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Taqsima B

L.N. 119 of 2012

COMPANIES ACT
(CAP. 386)

Companies Act (Recognised Incorporated Cell Companies) Regulations, 2012

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:

1. The title of these regulations is the Companies Act (Recognised Incorporated Cell Companies) Regulations, 2012. Citation.

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

"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.

"competent authority" means the Malta Financial Services Authority established by article 3 of the Malta Financial Services Authority Act; Cap. 330.

"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, unless otherwise specified, a cell of a recognised incorporated cell company created in accordance with the provisions of these regulations and licensed as a collective investment scheme in terms of article 4 of the Investment Services Act; Cap. 370.

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

"recognised incorporated cell company" means a limited liability company formed, continued as, transformed or divided into an incorporated cell company in accordance with the provisions of these regulations and recognised by the competent authority in terms of article 9A of the Investment Services Act;

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"relocation agreement" means an agreement setting out the terms upon which the relocation of an incorporated cell from one recognised incorporated cell company to another or to a SICAV incorporated cell company is to take place in accordance with the provisions of regulation 23;

"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;

"SICAV incorporated cell company" means an incorporated cell company established under the Companies Act (SICAV Incorporated Cell Companies) Regulations;

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"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.

Constitution of an incorporated cell company and incorporated cells.

3. (1) A limited liability company may be formed or constituted as a recognised incorporated cell company to establish incorporated cells formed and constituted in accordance with these regulations and to provide such incorporated cells with administrative services.

(2) A recognised incorporated cell company shall require a recognition by the competent authority in terms of article 9A of the Investment Services Act to provide incorporated cells with administrative services.

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(3) The administrative services which a recognised incorporated cell company may provide to its incorporated cells are listed in the Schedule, and the recognised incorporated cell company shall provide such administrative services in accordance with the applicable rules and conditions prescribed by the competent authority.

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(4) An incorporated cell established by a recognised incorporated cell company shall require a licence to carry out the activities of a collective investment scheme in terms of article 4 of the Investment Services Act. Cap. 370.

(5) The competent authority may, in terms of articles 6 and 9A of the Investment Services Act, issue Investment Services Rules applicable to recognised incorporated cell companies and to incorporated cells established under these regulations. Cap. 370.

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

(a) a body corporate registered, incorporated or constituted under the laws of an approved country or jurisdiction outside Malta, which carries out similar activities to those of a recognised incorporated cell company as herein defined, may be continued as a recognised incorporated cell company in Malta:

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

(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 cellular or non-cellular company as known under the laws of Malta, may be continued as an incorporated cell of a recognised incorporated cell company;

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

Provided that if such recognised incorporated cell company has an incorporated cell or incorporated cells in existence, the continuation of the recognised 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.

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(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. No event described in regulation 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:

(a) in the case of a body corporate which is or which is to be granted recognition as a recognised incorporated cell company in terms of article 9A of the Investment Services Act;

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(b) in the case of a body corporate which is or which is to be licensed as an incorporated cell in terms of article 4 of the Investment Services Act as a collective investment scheme.

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Memorandum of incorporated cell company.

6. The memorandum of a recognised incorporated cell company shall, in addition to the matters prescribed by article 69 of the Act, state that it is a recognised incorporated cell company.

Name of recognised incorporated cell company.

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

Applicable law.

8. (1) Subject to the provisions of these regulations, and unless the context otherwise requires, the provisions of the Act shall apply to a recognised incorporated cell company and to an incorporated cell established under these regulations.

(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 a recognised incorporated cell company or to an incorporated cell.

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Establishment of incorporated cells.

9. (1) A recognised 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 recognised incorporated cell company; and

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(c) authorises, if applicable, the subscription by the recognised 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 cell resolution is delivered to the Registrar, the memorandum and articles of association are entered into in accordance with the provisions of sub-regulation (3) and a certificate of registration is issued in terms of the Act.

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

(a) the recognised incorporated cell company, whether the recognised incorporated cell company is subscribing to a share or shares in the incorporated cell or not; and

(b) such persons, other than the recognised 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 provide that the incorporated cell may not own shares in its recognised incorporated cell company.

(6) Without prejudice to article 110 of the Act and unless expressly prohibited by any applicable rules or regulations or by its articles of association, an incorporated cell shall be permitted to own shares in any other incorporated cell of its recognised incorporated cell company subject to any conditions that may apply in terms of the licence issued to it by the competent authority.

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" or the abbreviation "IC"; and

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

incorporated cell company solely by virtue of the fact of it being an incorporated cell of its recognised incorporated cell company.

(3) An incorporated cell may not itself be a recognised incorporated cell company.

(4) An incorporated cell may be a SICAV or an investment company with fixed share capital.

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

(6) Subject to the requirements of Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as may be amended from time to time, an incorporated cell shall use the standard form documents provided by its recognised incorporated cell company and shall not amend or alter such documents in any manner without the prior written approval of the recognised incorporated cell company:

Provided that nothing stated in this sub-regulation shall prejudice the rights and interests of investors in the incorporated cell or affect the relationship between the incorporated cell and its investors.

(7) Without prejudice to the requirements of article 6 of the Act, a recognised 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 a recognised 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 a recognised incorporated cell company and of the directors of each incorporated cell, as applicable:

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

(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 recognised incorporated cell company at all times.

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

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

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

13. (1) A recognised incorporated cell company shall have no power, by virtue of its position as a recognised 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 recognised incorporated cell company.

(3) The directors or officers of a recognised 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 recognised 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 of the Investment Services Act shall apply to a recognised 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 a recognised incorporated cell company or an incorporated cell;

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

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

(e) to shares in a company were a reference to shares in a recognised incorporated cell company or an incorporated cell;

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

(g) to the share capital of a company were a reference to the share capital of a recognised 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 a recognised 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 recognised 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. A recognised 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 a recognised incorporated cell company or of other incorporated cells except when the incorporated cell is a subsidiary of the recognised 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 a recognised incorporated cell company shall also include the names and registration numbers of all its incorporated cells.

Winding up.

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

(2) A recognised 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 under regulation 23; or

(b) relocated to another recognised incorporated cell company under regulation 24 or to an incorporated cell company under regulation 24 of the Companies Act (SICAV Incorporated Cell Companies) Regulations; or

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(c) expelled under regulation 25; or

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

(e) struck-off,

and the Registrar has obtained the consent of the competent authority to the striking-off of the recognised incorporated cell company.

Directions during winding up.

20. (1) Without prejudice to the provisions of regulation 19(1), the appointment of a liquidator in respect of a recognised 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 a recognised 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 recognised incorporated cell company.

Transformation and division.

23. (1) A limited liability company 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 a recognised incorporated cell company or into an incorporated cell;

(b) from a recognised 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 into an incorporated cell;

(d) from an incorporated cell into a segregated multi-fund company:

Provided that a transformation from a non-cellular SICAV into a recognised incorporated cell company, or vice versa, shall be prohibited.

(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 one or more incorporated cells of a recognised incorporated cell company.

(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; 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 referred to 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 a recognised incorporated cell company. The

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incorporation agreement shall be approved by:

(i) the board of directors and by an extraordinary resolution of both the non-cellular company and the recognised 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 recognised 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) For the purposes of this regulation, the term "incorporated cell company" or "ICC" shall be deemed to refer both to a recognised incorporated cell company established under these regulations and to an incorporated cell company established under the Companies Act (SICAV Incorporated Cell Companies) Regulations. S.L. 386.14

(2) 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.

(3) The relocation of an 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 (4).

(4) (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.

(5) 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.

(6) 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 (3)(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 (7), signed by each director of the incorporated cell which is being relocated; and

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

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(7) The declaration referred to in sub-regulation (6)(d) must state that each director of the incorporated cell being relocated 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.

(8) Upon delivery to the Registrar of the documents referred to in sub-regulation (6), 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.

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

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

(b) the incorporated cell shall become 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 shall 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 shall 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.

(10) The operation of sub-regulation (9) 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.

(11) An incorporated cell shall not be relocated under this regulation if such relocation is 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) A recognised 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 recognised incorporated cell company or any other incorporated cell of that company;

(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 or on the recognised incorporated cell company.

(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 recognised 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.

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(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.

26. (1) An appeal shall lie to the Financial Services Tribunal from a decision of the competent authority: Appeals.

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

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

(c) 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;

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

(e) 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.

(2) The provisions of article 21 of the Malta Financial Services Authority Act shall, *mutatis mutandis*, apply to appeals brought before the Tribunal under this regulation. Cap. 330.

SCHEDULE

(Regulation 3)

Administrative Services which may be carried out
by Recognised Incorporated Cell Companies

A Recognised Incorporated Cell Company shall require recognition in terms of Article 9A of the Investment Services Act to provide one or more of the following services:

(i) Provision of administrative services related to the establishment of incorporated cells;

(ii) Procurement of external service providers and approval of any changes thereto;

(iii) Negotiation of service provision agreements and changes thereto;

(iv) Submission of any model agreements to be used by incorporated cells of a recognised incorporated cell company;

(v) Submission to the competent authority of any changes or amendments to model agreements and submission of any new model agreements negotiated with service providers for the approval of the competent authority;

(vi) Signature of tripartite agreements between service providers, the recognised incorporated cell company and an incorporated cell based on the model agreements;

(vii) Standardisation of any other documentation to be used by incorporated cells;

(viii) Approval and joint signature of any applications for licences (including variations, extensions thereof) to be submitted by or on behalf of incorporated cells which are in the course of being formed;

(ix) Provision of written declarations identifying any changes to model agreements already submitted to the competent authority, including a NIL declaration confirming that no changes have been made;

(x) Provision of ancillary services as may be approved by the competent authority.

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