

# Award in Company Law Fundamentals

Lecture Title: Commercial Partnerships

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Diploma in Law (Malta)



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ADVOCATES

# Introduction

*A contract of a commercial partnership*

- An agreement between two or more persons
- Creating a legal relationship between the parties
- Regulated by the Memorandum and Articles of Association or by the deed of partnership



# Different forms of commercial partnerships



Partnership *en nom collectif*



Partnership *en nom commandite*  
or limited partnership



Limited liability company

# Partnership *en nom collectif*

***“.....may be formed by two or more partners and operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners”***

*(Article 7, Companies Act)*



# Partnership *en nom collectif*

- Each and every partner is liable for the debts and obligations of the partnership with all his property, present and future and not merely up **to the amount contributed by him to the partnership.**
- As between the partners, however, each partner is liable for the debts and obligations of the partnership in the proportion fixed in the deed of partnership and, in default, by law.



# Partnership *en nom collectif*

- Joint and several liability connotes the idea of the ability of the creditor to turn to one of the co-debtors and claim the full amount of the debt owed to him.
- **But**, the Companies Act says that *“no action shall lie against the individual partners unless the property of the partnership has first been discussed.”*



# Partnership *en commandite*

***“A partnership en commandite or limited partnership operates under a partnership-name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution of one or more partners, called limited partners.”***

*(Article 51, Companies Act)*



# Limited liability company

*“... is formed by means of a capital divided into shares held by its members. The members’ liability is limited to the amount, if any, unpaid on the shares respectively held by each of them.”*

*(Article 67, Companies Act)*





# Limited liability company

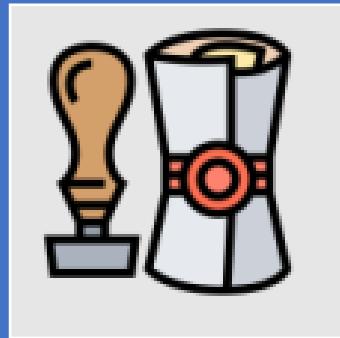
A limited liability company is the most common form of business entity in Malta. It may be formed for any lawful purpose and shall have the status of a:

Public company (p.l.c.)

Private company (Ltd)



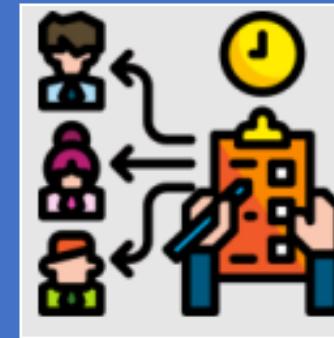
# Key features of the limited liability company



The LLC is a separate legal entity



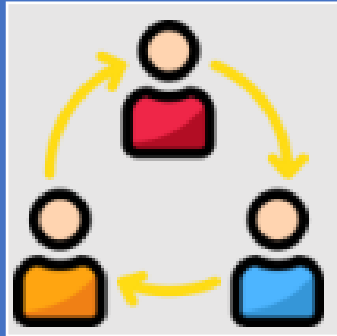
Partners are members/shareholders of the company



Management is vested in the board of directors, and shareholders vote at meetings



# Key features of the limited liability company



Shares may be transferred, which may be considered an asset in the hands of shareholders



Must be registered with the MBR, with formation documents signed by at least 2 members



Members' liability is limited



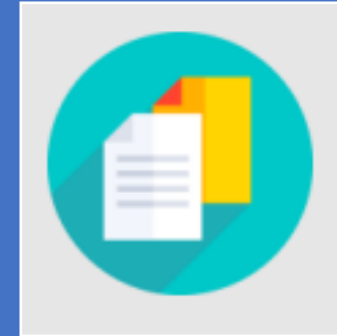
# Key features of the limited liability company



The shareholders/owners may benefit from a distribution of dividend



Name of the company must end in 'p.l.c.' or 'ltd.'



The company must file annual statutory filings



# Private company



## A private company:

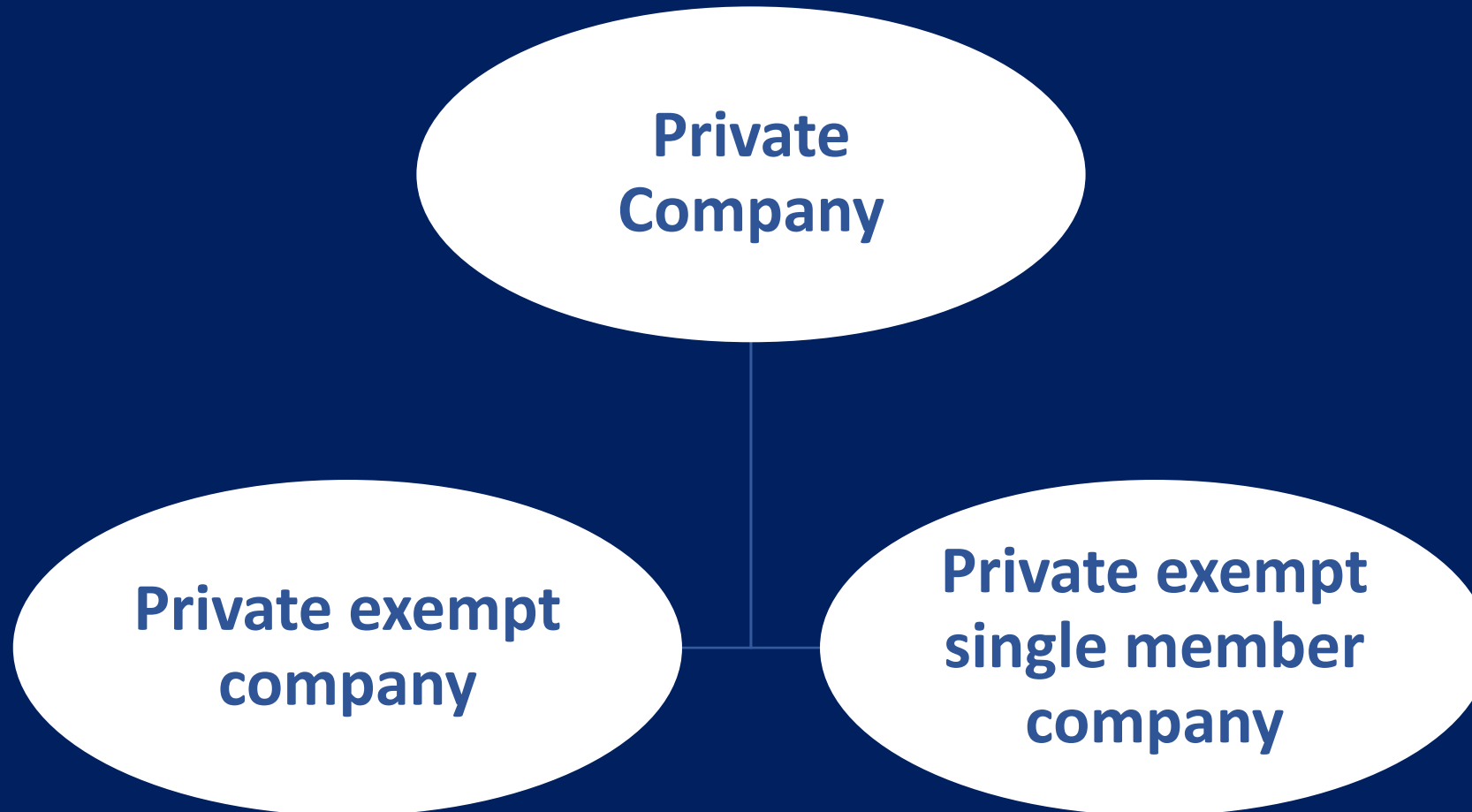
- restricts the right to transfer its shares;
- limits the number of its members to 50;
- prohibits any invitation to the public to subscribe for any of its shares or debentures.

The Companies Act also provides that a private company shall not offer to the public, whether for cash or otherwise, any shares in or debentures of the company or allot or agree to allot, whether for cash or otherwise, any shares in or debentures of the company, with a view to all or any of those shares or debentures before offered to the public.

The equity securities of private companies may also not be admitted to listing or trading.



# Private company



# Private exempt company

The additional conditions apply to private exempt companies:

- The number of persons holding debentures of the company must not be more than 50;
- No body corporate is a director of the company and neither the company nor any of the directors is party to an arrangement whereby the policy of the company is capable of being determined by persons other than the directors, members or debenture holders thereof.

The **advantage** of a private exempt company is that it is not required to comply with certain legal requirements applicable in the case of all other private companies.



# Private exempt single member company

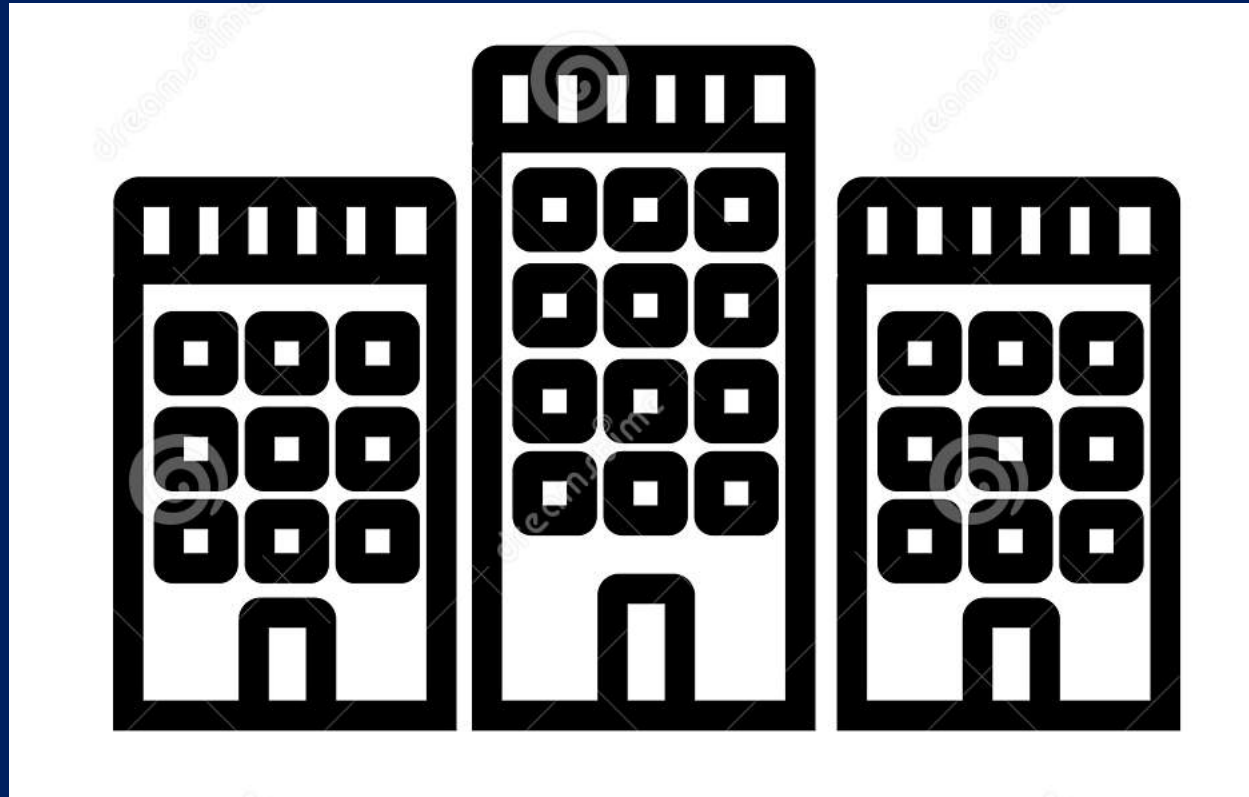
- A private exempt single member company is a private exempt company formed and registered or operating, with one member.
- The memorandum and articles of association must specify the principal activity of the company.





# Public company

- A public company is defined as a company which is not a private company.



# SICAVs

- These are investment companies with variable share capital.
- They are typically used for collective investment schemes or fund structures.



# The main differences between a PLC and a LTD company

Features	LTD	PLC
Minimum number of directors	1	2
Minimum number of members	2	2
Authorised share capital	EUR 1,164.69	EUR 46,587.47
Nominal value paid up upon subscription	>20%	>25%
Transferability of shares	Limited	Free
Advertise shares/debentures to public	No	Yes
Time to hold accounting records	10 years	10 years
Annual general meeting	Compulsory	Compulsory

# The Process for the Incorporation of a Limited Liability Company



# Reservation of Company Name

- It is highly recommended that a practitioner, when entrusted with the formation of a company, reserves the proposed name prior to registering a company.
- The Registrar will reserve names for a period of 3 months against a fee.
- However, the Registrar, in certain instances, will not reserve the name.



# Minimum requirements for setting up a company in Malta

- In the simplest of cases, the following documentation/information must be delivered to the Registrar:
  1. the memorandum and articles of association;
  2. a declaration by each prospective director that they are not aware of any circumstances which could lead to a disqualification from being appointed or to hold the office of director and also consenting to act as a director of the company (this declaration would need to be made on statutory Forms K(1));
  3. e-mail address of each prospective director, for contact purposes;
  4. declaration of beneficial owner (this is not required where the shareholders are natural persons);
  5. due diligence documents with respect to all involved parties (shareholders, directors, company secretary and ultimate beneficial owners);
  6. a deposit slip (or other evidence) in respect of the initial paid up share capital; and
  7. payment of the registration fees.

Where the company to be registered intends to use, as its registered office address, the address of a property owned by a third-party, a letter of consent authorising the company to use the address of said property as its registered office address will also be required to be submitted to the Registrar (this is not required where the address to be used is that of a duly authorised company services provider engaged by the company in-information to offer such registered office address).



# Minimum requirements for setting up a company in Malta

- There should be a minimum number of 2 shareholders, each holding a minimum of at least 1 share. A single member company may be set up, subject to statutory conditions.
- There is no specific requirement for any director (or other officer) of the company to be a Maltese national or resident.



# Companies operating in highly specialised sectors

- In the case of businesses operating in highly specialised sectors, the need for expert professional advice is essential.
- Some highly specialized sectors are further subject to tight and detailed regulation, and a license to operate in these sectors will not be granted unless certain conditions are satisfied.





# Declaration by Prospective Directors

- A person shall not be capable of being appointed director of a company unless he has personally signed the memorandum indicating his consent to act as a director or has otherwise signed and delivered to the Registrar for registration a consent in writing to act as such director.
- Upon being appointed director of a company, such person shall be required to declare to the Registrar, in the prescribed form, whether he is aware of any circumstances which could lead to a disqualification from appointment or to hold office as a director of a company under the provisions of this Act or in another Member State.



# Beneficial Ownership - The Internal Beneficial Owners Register

- Every company shall obtain and at all times hold adequate, accurate and up-to-date information in respect of its beneficial owners.
- The information shall be entered into and held by the company in a beneficial owners register to be kept at the registered office of the company or at such other place in Malta as may be specified in the memorandum or articles of association of the company.
- The company shall not enter the name of a new shareholder or any changes to existing shareholdings in the register of members unless they have obtained, where applicable, information on the underlying beneficial ownership.



# Beneficial Ownership - Identifying the Beneficial Owner

- A beneficial owner is any natural person or persons who ultimately own or control the commercial partnership or company, or the natural person or persons on whose behalf a transaction or activity is being conducted (this could also be a body corporate or a body of persons) through direct or indirect ownership of 25% plus one or more of the shares or more than 25% of the voting rights or an ownership interest of more than 25% in that body corporate or body of persons, including through bearer share holdings, or through control via other means (other than a company that is listed on a regulated market which is subject to disclosure requirements consistent with EU law or equivalent international standards which ensure adequate transparency of ownership information).
- Ultimately, it is a natural person/s who must be identified and entered as the beneficial owner/s of a company.
- If after having exhausted all possible means and provided there are no grounds of suspicion, no natural person is identified as a beneficial owner, or if there is any doubt that the person/s identified is the beneficial owner/s, then the natural person/s who hold the position of senior managing official/s shall be recorded as the beneficial owner/s. The company is to keep a record of the actions taken and any difficulties encountered to determine who the beneficial owner is.



# Beneficial Ownership – Statutory Forms

- In addition to maintaining internal records and a register, companies are also under an obligation to report their beneficial owners and information in respect thereof to the Registrar, and must keep the Registrar informed of any changes in the beneficial owners and, or beneficial ownership of the company or changes in the information pertaining to the beneficial owners.
- This is done through the submission of various statutory forms to the Registrar.



# Beneficial Ownership – Statutory Forms

Name of Form	Timeframe
Form BO1	To be delivered to the Registrar with company incorporation.
Form BO2	<p>To be delivered to the Registrar in the following instances: (i) a change in beneficial ownership of a company; (ii) where a notice of transfer or transmission of shares (statutory Form T) is delivered to the Registrar; (iii) an increase or reduction of the issued share capital; (iv) a restructuring of a company's share capital; or (v) a change in the voting rights.</p> <p>This form is to be delivered within 14 days from the change being reflected in the internal register of the company.</p> <p>In the case of (ii) to (v) above, the form is to be submitted even where no change in beneficial ownership has occurred.</p>
Annual Confirmation BO Form	To be delivered to the Registrar on an annual basis, within 42 days from each anniversary of the registration of the company, showing any changes in the details of the beneficial owners, or confirm that no such changes in details took place.

# Beneficial Ownership – Statutory Forms

Name of Form	Timeframe
Change in Senior Managing Officials Form	To be delivered to the Registrar within 14 days after the date on which a change to the senior managing officials of the company are recorded with the company.
Change in Details of BO/Senior Managing Officials Form	To be delivered to the Registrar whenever there is a change in the details of the beneficial owners/senior managing officials such as name, country of residence or official identification document.

- Where SMOs are disclosed, the company is also required to submit a letter to the Registrar explaining the reasons for identifying the SMO of the company as its BO.



# Beneficial Ownership – Penalties

- If default is made in complying with the provisions of the BO Regulations, the company and every officer, and in some instances the shareholder and BO of the company, who are in default are jointly and severally liable to penalties, and for every day during which the default continues, to a further penalty.
- The penalties range from €5,000 to €10,000, and the daily penalties range from €100 to €500 each day, and the amount of said penalties are at the discretion of the Registrar.
- If any officer, shareholder or beneficial owner of a company knowingly or recklessly makes a statement, declaration or otherwise provides the Registrar with information on the beneficial ownership of a company, that is misleading, false or deceptive in a material particular, s/he shall be guilty of an offence and shall be liable on conviction to a fine (*multa*) of not more than €5,000 or to imprisonment for a term not exceeding 6 months or to both such fine and imprisonment.



# Beneficial Ownership – Register of Beneficial Owners kept by the Registrar

- The information on the beneficial owners of every company provided to the Registrar in accordance with the BO Regulations shall be entered into and held by the Registrar in a register of beneficial owners kept by the Registrar for this purpose. The Register of Beneficial Owners is kept in electronic format only.





# Beneficial Ownership - Powers of the Registrar

- The Registrar is granted certain powers in order to ensure that the beneficial ownership information is submitted thereto including, amongst others, the power to:
  - (a) reject a new company if the beneficial owners are not disclosed;
  - (b) restrict new incorporations for directors involved in other Maltese registered companies that failed to submit information on beneficial owners; and
  - (c) before registering a new company, take such steps and require such information and documentation as she may deem necessary to ascertain the correctness of the beneficial ownership information submitted to him.



# Evidence of paid-up share capital

## A. CASH

- For the purposes of giving evidence that the share capital has been paid-up, if in cash, the share capital of the proposed company is often deposited in the “**company/client in formation account**” of the practitioner or firm handling the incorporation of the company.
- A statement by a foreign bank that the amount has been deposited into an account in the name of the proposed company with such foreign bank is also acceptable.



# Evidence of paid-up share capital

## A. IN KIND

- Expert's report describing the assets comprising the consideration as well as the methods of valuation which have been used.
- The expert's report must further state whether the values arrived at by the application of these methods correspond at least to the number and nominal value on the shares to be issued for them.
- The report must be delivered to the Registrar for registration before the company is registered.



# Registration Fees

- Fees are usually paid to the Malta Business Registry – with the delivery of the Memorandum and Articles of Association, and every year thereafter together with the filing of the statutory Annual Return.
- The amount of fees payable to the MBR depends on the amount of the authorised share capital.



# The Role of the Registrar of Companies

- All the documentation required for the purposes of the registration of a company must be delivered to the Registrar of Companies.
- The Registrar plays a crucial role in ensuring that the applicable legal requirements are complied with.



# Effects of Registration

- On the registration of the memorandum and articles (if any), of a company, the Registrar shall certify that the company is registered and shall issue a Certificate of Registration.
- The company comes into existence and is authorized to commence business from the date of registration.
- Once registration is affected, the company will have a legal personality distinct from that of its member or member. This will subsist until the name of the company is struck off the register.



# Foreign Direct Investment Screening

- Depending on whether the company will be registered with non-EU companies or individuals as its shareholders, related screening may need to take place in anticipation of the registration of the company.
- The sectors which are subject to screening include the following:
  - (a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
  - (b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
  - (c) supply of critical inputs, including energy or raw materials, as well as food security;
  - (d) access to sensitive information, including personal data, or the ability to control such information; and
  - (e) the freedom and pluralism of the media.





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# Memorandum and Articles of Association

- A company shall not be validly constituted in terms of Maltese company law unless a memorandum of association is entered into and subscribed (signed) by at least two persons (unless the company being incorporated qualifies as a single member company).
- **Memorandum of Association:** outward looking document which provides key information on the company, such as the objects, capital, directors, subscribers, etc.
- **Articles of Association:** inward looking document which sets out the internal regulations of the company.
- **The Articles of Association may be registered together with the Memorandum of Association.**



# Memorandum of Association

- The provisions of the memorandum of association are mandatory. If any one of the matters is not included, the Registrar of Companies will refuse to register it.



# Memorandum of Association

- The contents shall vary from company to company, depending on the type of company however, the memorandum must state the:
  - (a) status of the company (*public, private, private exempt, private exempt single member, SICAV*);
  - (b) name, residence and identity of the subscribers;
  - (c) name of the company;
  - (d) registered office and the electronic mail address of the company;
  - (e) objects of the company;
  - (f) amount of share capital with which the company proposes to be registered, the division thereof into shares of a fixed amount, the number of shares taken up by each subscriber and the amount paid up in respect of each share and, where the share capital is divided into different classes of shares, the rights attaching to the shares of each class;
  - (g) number of directors, and the name, residence and identity of the first directors (and the name, registration number and registered office where any of the directors is a body corporate), the manner in which the representation of the company is to be exercised, and the name of the first person/s vested with such representation;
  - (h) name, residence and identity of the first company secretary (or the name, registration number and registered office where the company secretary is a body corporate);
  - (i) the period, if any, fixed for the duration of the company.



# Status Clause

- The status clause must state whether the company is a public company or a private company.

Private  
Company

- The name must end with “private limited company” or “limited” or “ltd”

Public  
Company

- The name must end with “public limited company” or “p.l.c.”

# Registered Office Clause

- Since a company has a legal but not physical existence, a company must be allocated a place where the company can be found.
- Communications and notices shall be sent to the registered office.
- The registered office does not need to be the principal place of business.
- The registered office of a Maltese company must be in Malta.
- Where the company to be registered intends to use, as its registered office address, the address of a property owned by a third-party, a letter of consent authorising the company to use the address of said property as its registered office address will also be required to be submitted to the Registrar (this is not required where the address to be used is that of a duly authorised company services provider engaged by the company in-information to offer such registered office address).



# Objects Clause

- The objects of a company may not be simply stated to be any lawful purpose or trade in general.



MEMORANDUM OF ASSOCIATION  
OF  
BUHAGIAR LIMITED

**1. Name**

The name of the company is Buhagiar Limited (“the Company”).

**2. Registered Address**

The registered address of the Company shall be at Level 3, Valletta Buildings, South Street, Valletta, Malta.

**3. Objects and Powers**

The objects for which the Company is established are as follows:-

- (a) to subscribe for, purchase or otherwise acquire, take, hold, dispose of or otherwise deal in all kinds of securities including shares, stocks, debentures, debentures stock, bonds, notes, options, and interests in all kinds of companies, corporations, entities, partnerships or other body of persons as the Board of Directors may determine, and to manage and administer any of the afore-mentioned property or any other property permitted by law;
- (b) to receive from the assets mentioned in paragraph (a) above dividends, capital gains, interest, and any other income derived from investments including income or gains on their disposal, rents, royalties and similar income whether arising in or outside Malta, and profits or gains attributable to a permanent establishment (including a branch) whether situated in or outside Malta;
- (c) to acquire and dispose of, by any title valid at law, movable or immovable property, whether for commercial or other purposes and to hold the property so acquired, and the consideration for any acquisition or disposal can be in credit or in cash or in kind, including the allotment of shares or debentures of the company, credited as paid up in full or in part as need be;
- (d) to administer, invest, lease, hire, grant by way of emphyteutical concession or in any other manner employ, improve, manage, administer or develop any of its assets, or any other property, as may from time to time be determined;



# Management Clause

- The number of directors can be stated either as a fixed number or as a range or as a maximum.
- It is not advisable to fix an amount as if there is a vacancy the board may be unable to act.





# Subscribers' Clause

- The subscribers' clause generally incorporates, in tabular form, not just the name, addresses and identification details of the subscribers but also the number, nominal value and class, if any, of the shares respectively taken up by them.



# Share Capital Clause

- The memorandum must state:
  - (i) the amount of share capital with which the company proposes to be registered;
  - (ii) the division thereof into shares of a fixed amount;
  - (iii) the number of shares taken up by each of the subscribers;
  - (iv) the amount paid in respect of each share; and
  - (v) where the share capital is divided into different classes of shares, the rights attaching to the shares of each class.



# Share Capital Clause

## 5. Share Capital

The authorised and issued share capital of the Company is twenty thousand Euro (€20,000) divided into twenty thousand (20,000) Ordinary Shares of one Euro (€1) each, which have all been subscribed, allotted, taken up and fully paid up, as follows:

Michael Buhagiar I.D. number: 123483 M Address: No.2, Trig Santa Margerita, Tarxien	10,000 Ordinary Shares of €1.00 each (fully paid up)
Nicola Buhagiar I.D. number: 123483 M Address: No.5, Old Bakery Street, Mdina	10,000 Ordinary Share of €1.00 each (fully paid up)

# Representation Clause

- A company cannot act in its own person since its person is a fiction of law with legal but no physical existence.
- Typically representation of the company is vested in *“any one director”* or *“in any two directors”* or *“in any two directors and the Chairman jointly”* or *“in such other person or persons duly authorised by the board of directors”*



# Representation Clause

## 8. Legal and Judicial Representation

The legal and judicial representation of the Company shall be vested in any one (1) of the directors who may act severally or, without prejudice to the aforesaid, in any person or persons authorised by the Board of Directors from time to time.



# Articles of Association

- **Inward looking document:** it regulates the relationship between the company and its members and between each of the members *inter se*.
- The articles of association may be registered. If they are not registered, the model articles contained in the First Schedule to the Companies Act will apply.
- Even if the company does register the articles of association, insofar as these do not exclude or modify the provisions of the First Schedule, the provisions of the First Schedule will continue to apply.
- The articles of association must be signed by the subscribers.



# Articles of Association

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CAP. 386.]

COMPANIES

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## FIRST SCHEDULE

(Article 75)

### MODEL REGULATIONS FOR A LIMITED LIABILITY COMPANY

#### PART I REGULATIONS FOR THE MANAGEMENT OF A LIMITED LIABILITY COMPANY

##### Share capital and variation of rights

1. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares, any share in the company may be issued with such preferred, deferred or other special rights or such restrictions, whether in regard to dividend, voting, return of capital or otherwise as the company may from time to time by ordinary resolution determine.

2. Subject to the provisions of article 115 of the Companies Act, (hereinafter referred to as "the Act"), any preference shares may, with the sanction of an ordinary resolution, be issued on the terms that they are, or at the option of the company are, liable to be redeemed on such terms and in such manner as the company before the issue of the shares may by extraordinary resolution determine.

3. If at any time the share capital is divided into different classes of shares, the change of any shares from one class into another or the variation of the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class which is to be changed or the rights attached to which are to be varied, according to the case) may, whether or not the company is being wound up, be made with the consent in writing of the holders of three-fourths of the issued shares of that class.

# Articles of Association







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