

Company Law Fundamentals

Lecture Title: The Commercial Partnerships

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Date: 23 October 2023

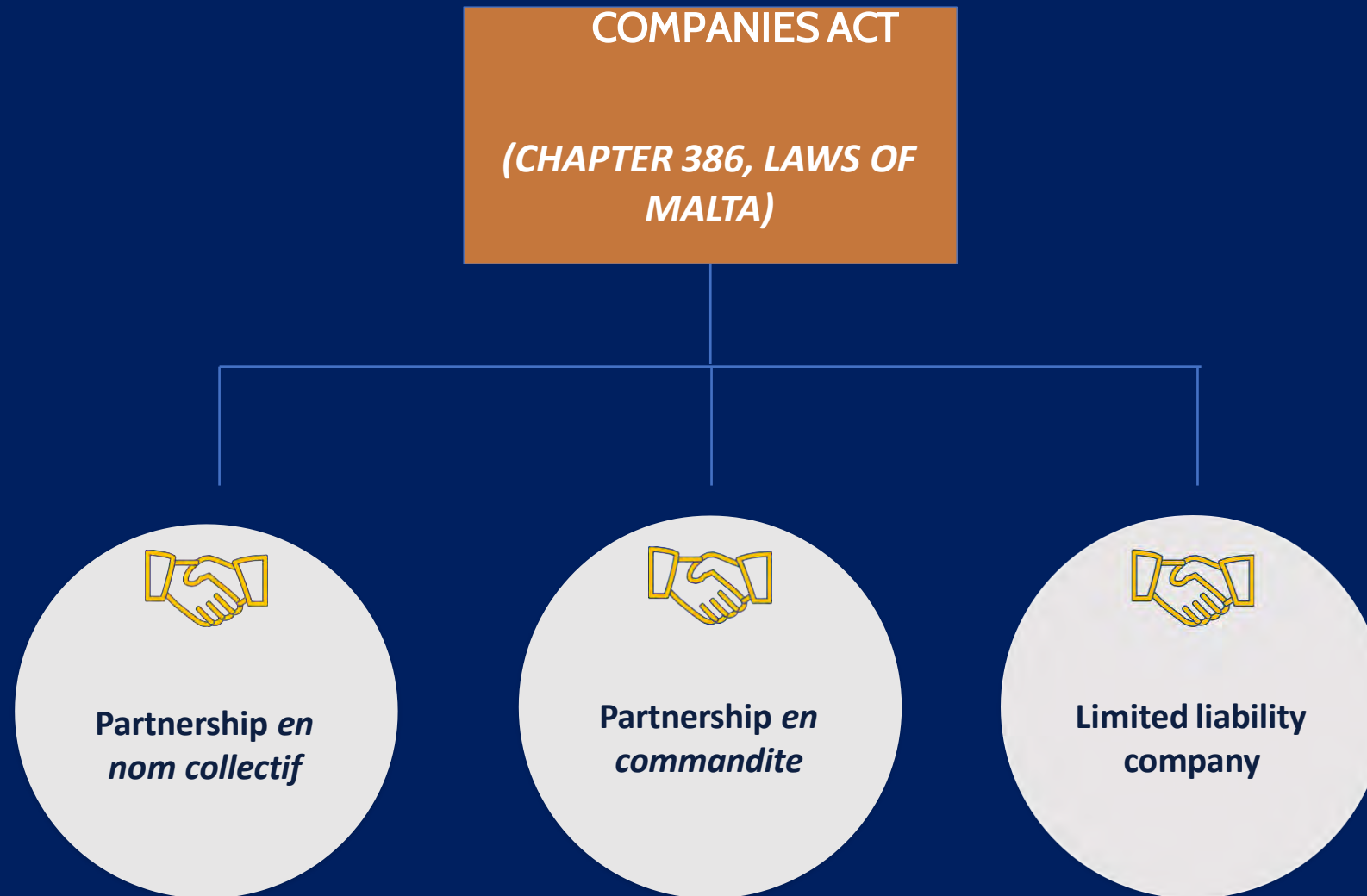


Diploma in Law (Malta)



CAMILLERI PREZIOSI

ADVOCATES



A relationship based on contract

- 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



Validity of a Commercial Partnership

Form

- Constituted by a deed of partnership; drawn up as a private agreement or public deed
- Based on the contribution of the partners
- Must be registered with the Malta Business Registry, and comes into existence with the issuance of a certificate of registration





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)



Contribution – *en nom collectif*

The contribution may take the form of cash, items in kind and, or services.

There is no minimum or maximum amount of contribution set out at law.

In return for the contribution, the partners have an interest in the partnership which is regulated by the terms of the deed of partnership.



Administration of the partnership – *en nom collectif*

Insofar as the deed of partnership does not otherwise provide, the administration and representation of the partnership shall vest in each of the partners severally.

A partnership may not be bound in favour of third parties except by a partner acting under the partnership-name and having the representation of the partnership either by virtue of the deed of partnership or by operation of law.



The unlimited liability of the partners for the obligations of the partnership

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/her 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.

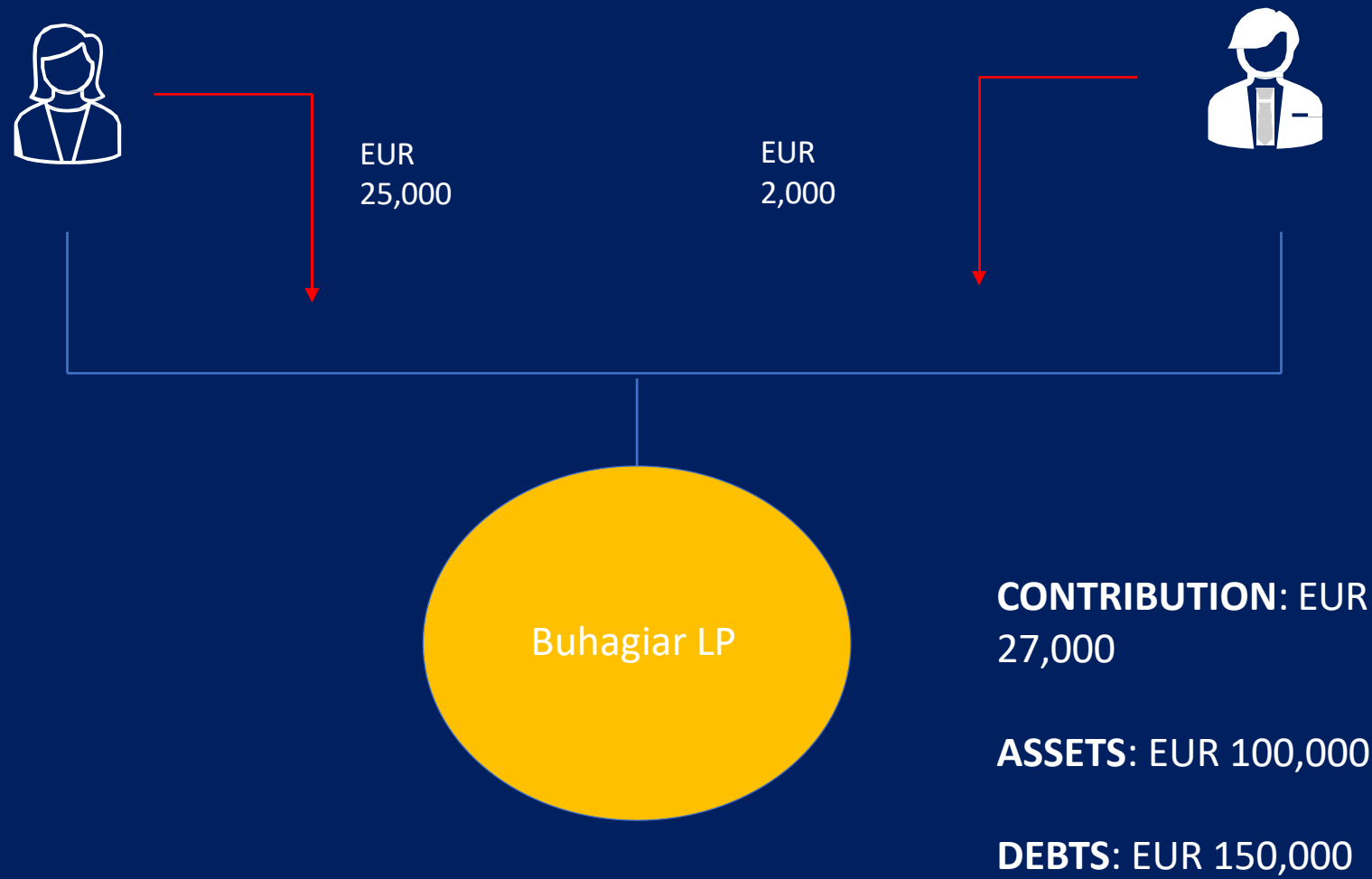


The joint and several liability of the partners for the obligations of the partnership

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.”





Partner is a corporate entity

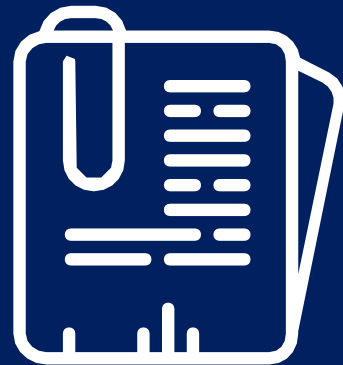
In the case of a corporate entity which is a partner, the liabilities of the partnership must be guaranteed by unlimited and joint and several liability of one or more of the corporate entity's members.

If not, the partnership must notify the Registrar of Commercial Partnerships of this fact and the provisions on the publication of audited accounts in the Companies Act will apply to the partnership.



Principal characteristics – *en nom collectif*

- Two or more partners
- May be established for one or more acts of trade
- Unlimited joint and several liability of the partners for the debts of the partnership
- The partnership has a juridical personality separate from that of the partners
- Except in specific circumstances, audited accounts need not be filed



Partnership
en
commandite

This is defined in the Companies Act as a partnership which 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.

The provisions in the Companies Act applicable to partnerships *en nom collectif* also apply to partnerships *en commandite*, except for the specific variations set out in Companies Act



Contribution – *en commandite*

The contribution of the limited partners cannot include personal services



Administration – *en commandite*

The administration and representation of the partnership *en commandite* or limited partnership shall vest in the general partners, and unless the deed of partnership otherwise provides, such administration and representation shall vest in each of the general partners severally.



Principal characteristics – *en commandite*

- Two or more partners
- May be established for one or more acts of trade
- The liability of the partners is limited to the amount unpaid on their contribution
- The general partners are unlimitedly liable for the debts of the partnership
- The partnership has a juridical personality separate from that of the partners
- Except in specific circumstances, audited accounts need not be filed
- The capital of the partnership may be divided into shares

Limited Partner



EUR
25,000

Limited Partner



EUR
2,000

General Partners



Buhagiar LP

CONTRIBUTION: EUR
27,000

ASSETS: EUR 100,000

DEBTS: EUR 150,000



General Partner is a corporate entity

In the case of a corporate entity which is a general partner, the liabilities of the partnership must be guaranteed by unlimited and joint and several liability of one or more of the corporate entity's members.

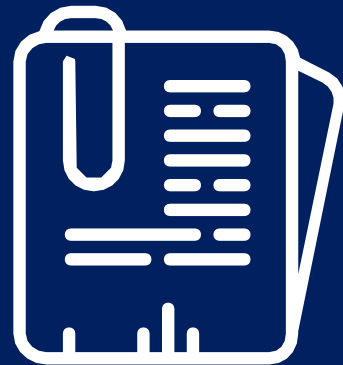
If not, the partnership must notify the Registrar of Commercial Partnerships of this fact and the provisions on the publication of audited accounts in the Companies Act will apply to the partnership.



Why are these structures still relevant?

- In a limited liability company, **personal skills cannot be contributed**. This is possible in the *en nom collectif* and for all partners except limited partners in an *en commandite*.
- Except in certain cases, the partnerships do **not** need to file accounts.
- The *en commandite* is also used in the funds industry. May be constituted either as a close-ended or as an open-ended collective investment vehicle.





The limited liability company

Introduction

The Companies Act provides that “a 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.”



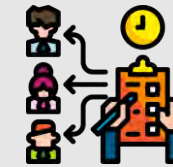
Key features of a LLC



The LLC is a separate legal entity

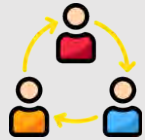


The owners are the shareholders of the company



Management is vested in the board of directors

Key features of a LLC



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



Memorandum and articles of association must be registered with the MBR, with formation documents signed by at least 2 members



Members' liability is limited

Key features of a LLC



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

Shareholders

- A shareholder is a person entered in the register of members of a company
- A person (corporate or individual) becomes a member of the company either on subscription or following the acquisition or transmission of shares in his/her/its favour
- Shareholders contribute capital (in the form of cash or kind) and receive instruments called shares
- The rights attaching to the shares are set out in the constitutional documents of the company which will determine dividend rights, voting rights and the right to participate in the profits of the capital on winding up
- Shareholders are not involved in the management of the company but, at law, they have the right to vote on certain matters e.g. the amendment to the constitutional documents.

Limited liability of shareholders

The members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them.

The only exception is the lifting of the corporate veil e.g. in the case of fraudulent trading where a shareholder was knowingly a party to the carrying on of the business of the company in a fraudulent manner with the intent to defraud creditors during the course of the winding-up of the company



Shareholder I



EUR
25,000
(100%)

Shareholder II



EUR
2,000
(20%)

Directors



CONTRIBUTION: EUR
27,000 (of which
EUR1,200 is left
unpaid)

ASSETS: EUR 100,000

DEBTS: EUR 150,000



Directors

The directors are responsible for promoting the well-being of the company for the general governance of the company, its proper administration and management and the general supervision of its affairs.

Directors are bound by fiduciary obligations.

Directors are bound by statutory duties as well as duties of loyalty and duties of care and skill.



Directors

Private limited companies – run by 1 or more directors

Public limited companies – run by 2 or more directors

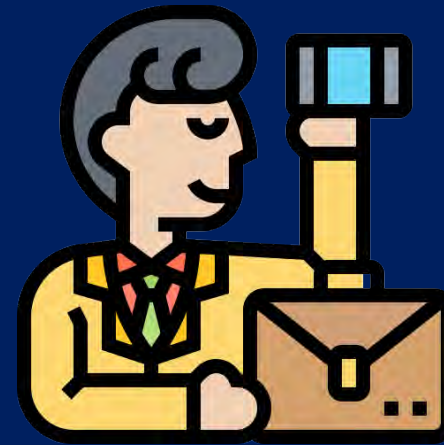
The managers and directors of the company have wide ranging responsibilities



Company Secretary

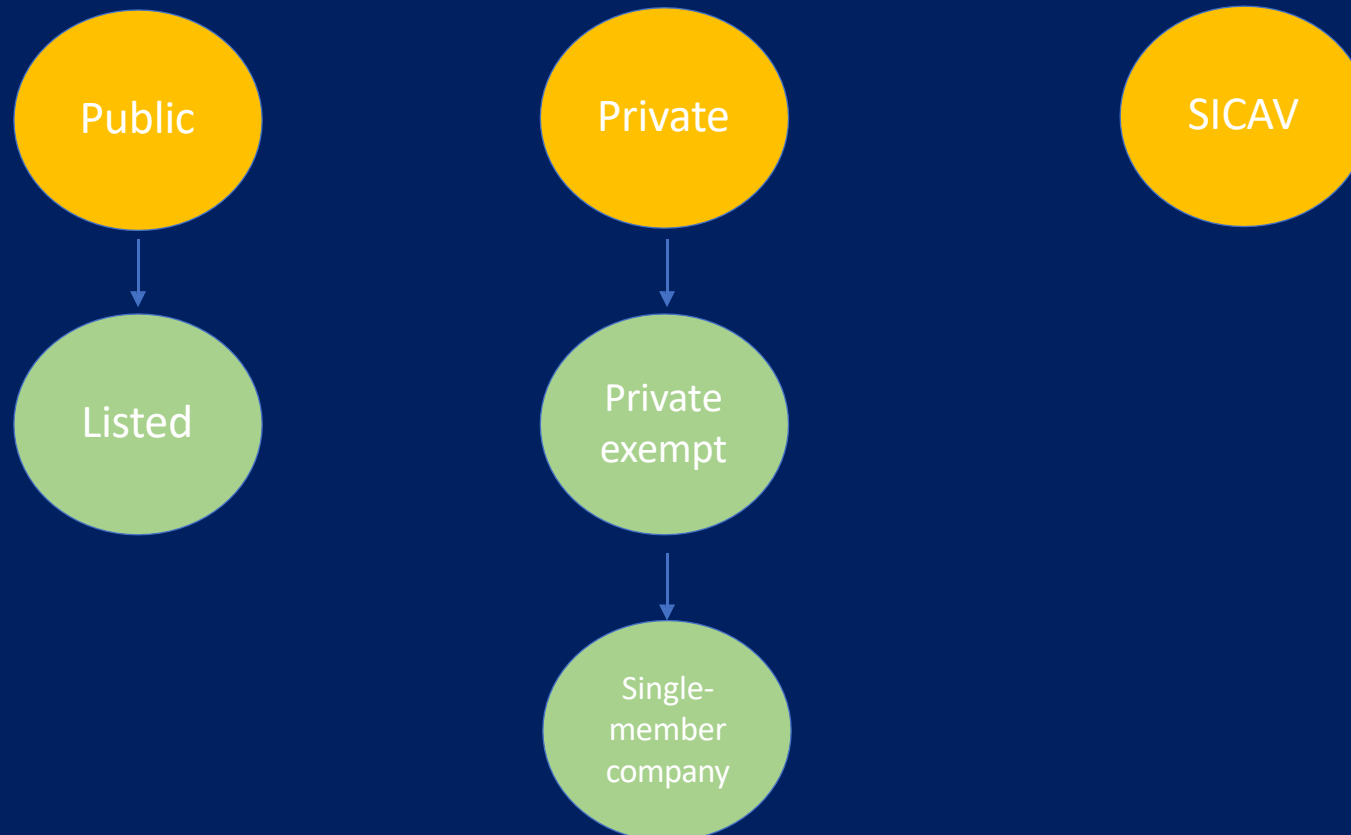
The role of the company secretary is **purely administrative**.

Both public and private companies must have a company secretary.



Limited Liability Companies

A limited liability company is the most **common** form of business entity in Malta.



Private Company

Features of a private limited liability company

The M&As:

- restrict the right of shareholders to transfer their shares;
- limit the number of its members to 50; and
- prohibit the invitation to the public to subscribe for any of its shares or debentures.



Private Exempt Company

For a company to have a **private exempt status**, besides complying with the three restrictions for a company to be considered a private company, it must also include within its memorandum or articles, the following conditions:

- that the number of persons holding debentures of the company is not more than 50; and
- that 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.



Private Exempt Company

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, such as:

- The company may grant loans to its directors or to directors of its parent company.
- Private exempt companies which qualify as “small companies” need not submit the it need not deliver to the Registrar the directors’ report and the profit and loss account. In certain instances, they do not need to submit the auditors’ report.



Single Member Exempt Company

A **Single Member Exempt Company** is a private exempt company formed and registered or operating, with one member.

In the case of private exempt companies which are single member companies, the sole director may also occupy the post of secretary and therefore the same person may exercise the functions of both offices.



Public Company

A public company is a company which is not a private company.

A public company may offer shares or debentures to the public but it may not issue any form of application for its shares or debentures unless the company is registered and the issue is accompanied by a prospectus.

Offer to the public:

The Companies Act implements the provisions of the EU Prospectus Regulation



Main Differences between a PLC and a LTD

FEATURES	LTD	PLC
Minimum number of directors	1	2
Minimum number of members	2	2
Authorised share capital	euro 1,164.69	euro 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

Incorporation of a limited liability company



Reservation of the company name

It is highly recommended that a practitioner, when entrusted with the formation of a company, reserves the proposed name.

However, the Registrar, in certain instance, will not reserve the name.



The Role of the Registrar

All the documentation required for the purposes of the registration of a company must be delivered to the Registrar.

The Registrar plays a crucial role in ensuring that the applicable legal requirements are complied with.

In the simplest of cases, the following documentation must be delivered to the Registrar:

1. The memorandum and articles of association
2. A deposit slip (or other evidence) in respect of the paid up share capital
3. Payment of the registration fee
4. KYC information and
5. Bo Form (unless the shareholders are natural persons)

Evidence of paid up share capital

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

- 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 MBR with the delivery of the Memorandum and Articles of Association.
- The amount of fees depends on the amount of the authorised share capital.



Beneficial Ownership

- Every company shall obtain and at all times hold adequate, accurate and up to date information in respect of its beneficial owners.
- A beneficial owner is any natural person or persons who ultimately own or control the commercial partnership 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 more than 25% of the shares or more than 25% of the voting rights or ownership interests in that body corporate or body of persons, 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.

After having exhausted all possible means and provided there are no grounds of suspicion, no beneficial owner has been identified subject persons shall consider the natural person or persons who hold the position of senior managing official or officials to be the beneficial owners, and shall keep a record of the actions taken to identify the beneficial owner

Beneficial Ownership – Submission of Form BO1

SCHEDULE A

Companies Act (Register of Beneficial Owners) Regulations, 2017

Declaration on Beneficial Owners in terms of Regulation 3

FORM BO1

To the Registrar of Companies:

I, the undersigned, being a proposed director of, a company to be constituted/continued* in Malta hereby declare that : *(complete Section A or Section B as applicable)*

Section A : The beneficial owner/s of the proposed company is/are the following:

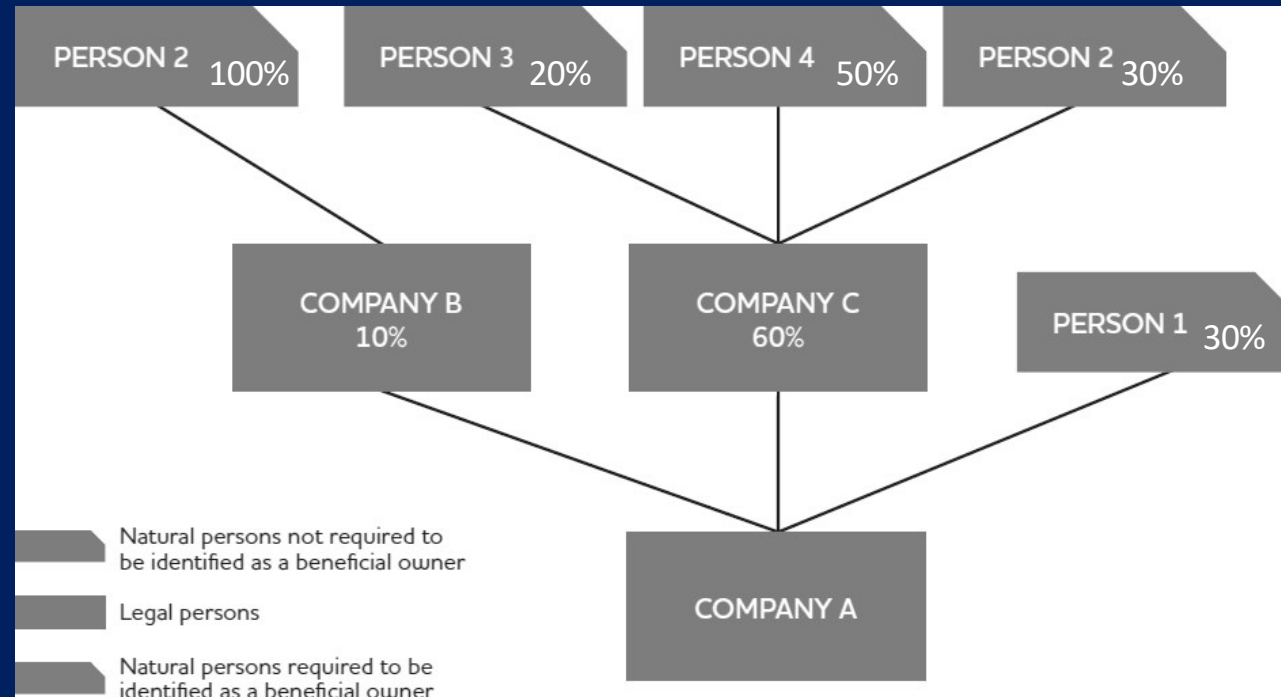
Particulars of Beneficial Owner (a)	Extent of Beneficial Ownership (b)	Nature of Beneficial Ownership (c)
Name:		
Date of Birth:		
Nationality:		
Country of Residence:		
Official Identification number:		
Document type:		
Country of Issue:		

Section B :

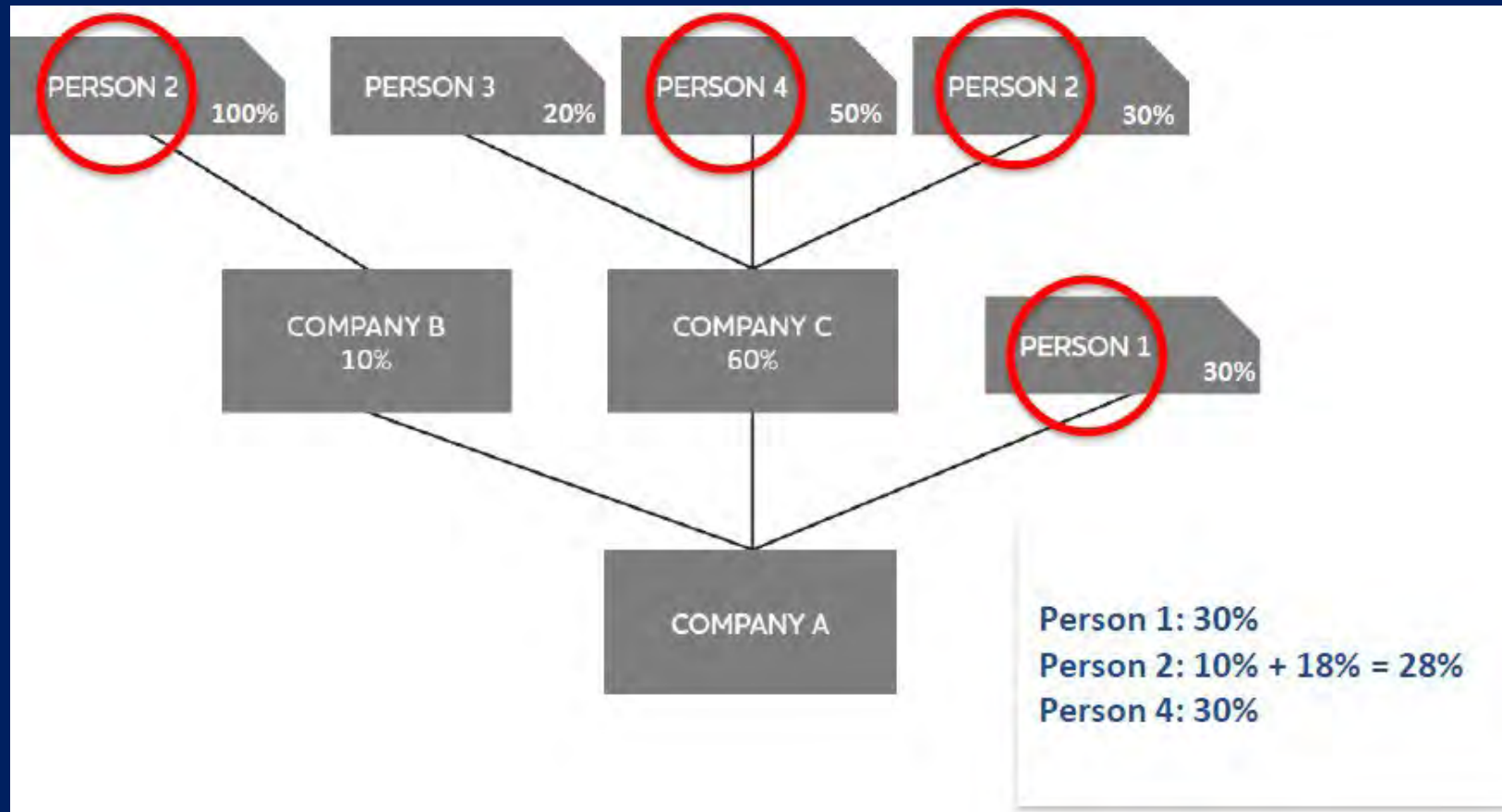
After having exhausted all possible means no natural person who ultimately owns or controls, whether through direct or indirect ownership or control, including, where applicable, through bearer share holdings, more than 25% of the shares or voting rights in the company, or otherwise exercises control over the company through other means has been identified, and the natural person/s holding the position of senior managing official/s is/are the following (d):



Beneficial Ownership – Example 1



Beneficial Ownership – Example 1

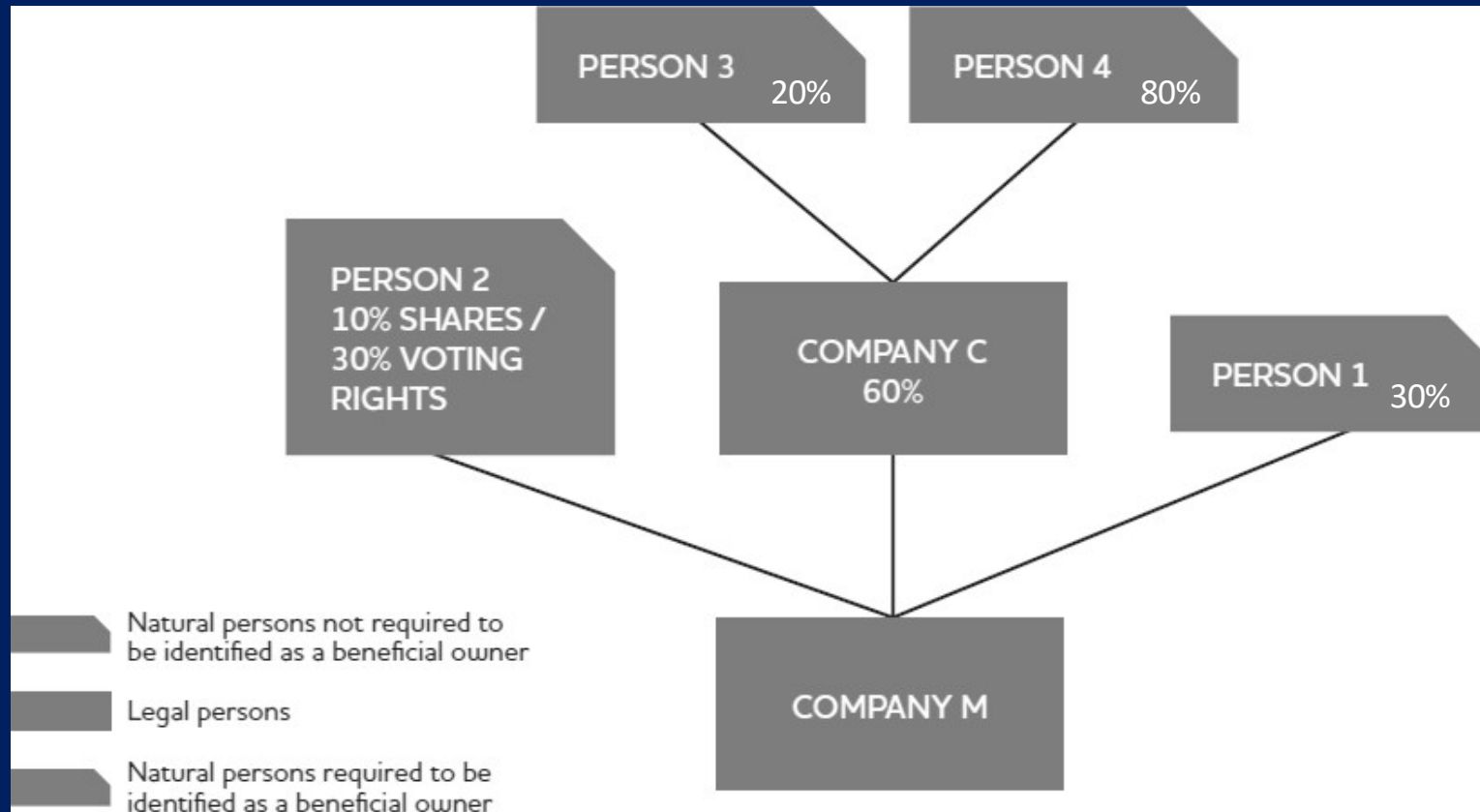


Beneficial Ownership – Example 1

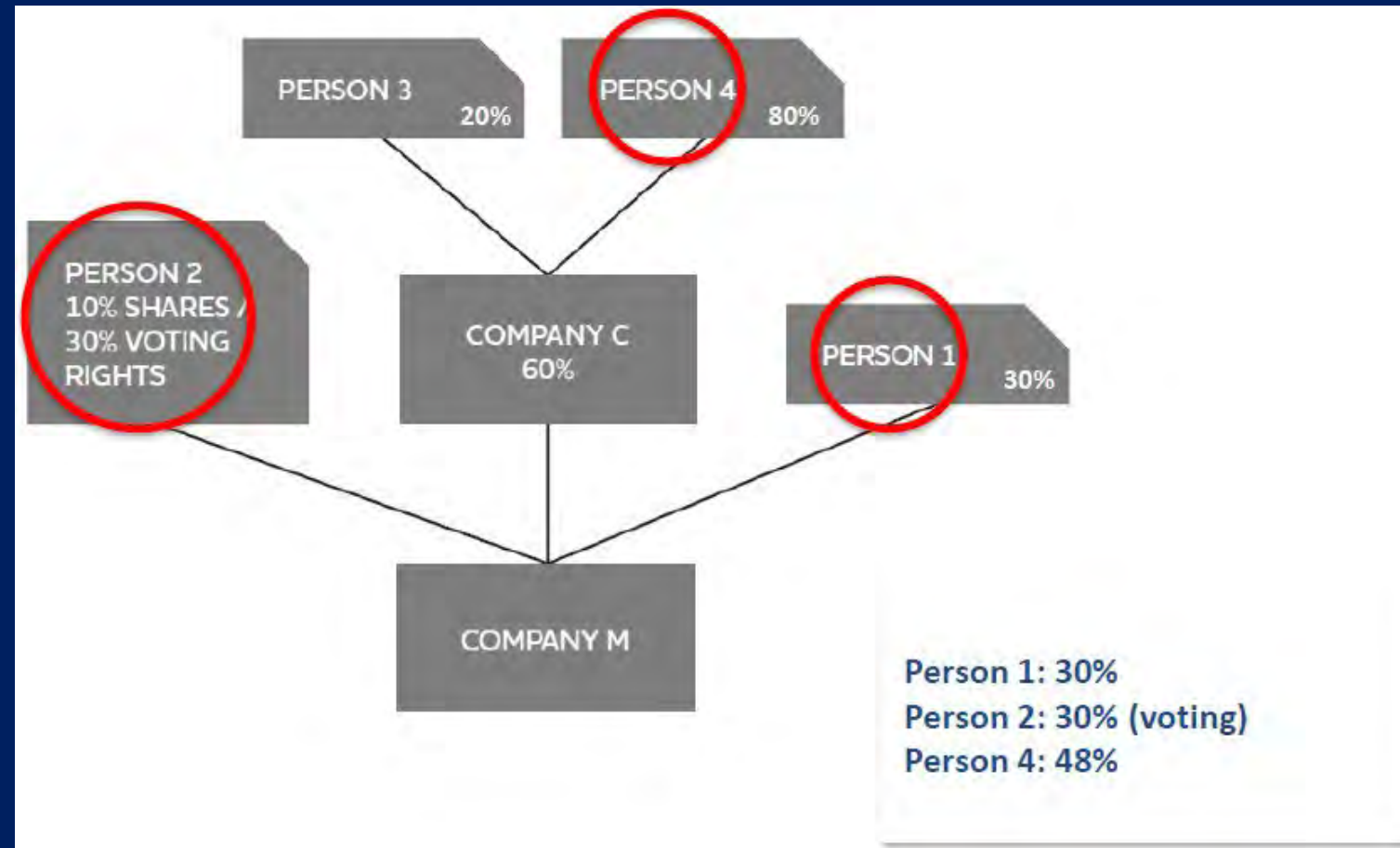
- Key take away
- It is important to establish and figure out the customer's entire corporate structure to be in a position to understand whether an individual features within an ownership structure through more than 1 entity. In such cases, all holdings of that same individual are to be assessed since, through the different holdings within the structure he may hold a sufficient % of shareholding that would make him a BO.



Beneficial Ownership – Example 2



Beneficial Ownership – Example 2



Beneficial Ownership – Example 3

- The company's shares are listed or the company's sole shareholder is listed
- Company must submit a letter to the MBR explaining the fact above and that, accordingly, a BO Form need not be filed.



FDI Screening

Relevant if the company is being set up by non EU companies and individuals

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, defence, 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.



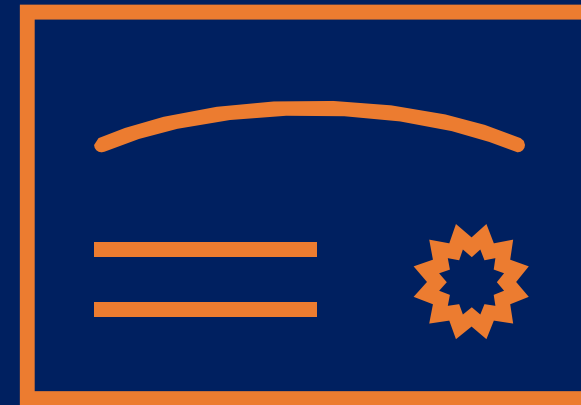
Considerations for listed and regulated entities

- Approval process by the MFSA prior to submission of the constitutional documents to the Malta Business Registry



Effects of registration

- Registration is official once the Registrar issues a **Certificate of Registration**. At this point, the company comes into existence and is authorized to commence business.
- Once registration is effected, the company shall have a legal personality distinct from that of its member or members This will subsist until the name of the company is struck off the register.



Constitutional documents of a limited liability company



Memorandum & Articles of Association

A company shall not be validly constituted in terms of Maltese company law (the Maltese Companies Act, Chapter 386 of the laws of Malta) 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).

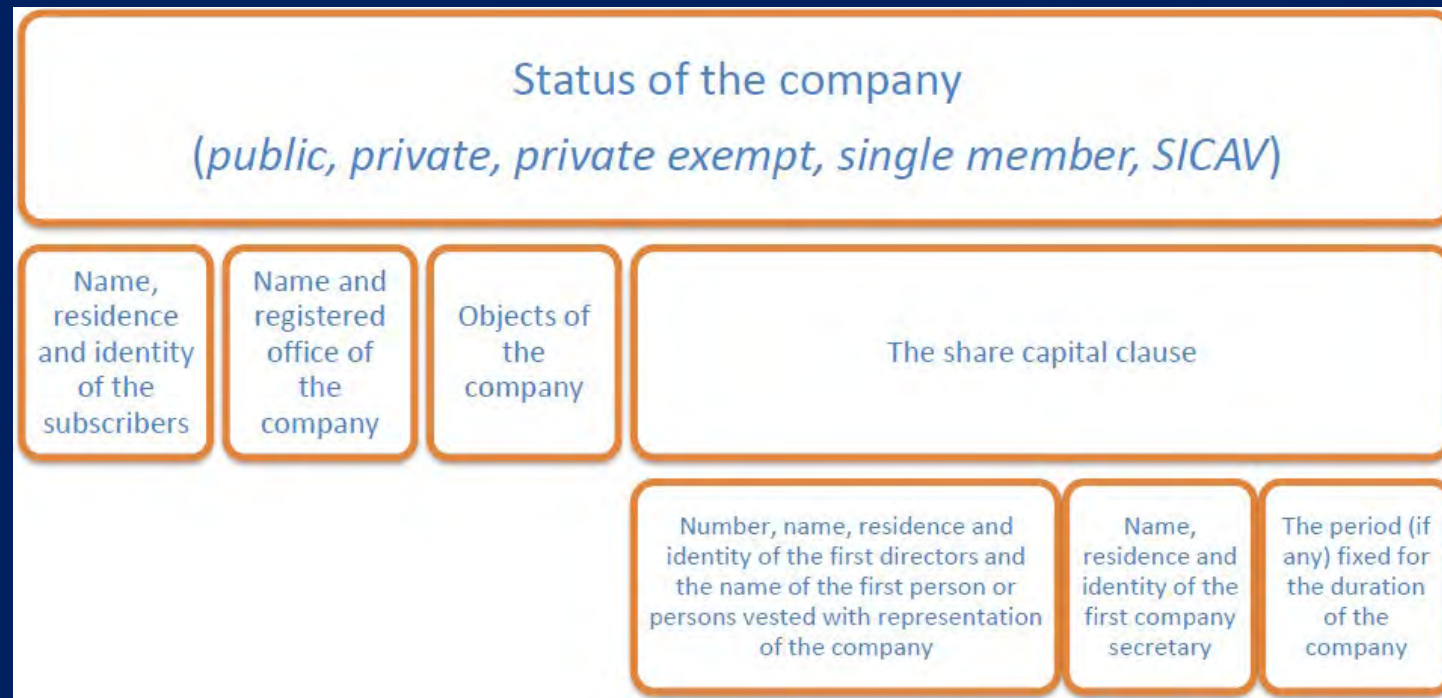
Memorandum of Association: outward looking document which provides key information on the company, such as the objects, capital, directors, subscribers, etc

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



Status Clause

Private Company:

The name must end with the words “**private limited company**” (“limited” / “ltd”)

Public Company:

The name must end with the words “**public limited company**” (“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.
- Consent letter for use of property if owned by third parties.



Objects Clause

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;

Objects Clause

Generally, the Registry of Companies requires a proviso to be included at the end of the objects clause:

- stating that the objects of the company should not be construed as empowering or enabling the company to carry out any activity or service which would require a license or other authorisation under any law in force in Malta unless such a licence or other appropriate authorisation from the relevant competent authority is obtained; and
- that the registration of the company is without prejudice to any other licence or other authorisation as may be required in respect of the activities to be carried on by the company under any other law.



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:

1. The amount of share capital with which the company proposes to be registered
2. The division thereof into shares of a fixed amount
3. The number of shares taken up by each of the subscribers
4. The amount paid in respect of each share
5. Where the share capital is divided into different classes of shares, the rights attaching to the shares of each class.



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*”.

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.



Articles of Association

270	CAP. 386.]	COMPANIES
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		
<p>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.</p>		
<p>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.</p>		
<p>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</p>		

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