L.N. 559 of 2010

COMPANIES ACT
(CAP. 386)

Companies Act (SICAV Incorporated Cell Companies) Regulations, 2010

IN exercise of the powers conferred by article 84D of the Companies Act, the Minister of Finance, the Economy and Investment, acting on the advice of the Malta Financial Services Authority, has made the following regulations:-

Citation and commencement.

1. (1) The title of these regulations is the Companies Act (SICAV Incorporated Cell Companies) Regulations, 2010.

(2) These regulations shall come into force on such date as the Minister of Finance may by notice in the Gazette appoint.

Interpretation.

2. (1) In these regulations, unless the context otherwise requires -

"the Act" means the Companies Act; Cap. 386.

"collective investment scheme" shall have the same meaning as that assigned to the term in article 2 of the Investment Services Act; Cap. 370.

"the competent authority" means the Malta Financial Services Authority established by article 3 of the Malta Financial Services Authority Act and appointed under article 2A of the Investment Services Act; Cap. 330. Cap. 370.

"the Continuation Regulations" means the Companies Act (Continuation of Companies) Regulations; S.L. 386.05

"Financial Services Tribunal" means the Tribunal referred to in article 21 of the Malta Financial Services Authority Act, and the term "Tribunal" shall be construed accordingly; Cap. 330.

"incorporation agreement" means an agreement setting out the terms upon which a non-cellular company becomes an incorporated cell of an incorporated cell company in accordance with the provisions of regulation 23(5)(a);

"incorporated cell" means a cell of an incorporated cell company created in accordance with the provisions of these regulations;

"incorporated cell company" means a SICAV formed and registered as, continued as or transformed or divided into, an incorporated cell company in accordance with the provisions of these regulations and any other applicable law;

"non-cellular company" means a company which is not an incorporated cell company, an incorporated cell or a segregated multi-fund company;

"relocation agreement" means an agreement setting out the terms upon which the relocation of an incorporated cell from one incorporated cell company to another is to take place in accordance with the provisions of regulation 24;

"segregated multi-fund company" means a multi-fund SICAV with one or more segregated sub-funds, each treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of each other sub-fund of the company in accordance with the provisions of regulation 9 of the SICAV Regulations;

"SICAV" means an investment company with variable share capital established under the Act and the SICAV Regulations;

S.L. 386.02 "SICAV Regulations" means the Companies Act (Investment Companies with Variable Share Capital) Regulations.

(2) Words and expressions used in the Act shall, in these regulations, have the same meaning as in the Act.

Incorporated cell companies.

3. A SICAV may be formed or constituted as an incorporated cell company and may establish incorporated cells in accordance with these regulations.

Continuation.

4. (1) Subject to the provisions of the Continuation Regulations:

(a) a body corporate with variable share capital, registered, incorporated or constituted under the laws of an approved country or jurisdiction outside Malta and carrying on the activity of a collective investment scheme, which is similar in nature to an incorporated cell company as known under the laws of Malta may be continued as an incorporated cell company:

Provided that if such body corporate as aforesaid has a cell or cells which are similar in nature to incorporated cells as known under the laws of Malta, the continuation of the body corporate shall require the simultaneous continuation of all such

cells as incorporated cells;

(b) a body corporate, registered, incorporated or constituted under the laws of an approved country or jurisdiction outside Malta, and carrying on the activity of a collective investment scheme, which is similar in nature to a non-cellular company as known under the laws of Malta may be continued as an incorporated cell of an incorporated cell company;

(c) an incorporated cell company may be continued as a body corporate similar in nature to an incorporated cell company as known under the laws of Malta under the laws of a country outside Malta:

Provided that if such incorporated cell company has an incorporated cell or incorporated cells in existence, the continuation of the incorporated cell company shall require the simultaneous continuation of all such incorporated cells under the laws of such country outside Malta; or

(d) an incorporated cell may be continued as a body corporate under the laws of a country outside Malta.

(2) For the purpose of sub-regulation (1), the expression "approved country or jurisdiction" means such country or jurisdiction as may be established from time to time by guidelines issued by the Registrar of Companies pursuant to the Continuation Regulations.

Powers of the competent authority.

5. (1) No event described in regulation 3 or 4 shall take place except in accordance with the terms and conditions of the prior written approval of the competent authority which shall only be granted in the case of a body corporate which is or which is to be licensed in terms of article 4 of the Investment Services Act as a collective investment scheme.

Cap. 370.

(2) The competent authority may in terms of article 6 of the Investment Services Act issue Investment Services Rules applicable to incorporated cell companies and incorporated cells.

Cap. 370.

Memorandum of incorporated cell company.

6. The memorandum of an incorporated cell company shall, in addition to the matters required by articles 69 and 84 of the Act, state that it is an incorporated cell company.

Name of incorporated cell company.

7. The name of an incorporated cell company shall, in addition to compliance with the provisions of article 70 of the Act, include the expression "Incorporated Cell Company" or its abbreviation "ICC".

Applicable law.

8. (1) The Act shall, subject to the provisions of these regulations, and unless the context requires otherwise, apply to an incorporated cell company and to an incorporated cell.

Cap. 370.

(2) In so far as the provisions of the Act are inconsistent with the provisions of the Investment Services Act or these regulations, the provisions of the Investment Services Act and of these regulations shall prevail and the provisions of the Act shall, to the extent of the inconsistency, not apply to an incorporated cell company or to an incorporated cell.

Establishment of incorporated cells.

9. (1) An incorporated cell company may establish an incorporated cell by virtue of a resolution of the board of directors (the "cell resolution") which:

(a) approves the name of the incorporated cell being established;

(b) approves the terms of the memorandum and articles of association of the incorporated cell and resolves that the said memorandum and articles of association are to be entered into by the incorporated cell company; and

(c) authorises, if applicable, the subscription by the incorporated cell company of a share or shares in the incorporated cell.

(2) An incorporated cell shall not be validly constituted unless a copy of the resolution shall be delivered to the Registrar and the memorandum and articles is entered into as is described in sub-regulation (3) and a certificate of registration is issued in terms of the Act in respect thereof.

(3) The memorandum and articles of association of an incorporated cell shall be entered into by:

(a) the incorporated cell company, whether the incorporated cell company is subscribing to a share or shares in the incorporated cell or otherwise; and

(b) such persons, other than the incorporated cell company, subscribing to shares in the incorporated cell.

(4) The memorandum of association of an incorporated cell shall state that it is an incorporated cell.

(5) The memorandum or articles of association of an incorporated cell shall contain a provision that the incorporated cell

may not own shares in its incorporated cell company.

(6) Without prejudice to article 110 of the Act and unless expressly prohibited by the articles of association of the incorporated cell, an incorporated cell shall be permitted to own shares in any other incorporated cell of its incorporated cell company.

Name of incorporated cell.

10. Without prejudice and in addition to compliance with the provisions of article 70 of the Act, the name of an incorporated cell:

(a) shall include the expression "Incorporated Cell"; and

(b) may be similar to that of the incorporated cell company of which it forms part but shall not be so similar as, in the opinion of the Registrar, it could create confusion.

Status of an incorporated cell.

11. (1) An incorporated cell is a limited liability company with separate legal personality.

(2) An incorporated cell is not a subsidiary of its incorporated cell company solely by virtue of the fact of it being an incorporated cell of its incorporated cell company.

(3) An incorporated cell may not itself be an incorporated cell company or a segregated multi-fund company.

(4) An incorporated cell established in terms of regulation 9 may be a SICAV or an investment company with fixed share capital.

(5) An incorporated cell shall have the same registered office as its incorporated cell company at all times.

(6) Without prejudice to the requirements of article 6 of the Act, an incorporated cell company and an incorporated cell shall also indicate in a suitable manner in all of their business letters and forms that they are an incorporated cell company or an incorporated cell, as applicable.

Separation of assets and liabilities.

12. (1) It shall be the duty of the directors of an incorporated cell company and of the directors of each incorporated cell, as applicable:

(a) to keep the assets and liabilities of the incorporated cell company separate and separately identifiable from the assets and liabilities of its incorporated cells;

(b) to keep the assets and liabilities of each incorporated cell separate and separately identifiable from the assets and

liabilities of the other incorporated cells of the incorporated cell company.

(2) The duty imposed by sub-regulation (1) is not breached by reason only that the directors cause or permit assets of the incorporated cell company or of any of its incorporated cells to be collectively invested, or collectively managed by an investment manager:

Provided that the assets so invested or managed shall remain separately identifiable in accordance with sub-regulation (1).

Incorporated cell company cannot transact on behalf of its incorporated cells and vice versa.

13. (1) An incorporated cell company shall have no power, by virtue of its position as an incorporated cell company, to enter into transactions on behalf of any of its incorporated cells.

(2) An incorporated cell shall have no power, by virtue of its position as an incorporated cell, to enter into transactions on behalf of its incorporated cell company.

(3) The directors or officers of an incorporated cell company or of an incorporated cell shall ensure that, in respect of every transaction entered into, it is identified or specified whether that transaction is being entered into by the incorporated cell company or by the incorporated cell, and if the transaction is entered into by an incorporated cell, which incorporated cell.

Application of the Act. Cap. 370.

14. Save as otherwise provided by these regulations, the provisions of the Act and the Investment Services Act shall apply to an incorporated cell company and to an incorporated cell as if a reference in the Act and in the Investment Services Act:

(a) to a company were a reference to an incorporated cell company or an incorporated cell;

(b) to the directors of a company were a reference to the directors of the incorporated cell company or an incorporated cell;

(c) to the memorandum or articles of association of a company were a reference to the memorandum or articles of the incorporated cell company or an incorporated cell;

(d) to the members of a company were a reference to the members of the incorporated cell company or an incorporated cell;

(e) to shares in a company were a reference to shares in

the incorporated cell company or an incorporated cell;

(f) to assets and liabilities of a company were a reference to the assets and liabilities of the incorporated cell company or an incorporated cell; and

(g) to the share capital of a company were a reference to the share capital of the incorporated cell company or an incorporated cell.

Company secretary and single-member incorporated cells.

15. (1) Notwithstanding anything contained in the definition "company secretary" in article 2 and in article 138(3) of the Act, the company secretary of an incorporated cell company and of an incorporated cell may be a body corporate.

(2) Notwithstanding the provisions of the Act, an incorporated cell may have its incorporated cell company as its only member and the provisions of articles 212 and 214(2)(b)(i) of the Act shall not apply in relation thereto in such case.

Annual return.

16. An incorporated cell company and an incorporated cell shall each submit an annual return containing the information required by the Seventh Schedule to the Act.

Consolidated accounts.

17. The financial statements of an incorporated cell shall not be consolidated with those of an incorporated cell company or of other incorporated cells except when the incorporated cell is a subsidiary of the incorporated cell company and only to such extent.

Directors' report.

18. In addition to the requirements of article 177 of the Act, the directors' report of the incorporated cell company shall also include the names and registration numbers of all of its incorporated cells.

Winding up.

19. (1) An incorporated cell company shall be dissolved and wound up in accordance with Title II of the Act and any regulations issued thereunder.

(2) An incorporated cell company that has been dissolved and wound up shall not be struck off the register until each of its incorporated cells have been either -

(a) transformed into non-cellular companies in accordance with regulation 23; or

(b) relocated to another incorporated cell company under regulation 24; or

(c) expelled under regulation 25; or

(d) continued as a body corporate under the law of another jurisdiction under regulation 4; or

(e) struck-off,

and the Registrar has obtained the consent of the competent authority.

Directions during winding up.

20. (1) Without prejudice to the provisions of regulation 19(1), the appointment of a liquidator in respect of an incorporated cell company shall not affect the position of its incorporated cells subject to any direction to the contrary given during the course of a winding up by:

(a) the Court; or

(b) the competent authority.

(2) The competent authority may make an application to the Court for the Court to give a direction under sub-regulation (1).

Competent authority may be heard by Court in respect of winding up.

21. The competent authority may be heard on any application to the Court requesting the dissolution and winding up of an incorporated cell company or an incorporated cell.

Amendments to memorandum and articles of association.

22. The memorandum and articles of association of an incorporated cell may be amended by an extraordinary resolution of the incorporated cell following the written approval of its incorporated cell company.

Transformation and division.

23. (1) A SICAV may, by extraordinary resolution in accordance with article 79 of the Act and any other applicable provisions of the Act, and in compliance with these regulations, and provided it is authorised to do so by its memorandum of association, be transformed:

(a) from a non-cellular company into an incorporated cell company or into an incorporated cell;

(b) from an incorporated cell company having no incorporated cells or from an incorporated cell, into a non-cellular company;

(c) from a segregated multi-fund company established under the Act and regulation 9 of the SICAV Regulations having no segregated sub-funds, into an incorporated cell company;

(d) from an incorporated cell company having no incorporated cells into a segregated multi-fund company.

(2) (a) A segregated multi-fund company established under the Act and regulation 9 of the SICAV Regulations which has one or more segregated sub-funds may, in accordance with Part IX of the Act and any other applicable provisions of the Act, and in compliance with these regulations, be divided into an incorporated cell company and one or more incorporated cells.

(b) Where a segregated multi-fund company is divided in accordance with paragraph (a), the non-cellular assets, rights, liabilities and obligations of the company and all claims, actions and legal proceedings concerning the non-cellular part of the company shall be allocated and delivered to the recipient incorporated cell company; and the assets, rights, liabilities and obligations of each segregated sub-fund and all claims, actions and legal proceedings concerning each segregated sub-fund shall be allocated and delivered to a separate recipient company constituting an incorporated cell.

(3) (a) A company shall not carry out any of the operations mentioned in sub-regulation (1) except with the approval of the board of directors.

(b) In a division of a segregated multi-fund company as is mentioned in sub-regulation (2), each of the directors of the company shall sign a declaration stating that he has made a full enquiry into the affairs of the company and each of its segregated sub-funds, and that, having so done, he is of the opinion that the company and each of its segregated sub-funds are able to discharge their liabilities as they fall due and that there are no creditors of the company or of the segregated sub-funds whose interests will be unfairly prejudiced by the division.

(4) The operations mentioned in sub-regulations (1) and (2) shall not be carried out except with the prior written approval of the competent authority and in accordance with such terms and conditions as the competent authority may establish and such directives as the competent authority may issue.

(5) (a) A non-cellular company that intends to transform itself into an incorporated cell shall enter into an incorporation agreement with an incorporated cell company. The incorporation agreement shall be approved by:

(i) the board of directors and by an extraordinary resolution of both the non-cellular company and the incorporated cell company; and

(ii) the competent authority.

(b) An incorporated cell that intends to transform itself into a non-cellular company shall, within fourteen days of the extraordinary resolution taken to so transform, notify its incorporated cell company in writing of such decision.

(6) In addition to any document which is required to be delivered to the Registrar for registration in accordance with the applicable provisions of the Act, a company which intends to carry out -

(a) any of the operations mentioned in sub-regulations (1) and (2), shall deliver to the Registrar for registration evidence of the written approval of the competent authority required under sub-regulation (4);

(b) any of the operations mentioned in sub-regulation (1), shall deliver to the Registrar for registration evidence of the approval by the board of directors required under sub-regulation (3)(a);

(c) the operation mentioned in sub-regulation (2), shall deliver to the Registrar for registration the declaration mentioned in sub-regulation (3)(b).

Relocation of an incorporated cell.

24. (1) An incorporated cell that intends to relocate from one incorporated cell company (the "Exiting ICC") to another incorporated cell company (the "Recipient ICC") shall notify the competent authority of its intention. The competent authority may impose such conditions and issue such directives as it may deem necessary in the circumstances.

(2) The relocation of the incorporated cell shall only take place if:

(a) it has the written consent of the competent authority to so relocate;

(b) the incorporated cell passes an extraordinary resolution to so relocate and amends its memorandum and articles of association accordingly; and

(c) a relocation agreement has been entered into between the incorporated cell and the Recipient ICC and is approved in accordance with sub-regulation (3).

(3) (a) A relocation agreement shall be submitted to the competent authority for prior approval.

(b) A relocation agreement shall also be approved by:

(i) the board of directors and an extraordinary resolution of the incorporated cell;

(ii) the board of directors and an extraordinary resolution of the Recipient ICC; and

(iii) the board of directors of the Exiting ICC.

(4) An Exiting ICC shall, within seven days of the approval by its board of directors of the relocation agreement, ensure that all records, documents and other information pertaining to the incorporated cell are duly transferred to the Recipient ICC.

(5) The Recipient ICC shall, within fourteen days of a relocation agreement, deliver to the Registrar for registration:

(a) evidence of the competent authority's written consent;

(b) a copy of the extraordinary resolution described in sub-regulation (2)(b) together with the memorandum and articles of association of the incorporated cell being relocated;

(c) a copy of the relocation agreement and the respective resolutions approving such agreement;

(d) a declaration made in accordance with sub-regulation (6), signed by each director of the incorporated cell which is being relocated; and

(e) the incorporated cell's original certificate of registration.

(6) The declaration referred to in sub-regulation (5)(d) shall state that each such director believes on reasonable grounds that:

(a) the incorporated cell being relocated is able to discharge its liabilities as they fall due;

(b) there are no creditors of the incorporated cell being relocated whose interests will be unfairly prejudiced by the transfer; and

(c) the relocation agreement has been approved and executed in accordance with this regulation.

(7) Upon delivery to the Registrar of the documents referred to in sub-regulation (5), the Registrar shall, if those documents comply with this regulation:

(a) register the relocation of the incorporated cell and the new memorandum and articles of the incorporated cell;

(b) issue to the incorporated cell a new certificate of registration indicating the name of the Recipient ICC; and

(c) record that the incorporated cell has ceased to be an incorporated cell of the Exiting ICC.

(8) Upon the issue of the new certificate of registration as aforesaid:

(a) the incorporated cell ceases to be an incorporated cell of the Exiting ICC;

(b) the incorporated cell becomes an incorporated cell of the Recipient ICC;

(c) all property and rights to which the incorporated cell was entitled immediately before the issue of the new certificate remain the property and rights of the incorporated cell;

(d) all liabilities and all contracts, debts and other obligations to which the incorporated cell was subject immediately before the issue of the new certificate remain the liabilities, contracts, debts and other obligations of the incorporated cell; and

(e) all actions and other legal proceedings which, immediately before the issue of the new certificate were pending by or against the incorporated cell may be continued by or against the incorporated cell.

(9) The operation of sub-regulation (8) shall not be regarded:

(a) as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of rights or liabilities or change of control; or

(b) as giving rise to any remedy by a party to a contract or other instrument, as an event of default under any contract or other instrument or as causing or permitting the termination of any contract or other instrument, or of any obligation or relationship.

(10) An incorporated cell may not be relocated under this regulation if the relocation were to be inconsistent with the memorandum or articles of association of:

(a) the incorporated cell; or

(b) the Recipient ICC.

Expulsion of an incorporated cell.

25. (1) An incorporated cell company may, subject to approval by the competent authority and on the grounds listed in sub-regulation (2), expel an incorporated cell.

(2) The grounds referred to in sub-regulation (1) are:

(a) that the affairs of the incorporated cell are being or have been conducted in a manner which is unfairly prejudicial to its incorporated cell company or any incorporated cell of that company or its incorporated cells;

(b) that the incorporated cell is being or has been used for fraudulent purposes; or

(c) that to fail to do so would have a serious adverse effect upon the members of the incorporated cell.

(3) In determining whether to approve an expulsion in terms of sub-regulation (1), the competent authority shall take into consideration any representations made to it by the incorporated cell company, the liquidator (where applicable), the incorporated cell and any other party deemed to have a material interest in the business of the relevant incorporated cell, and may give such directions as it deems fit.

(4) The provisions of this regulation are without prejudice to any and all powers granted to the competent authority under the Investment Services Act. Cap. 370.

Appeals.

26. (1) Any person who feels aggrieved by a decision of the competent authority -

(a) to refuse to issue an approval for a company to be formed or constituted as an incorporated cell company;

(b) to refuse to issue an approval to an incorporated cell company to establish incorporated cells;

(c) to refuse to issue an approval for a non-cellular company carrying on the activity of a collective investment scheme to transform itself into an incorporated cell company;

(d) to refuse to issue an approval for a segregated multi-fund company to be divided into an incorporated cell company and incorporated cells;

(e) to refuse to issue an approval for an incorporated cell to transform itself into a non-cellular company carrying on the activity of a collective investment scheme;

(f) to refuse to issue an approval for an incorporated cell to relocate from one incorporated cell company to another incorporated cell company; and

(g) to refuse to issue an approval for a non-cellular company carrying on the activity of a collective investment scheme to transform itself into an incorporated cell,

may appeal against the decision to the Financial Services Tribunal.

Cap. 330.

(2) The provisions of article 21 of the Malta Financial Services Authority Act shall apply *mutatis mutandis* to appeals that may be brought before the Tribunal under this regulation.