

A Guide to Affiliated Insurance and Insurance Management Companies



Senglea, Malta

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

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The Guide to Affiliated Insurance and Insurance Management Companies is designed to assist organisations considering captive insurance structures to obtain an overview of the regulatory regime that applies in Malta.

This guide does not purport to provide more than an overview. Readers interested in obtaining more information about the establishment of captive insurance companies in Malta or about any related topic are invited to make contact with the Malta Financial Services Authority (MFSA).

1. INTRODUCTION

The international environment for captives has changed. Corporate insurance buyers are facing higher primary premiums and related taxes, higher reinsurance prices, lower policy limits and less cover. In the captive sector, major corporations are also finding problems to make fronting arrangements with insurance companies as a result of which they are forced to make strategic choices. There is a need for captives to be financially stronger and to be able to take more risk. There are options such as direct underwriting and cost reduction to be considered. It is time new business models are explored and new locations studied.

Over recent years Malta has established itself as a model jurisdiction in financial services regulation. As in other successful economic sectors the regulatory framework combines well with other advantages Malta can provide in terms of competitiveness, EU membership, strategic access to southern Mediterranean markets and a good working environment.

Malta provides the opportunity for companies to locate their captive insurance business and insurance management activity within an OECD-recognised tax environment that combines tax efficiency with controlled foreign company tax legislation requirements.

Malta's insurance legislation is based on research carried out among Maltese and international insurance operators and provides opportunities for captive insurance business and related activities, including cell companies, insurance management companies and regional operations for insurers, reinsurers and brokers. The legislation also provides continuation procedures that allow insurance companies resident in a foreign domicile with equivalent legislation to re-domicile to Malta.

Captive insurance business is regulated under a set of tailor made rules that take into consideration the current state of the market and possible future developments. These rules provide for the registration and operation of captive insurance companies which within the Maltese insurance legislation are termed "Affiliated Insurance Companies" ("AICs").

In addition to the above, the Malta Financial Services Authority has also designed a fast track approach for back office operations. Further information in this respect may be obtained from the MFSA "Guide to Back Office Administration in the Financial Services Sector".

2. AFFILIATED INSURANCE COMPANIES

2.1. LEGAL FRAMEWORK

"Affiliated Insurance" is defined as "the business of an insurance company which is registered in Malta and whose business of insurance is restricted to risks originating with shareholders or connected undertakings or entities".

AICs may insure risks originating from a wide range of persons including:

- parent companies;
- associated or group companies;
- individuals or other entities having a majority ownership or controlling interest in the AIC, and

- members of trade, industry or profession associations insuring risks related to the particular trade, industry or profession.

These shareholding or other connecting relationships between undertakings are determined by Insurance Rule 21 of 2007 (see Appendix 2).

The detailed regulatory provisions on AICs are contained in subsidiary legislation which includes regulations and rules issued in terms of the Insurance Business Act, 1998 (“the Regulations”).

The main pieces of subsidiary legislation in this area are:

- the Insurance Business (Companies Carrying on Business of Affiliated Insurance) Regulations, 2003;
- the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2003;
- the Insurance Business (Continuance of Companies Carrying on Business of Insurance) Regulations, 2003;
- Insurance Rule 21 of 2007 on the business of affiliated insurance.

The Regulations establish a specific licensing framework for AICs and hence such companies are regulated by specific provisions found in the Regulations. The provisions of the Act and related subsidiary legislation and rules apply only to the extent stated in the Regulations and they may also apply with certain modifications.

For example:

- Similarly to other insurance companies, AICs regulated under the Act are required to establish and maintain adequate technical provisions;
- Affiliated companies are exempted from the custody of assets rules provided for in the Insurance Business (Insurer’s Assets and Liabilities) Regulations, 2007;
- AICs are also exempted from the requirement to contribute to the Protection and Compensation Fund; therefore such companies are exempted from the requirement to contribute for the payment of claims remaining unpaid by reason of the insolvency of an authorised insurance company;
- AICs are exempt from a number of obligations in the case it intends to cease to carry on business of insurance;
- The AICs are also exempt from the payment of duty under the Duty on Documents and Transfers Act, 1993 on any contract of insurance relating to a risk situated outside Malta.

2.2. LICENSING AND AUTHORISATION

An application for authorisation by an affiliated company is processed within a statutory period of three months.

Approval is granted after the MFSA is satisfied that:

- an application is filed in writing on the prescribed form;
- the company has the appropriate own funds for the type of business to be carried on or being carried on by the company;
- the company’s objects are limited to business of affiliated insurance and operations arising directly therefrom to the exclusion of other commercial business;
- sufficient information is made available on persons having any proprietary, financial or other interest in, or in connection with, the company;

- all qualifying shareholders, controllers, and all persons who will effectively direct the business of insurance are fit and proper to ensure the company's sound and prudent management;
- a scheme of operations has been submitted in accordance with the relevant Rule.

The Insurance Business (Fees) Regulations 1999 as subsequently amended establish specific fees for AICs, which unlike those of companies carrying on direct and reinsurance business do not vary according to the amount of business the company underwrites in the previous financial year. The fees applicable to AICs can be found in Appendix I.

Companies carrying on affiliated insurance are required to **possess own funds**, whether in Euros or in other currencies acceptable to the Authority amounting to not less than the applicable minimum guarantee fund as determined in the Fourth Schedule to the Insurance Business (Insurers' Assets and Liabilities) Regulations, 2007 as amended. Such funds are to be unencumbered at all times. The components making up the own funds are to consist of:

- paid up share capital which must not be less than 50% of the value of the own funds requirement;
- a mixture of issued and unpaid share capital, preferential share capital and subordinated loans, retained profits and reserves.

AICs carrying on general business of a prescribed nature are required to maintain an **equalisation reserve**. Companies are exempted from this obligation if:

- their head office is outside Malta; or
- the net premiums written in any financial year in respect of that business are less than 4% of the total net premiums written in the financial year and are less than Euro 2,500,000.

Notwithstanding the above, since technical provisions and equalisation reserves are allowed as a deduction in the computation of taxable income, an affiliated company carrying on reinsurance business may still elect to hold an equalisation reserve if its business is less than the aforementioned thresholds.

AICs are required to maintain at all times a **margin of solvency** in accordance with regulations which are modelled on the European Union Directives. Said companies are also required to establish and maintain **adequate technical provisions**.

An insurance company, including an affiliated insurance company, is required to cover its technical assets and margins of solvency requirements by admissible assets. Moreover to ensure the safety, yield and marketability of the assets must be diverse and spread. There are no investment restrictions with respect to that portion of assets that is not required to cover technical provisions and margins of solvency.

For the purposes of the technical reserves, assets are taken into consideration up to a certain limit. Admissible assets are determined in accordance with the Insurance Business (Insurers' Assets and Liabilities) Regulations, 2007.

In terms of the Insurance Business (Companies Accounts) Regulations, 2000 as amended affiliated companies are permitted to draw up accounts in an abridged form. They are also exempted from the requirement to publish accounts in local newspapers. A copy of the audited financial statements must

however be submitted to any person applying for such copy and the company may charge such reasonable fees for such copy.

3. PROTECTED CELL COMPANIES

The Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2004 allow a licensed AIC to be registered as or convert to a protected cell company.

These Regulations provide for:

- segregation and protection of cellular assets from other assets of the company,
- creation and issue of cell shares,
- transfer of cellular assets to other persons, and extension of protected cell assets concept to the transferee,
- provisions requiring assets attributable to different cells to be kept separate and separately identifiable;
- provisions requiring cellular and non-cellular assets to be kept separate and separately identifiable;
- use of non-cellular assets as a secondary asset base where cellular assets are exhausted, and
- other related matters.

Transfer of cellular assets is possible subject to approval of the MFSA. However, a cell company does not require cell transfer approval in order to invest, change investment of cellular assets or make payments or transfers from cellular assets in the ordinary course of the company's business.

4. INSURANCE MANAGEMENT COMPANIES

4.1. DEFINITION

The Insurance Business Act defines an Insurance Manager as a person enrolled to carry out activities that consist of accepting an appointment from a company to manage any part of its business, or to exercise managerial functions therein, or to be responsible for maintaining accounts or other records of such company. Management functions may include the authority to enter into contracts of insurance on behalf of such company under the terms of appointment. A local company authorised under the Insurance Intermediaries Act, 2006 as insurance intermediary and carrying on business as an insurance broker, restricted to contracts of insurance relating to risks situated outside Malta, may appoint an insurance manager authorised under the Act to manage such business.

4.2. LICENCING REQUIREMENTS

Companies carrying on affiliated insurance may employ the services of an insurance management company. The insurance management company must be a Maltese registered company and is regulated by the Insurance and Intermediaries Act.

Such company would require a license if it carries out activities which consist in the management of any part of another company's insurance business; the exercise of managerial functions therein and the maintenance of accounts or other records of such company. Such activity could also include the authority to enter into contracts of insurance on behalf of the company under the terms of the appointment.

An Insurance Management Company licensed under the Act is required to possess ‘own funds’ amounting to:

- (i) if it holds no appointment: - to the amount of the paid-up share capital in terms of the Companies Act, 1995 Euro 1,164.69 [in paid up share capital].
- (ii) EUR 16,803 where acting for, or on behalf of, a company whose business is restricted to affiliated insurance; or
- (iii) EUR 16,803 or 4% of the annual gross premiums receivable whichever is the higher – where it holds an appointment which (i) excludes or does not include authority to enter into contracts of insurance on behalf of a company and /or (ii) includes authority to collect and hold premiums on behalf of a company; or
- (iv) EUR 58,243,33 or 4 % of the annual gross premiums receivable, whichever is the higher – (i) where acting for, or on behalf of, a company whose business is not restricted to affiliated insurance and which appointment includes the authority to enter into contracts of insurance on behalf of the company; or (ii) where is holds an appointment from a company enrolled in the Brokers List

An insurance manager will be required to:

- keep moneys held by it in a fiduciary capacity separate from its own moneys; and
- effect a fidelity bond.

These requirements will not apply to an insurance management company for so long as it holds no appointment. In addition the insurance manager will be required to have in its favour a policy of professional indemnity insurance.

5. REDOMICILIATION OF AICS AND INSURANCE MANAGEMENT COMPANIES

A body corporate licensed in another jurisdiction to carry out any insurance business or to provide insurance management or broking services, may be authorised to continue as a company formed or registered in Malta.

The Insurance Business (Continuance of Companies Carrying on Business of Insurance) Regulations, 2003 provide that the MFSA may authorise such companies to re-domicile to Malta and operate under Maltese insurance legislation if they originate from an approved jurisdiction. Prior to applying for such authorisation, such company must first approve such continuance by a corporate decision which is valid under the laws of its country of origin and that would be equivalent to an extraordinary resolution under Maltese law.

The requirements in such case include the drawing up of an instrument of continuance and delivery of this document to the Registrar of Companies together with a copy of the Memorandum of Association or deed of partnership or equivalent instrument by which the continuing company was constituted in the country of origin. Upon acceptance and registration of these instruments and MFSA authorisation under the relevant Maltese insurance laws, such company shall cease to be a body corporate under its

previous jurisdiction and shall continue its corporate existence under the laws of Malta. The company will retain all its assets, rights and liabilities as a company otherwise formed and registered under the Companies Act and authorised under Maltese insurance legislation.

Similarly the said regulations empower the MFSA to authorise a Maltese registered and licensed company to be continued as a body corporate registered, incorporated or constituted under the laws of a country outside Malta. Such continuance must first be approved by extraordinary resolution of the company. Authorisation may only be granted if such company will operate as a continued company that continues to retain or succeeds to all its existing assets, rights and liabilities.

The company continuance provisions contained under the Companies Act and the Continuation of Companies Regulations, 2002 also *mutatis mutandis* apply with respect to the continuation of AICs.

6. PREVENTION OF MONEY LAUNDERING

AICs and insurance management companies must act in accordance with the regulations made under the Prevention of Money Laundering Act, 1994 and follow the relative Guidelines issued by the MFSA.

APPENDIX I

FEES

Fees	Euros
Affiliated Insurance Companies	
Application for authorisation	1,800
Acceptance of application	2,500
Continuance of authorisation	5,000
Insurance Management Companies	
Application for authorisation	375
Acceptance of application	500
Continuance of authorisation	500 and 375 per appointment
Company Registration Fee (<i>one off</i>)	<i>245 – 2,250 (depending on the company's authorised share capital)</i>

APPENDIX II

SHAREHOLDING AND CONNECTING RELATIONSHIPS

Clauses 1 and 2 of the First Schedule to Insurance Rule 21 of 2007

Affiliated Insurance Companies

1. (1) In the case of an affiliated insurance company, business of affiliated insurance is restricted to risks originating -
 - (a) with undertakings being members of a group of which it is itself an undertaking; or
 - (b) with an undertaking or undertakings not forming part of a group, having common membership, up to the ultimate beneficial owner level, with the company amounting to at least fifty one per centum of both the membership of such undertaking or undertakings and the company; or
 - (c) with a society, corporation, or body (howsoever constituted) established and recognised under the laws of Malta or under the laws of country outside Malta or individuals who hold fifty one per centum or more of the share capital issued by the company or of the voting rights attaching to such capital; or
 - (d) with members of an association or an organisation of a particular trade, industry or profession and the risks originating with the members are those restricted to the trade, industry or profession for the purposes of which the association or organisation was established or registered;
- (2) For the purposes of sub-paragraph (1) of paragraph 1 of this Rule -
 - (a) “group” shall mean a group of undertakings, which consists of a parent undertaking, its subsidiaries and the entities in which the parent undertaking or its subsidiaries hold a participation;
 - (b) “membership” shall mean a direct or indirect holding in the share capital issued by a company or of the voting rights attaching to such share capital or which makes it possible to exercise a significant influence over the management of the company.

Parent and subsidiary undertakings

2. (1) For the purposes of this Schedule, an undertaking is a parent undertaking in relation to another undertaking (“a subsidiary undertaking”) if –
 - (a) it holds a majority of the voting rights in the undertaking; or
 - (b) it is a member of the undertaking and has a right to appoint or remove a majority of its board of directors or persons entrusted with its administration; or
 - (c) it has a right to exercise a dominant influence over the undertaking:

- i. by virtue of provisions contained in the undertaking's memorandum or articles; or
 - ii. by virtue of a control contract (as defined in paragraph (2) of article 13 of Insurance Rule 18 of 2008); or
- (d) it is a member of the undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking; or
- (e) it is a member of the undertaking, no other person is the undertaking's parent by virtue of any of sub-paragraphs (a) to (c) of this paragraph, and at all times since the beginning of the undertaking's immediately preceding financial year, a majority of the undertaking's board of directors have been directors who were appointed solely as a result of the exercise of its voting rights; or
- (f) it has a participating interest in the undertaking and either actually exercises a dominant influence over the undertaking, or it and the undertaking are managed on a unified basis; or
- (g) it has a participating interest in the undertaking which either entitles it to twenty per centum or more of the voting rights in the undertaking or comprises twenty per centum or more of the shares in the undertaking.
- (2) For the purposes of sub-paragraph (1) of this paragraph, an undertaking shall be treated as a member of another undertaking if -
- (a) any of its subsidiary undertakings is a member of that other undertaking; or
 - (b) any shares in that other undertaking are held by a person acting on behalf of the undertaking or any of its subsidiary undertakings.
- (3) Subject to sub-paragraph (4) of this paragraph, a parent undertaking shall be treated as the parent undertaking of undertakings in relation to which any of its subsidiary undertakings are, or are to be treated as, parent undertakings.
- (4) An undertaking ("A") shall not be treated as a parent undertaking of an undertaking ("B") by reason only that another undertaking which is A's subsidiary undertaking by virtue of sub-paragraph (g) of paragraph (1) of this article is a parent undertaking of B.
- (5) For the purposes of this paragraph:
- (a) "participation" exists when an undertaking holds rights in the share capital of other undertakings which, by creating a durable link with those undertakings are intended to contribute to the company's activities. The holding of twenty per centum of the capital or of the voting rights of another undertaking shall be presumed to constitute a participating interest; and
 - (b) "subsidiary undertaking" shall mean a subsidiary undertaking within the definition of "parent undertaking" and any undertaking over which, in the opinion of the Authority, a parent undertaking effectively exercises a dominant influence; all subsidiary undertakings of subsidiary undertakings shall also be considered as subsidiary undertakings of the parent undertaking; and

- (c) references to “undertakings” shall include references to a person, whether natural or legal, and in the case of a legal person shall mean a society, corporation or body (howsoever constituted), established or recognised under the laws of Malta or under the laws of a country outside Malta.

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