the traditional PCC structure where all the cells form part of the same legal entity. The ICC is very similar to a PCC in that it allows its incorporated cells to enjoy the shared benefits of the cell structure (namely a faster, easier and less costly set-up for cells as well as other ongoing administrative benefits in contrast to traditional captive insurance structures) but takes the concept further by allowing each cell to have its own legal personality.

The Incorporated Cell

The memorandum and articles of association of an ICC shall state that it is an incorporated cell company and the name of the ICC shall also include the words “Incorporated Cell Company” or its abbreviation “ICC”. Similarly, the name of an incorporated cell shall include the words “Incorporated Cell”. Although the incorporated cell may have a name similar to that of its ICC, the Draft ICC Regulations provide that such name shall not be so similar as to create confusion.

Each incorporated cell must also have its own memorandum and articles of association, different to those of the other incorporated cells and the ICC, and such memorandum and articles shall state that it is an incorporated cell. An incorporated cell may not be a shareholder of its ICC and the memorandum and articles of association of each incorporated cell must also contain a prohibition to that effect.

As each incorporated cell is a company, it is possible for each to have its own board of directors and company secretary. However, this does not preclude the possibility of an incorporated cell company from having the same board of directors and company secretary as its ICC. Whatever the case, the Draft ICC Regulations importantly provide that the directors/officers of an ICC or its incorporated cell shall, in any transaction entered into by the ICC or its incorporated cell specify exactly which entity is entering into that particular transaction. Where it one of the incorporated cells entering into a transaction the directors shall further specify which incorporated cell is transacting.



The Draft ICC Regulations also provide that incorporated cells may have a body corporate as company secretary and this in contrast to the general rule provided for by the Malta Companies Act establishing that a company secretary must be an individual. In this manner the ICC can also act as company secretary for its incorporated cells. The Draft ICC Regulations further provide that an incorporated cell shall have the same registered office as its ICC at all times.

An ICC may or may not be a shareholder of its incorporated cells and it is also possible for the ICC to be the sole shareholder of its incorporated cells. It is important to note that the Draft ICC Regulations provide that an incorporated cell shall not be considered to be a subsidiary of its ICC solely by virtue of the fact that it is an incorporated cell of its ICC. This is because the ICC may not necessarily be a shareholder in its incorporated cells and neither is it required that an incorporated cell shares the same board of directors as (and is therefore under the control of) its ICC.

Inter-Cellular Transactions

A significant benefit of having cells with separate legal personality is that cells are able to enter into binding contractual relationships with one another, making it possible to create financial guarantees or reinsurance arrangements between cells. Incorporated cells can buy and sell assets to one another, provide guarantees and borrow and lend from one another, which offers significant flexibility to the ICC structure. The possibility of having individual cells transact with one another could, for example, allow for variability in the capital allocation between cells, by allowing 'successful' cells to diversify their portfolio by lending surplus assets to other cells for solvency.

Flexibility – Re-domiciliation & Conversion

The Draft ICC Regulations offer a great deal of flexibility with regard to the ICC structure. It provides the possibility of: conversion of an ordinary company into an ICC and vice-versa; conversion of an ordinary company into an incorporated cell and vice-versa; conversion of a PCC into an ICC and vice-versa; as well as the relocation of an incorporated cell from one ICC to another. Together with the Continuation of Companies Regulations enabling the re-domiciliation of companies from one jurisdiction to another, the new Draft ICC Regulations which provide for such flexibility will allow for the migration of companies from other jurisdictions to Malta to form part of such an ICC structure and vice-versa, providing the users of an incorporated cell with the considerable benefit of having a

variety of different options available depending on the needs of the cell user at a particular point in time. A significant advantage offered by such flexibility would be the ease of transition for an insurer from and incorporated in an ICC to a wholly owned captive. An incorporated cell of an ICC could also, for example, be sold off to a third party as a separate company. The Draft ICC Regulations allow cell owners to transform the entire cell into a new captive insurance company intact with the existing memorandum and articles and board of directors.

Winding-Up

The Draft ICC Regulations provide that even though it has been dissolved and wound up the ICC shall not actually be struck off the register of companies until the position of each of its incorporated cells has been resolved by one of five options. Although the actual winding up of the incorporated cell is also one of these options the ICC Regulations also provide that in such situations, for example, the incorporated cells may be converted into ordinary companies outside the ICC structure, or be relocated in their entirety to another ICC. Thus, incorporated cells are given the possibility to carry on business on their own, even though their ICC may have been wound up.

Kindly note that interested parties have been asked by the MFSA to submit their comments on the Draft ICC Regulations to the MFSA Insurance and Pensions Supervision Unit until the 30th April 2010

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The Insurance Law and Pensions Law Department at G&A has extensive experience in both the establishment and redomiciliation of PCCs in Malta and offer specialist legal advice on all legislative and regulatory requirements for PCCs.

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Further information about G&A, our services and copies of our previous insurance related publications can be found on our website: <http://www.jmganado.com>