

Introduction to Business Law

Lecture Title: Setting up a Company - The Process

Lecturer: Dr Nicola Buhagiar

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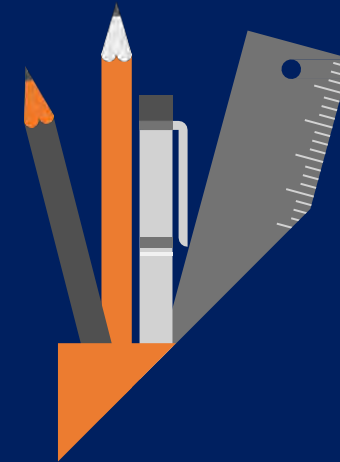


Company Registration

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.



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



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.

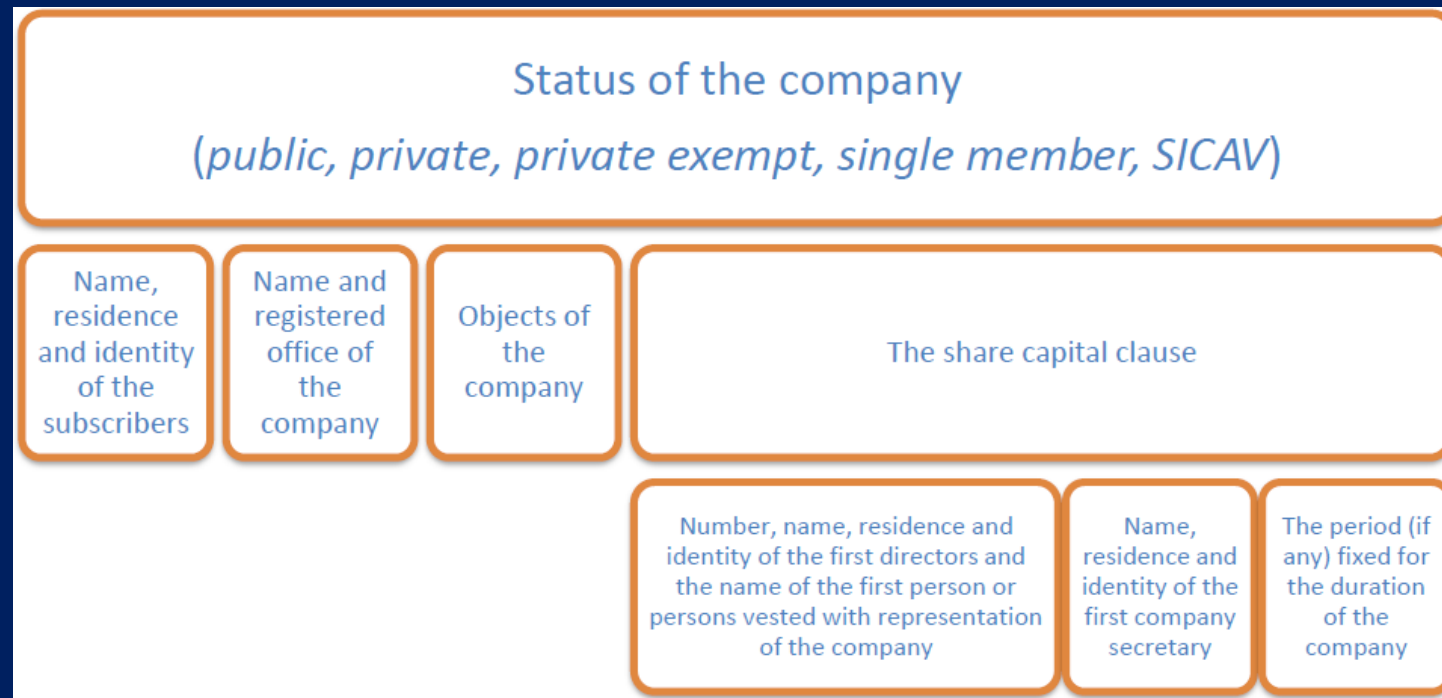
The Articles of Association *may* be registered together with the Memorandum of Association.



Memorandum

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

The contents shall vary from company to company, depending on the type of company.



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.



Share Capital Clause

- Authorised Share Capital
- Issued Share Capital
- Paid-up Share Capital
- Uncalled or unpaid Share Capital



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)

Classes of Shares

- Different classes of shares may be created to cater for specific shareholder requirements.
- Case in point, the memorandum and articles of association may allow a particular class to appoint a director to the board.
- The different rights allocated to each class, must be specified in the memorandum of association.
- If the shares are redeemable, certain additional matters need to be specified e.g. the date of redemption



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.
- The articles of association must be signed by the subscribers.



Articles of Association

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



Transfer of Shares

- As a general rule a shareholder has the right to transfer his shares, however the memorandum and articles of association may cater for certain restrictions on the right to transfer.
- Such restrictions may be utilised in order to control the membership of the company. One such restriction is the **pre-emption clause**.
- **Pre-emption clause:** a clause in the articles of association which obliges a member who wishes to transfer his shares in the company to first offer the shares to the other members at the price set out in the articles of association.



Transfer of Shares – sample clauses

Transfer of shares *inter vivos*

18. If any member (hereinafter referred to as "**the transferring member**") wishes to transfer any shares in the Company he shall inform the Board of Directors by a notice in writing (hereinafter referred to as "**transfer notice**") giving a description and the number of shares he proposes to transfer, the name of the proposed transferee and his estimated value of each share. The directors may decline to register the transfer of a share (not being a fully paid share) to a person of whom they shall not approve.
19. The receipt by the Board of Directors of a transfer notice shall constitute an authority to them to offer for sale to the other members of the Company the shares specified therein at their fair value to be ascertained as follows:-
 - a) at the estimated value given in the transfer notice if considered by the Board of Directors to be a fair one; or
 - b) at a value placed on them by the auditors where the estimated value given in the transfer notice is not considered by the Board of Directors to be a fair one; or
 - c) at a value placed on them by any other person whom the Board of Directors, with the consent in writing of the transferring member, shall appoint where for any reason the auditors do not make a valuation.



Transfer of Shares – sample clauses

20. When a fair value of the shares has been determined in the manner prescribed in the preceding clause, the Board of Directors shall by notice in writing inform the transferring member and shall cause a notice to be sent to every other member of the Company stating the number and fair value of the shares for sale and inviting them to state, in writing within fourteen (14) days what number of shares, if any, they are willing to purchase.
21. At the expiration of the said fourteen (14) days, the Board of Directors shall allocate the said shares to or among the member or members who have expressed his or their willingness to purchase as aforesaid.
22. When the shares offered for sale are not sufficient to cover all the requests for purchase the Board of Directors shall allocate to each member willing to purchase a proportion of the shares corresponding, as much as possible, to the proportion of the shares already held by each such member at the time of such allocation. If the said allocation exceeds the number of shares which any particular member is willing to purchase the excess shall be allocated in the said proportion to the members whose requests exceed their original allocation.



Transfer of Shares – sample clauses (different share classes)

23. When there is more than one class of shares in the Company the offer for sale of shares of a class shall first be made to the holders of shares of that class and if the Board of Directors are unable within one (1) month of receipt of the transfer notice to find a purchaser or purchasers for all or any of the shares amongst the holders of shares of that class according to the procedure set out in the preceding clauses they shall offer, using the same procedure, the available shares to the holders of the shares of the other classes.
24. When any of the issued shares of the Company consist of different classes of ordinary shares and of preference shares, an offer for sale of ordinary shares shall first be made to the holders of the different classes of ordinary shares under the procedures laid down in the preceding clauses and if the Board of Directors are unable within one (1) month of the date of the last offer to find a purchaser or purchasers for all or any of the ordinary shares amongst the holders of ordinary shares they shall offer, using the same procedure, the available shares to the holders of the preference shares.



Issue of Shares – sample clauses

3. Issues of new ordinary shares in the Company shall be made by ordinary resolution of the Company in general meeting.
4. The Company is authorised to acquire, other than by subscription, any of its fully paid up shares, subject to all the relevant provisions of the Act.
5. Without prejudice to any special rights 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 restriction, whether in regard to dividend, voting, return of capital or otherwise, as the Company may from time to time by extraordinary resolution determine.



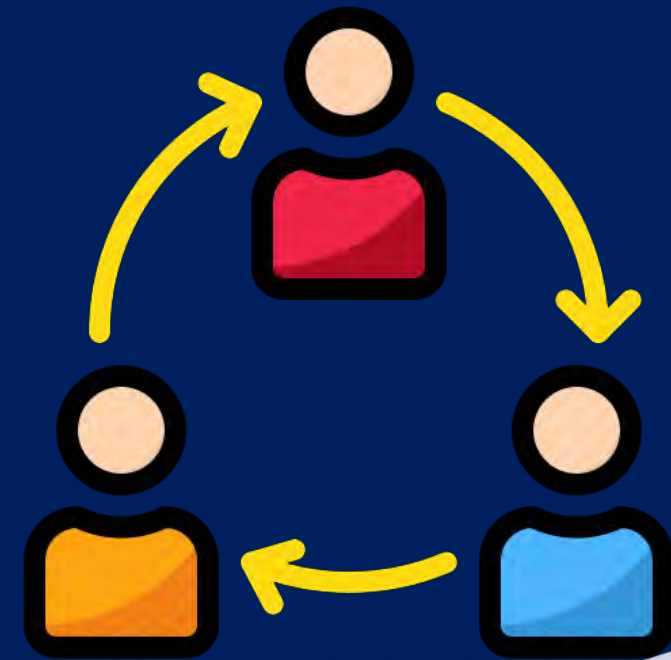
Classes of Shares – sample clauses

7. The rights attached to shares of a class may be varied and the shares of a class may be converted into another class only if the variation or the conversion:-
- a) is made in accordance with the terms of issue of those shares; or
 - b) is approved by an extraordinary resolution of the Company; or
 - c) by the consent in writing of the holders of three-fourths of the issued shares of that class and of the holders of three-fourths of the issued shares of any other class affected thereby.



Pledging of Shares

- A pledge is a contract which creates security for an obligation.
- Movables and debts as well as rights relating to movable things, may be given as a pledge.
- A pledge constitutes an effective security for a creditor.
- Shares are considered to be movables in terms of law and may therefore be pledged.
- A debtor (the pledgor) pledges the shares it has in a company in favour of the creditor (the pledgee) who subsequently obtains a right to obtain payment out of the pledged shares (with privilege over other creditors).



Pledging of Shares

Private Company:

Shares may only be pledged if the memorandum and articles of association so allow.

Public Company:

Shares may be pledged unless the memorandum and articles of association include a prohibition.



Pledging of Shares – sample clauses (private company)

16. Shares in the Company may be pledged in accordance with Section 122 of the Act.



Pledging of Shares – sample clauses (public company)

31.1 Subject to the provisions of the Act and unless otherwise provided in the applicable terms of issue, any listed Equity Securities and, or listed Debt Securities of the Company may be pledged by the registered holder thereof in favour of any person as security for any obligation.

31.2 Equity Securities and Debt Securities of the Company which are not listed may not be pledged by the holder in favour of any person as security for any obligation.



General Meetings

- Regulated by the Companies Act
- Quorum
- Notice period
- Ordinary Resolutions
- Extraordinary Resolutions



Board Meetings

- The board can determine its own procedure for the convening of meetings.
- More flexibility in the regulation of board meetings rather than general meetings.



Board Meetings – sample clauses

53. The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. Each director shall have one vote and in case of equality of votes the Chairman shall have a second or casting vote. A director shall be deemed to be present at a meeting of the Board if he participates by telephone or other electronic means and all directors participating in the meeting are able to hear each other.

54. The quorum necessary for the transaction of the business of the Board of Directors shall be one director. If a quorum is not present within half an hour from the appointed time the meeting shall be dissolved.

55. Meetings of the Board of Directors shall be convened by the Chairman or by the Company Secretary at the request of any director.

58. A resolution in writing, signed by all the directors of the Company shall be as valid and effective as if it had been passed at a meeting of the Board of Directors duly convened and held.



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)*

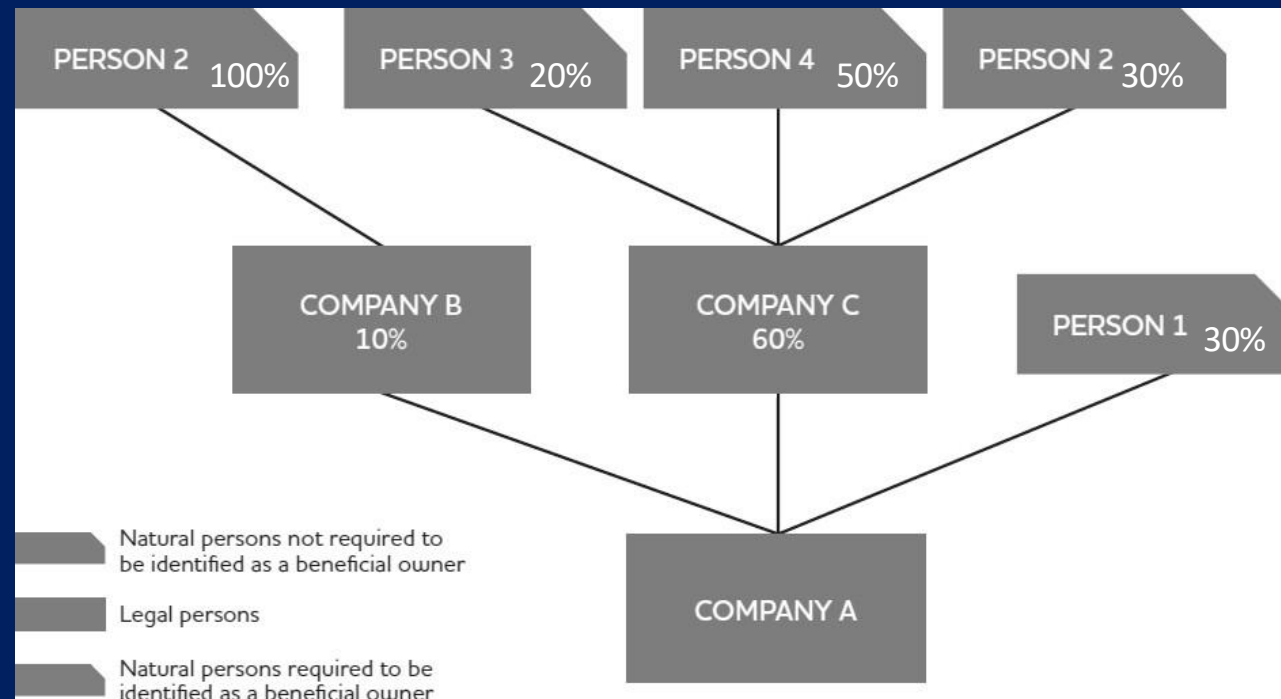
Section A : The beneficial owner/s of the proposed company is/are the following:

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:		

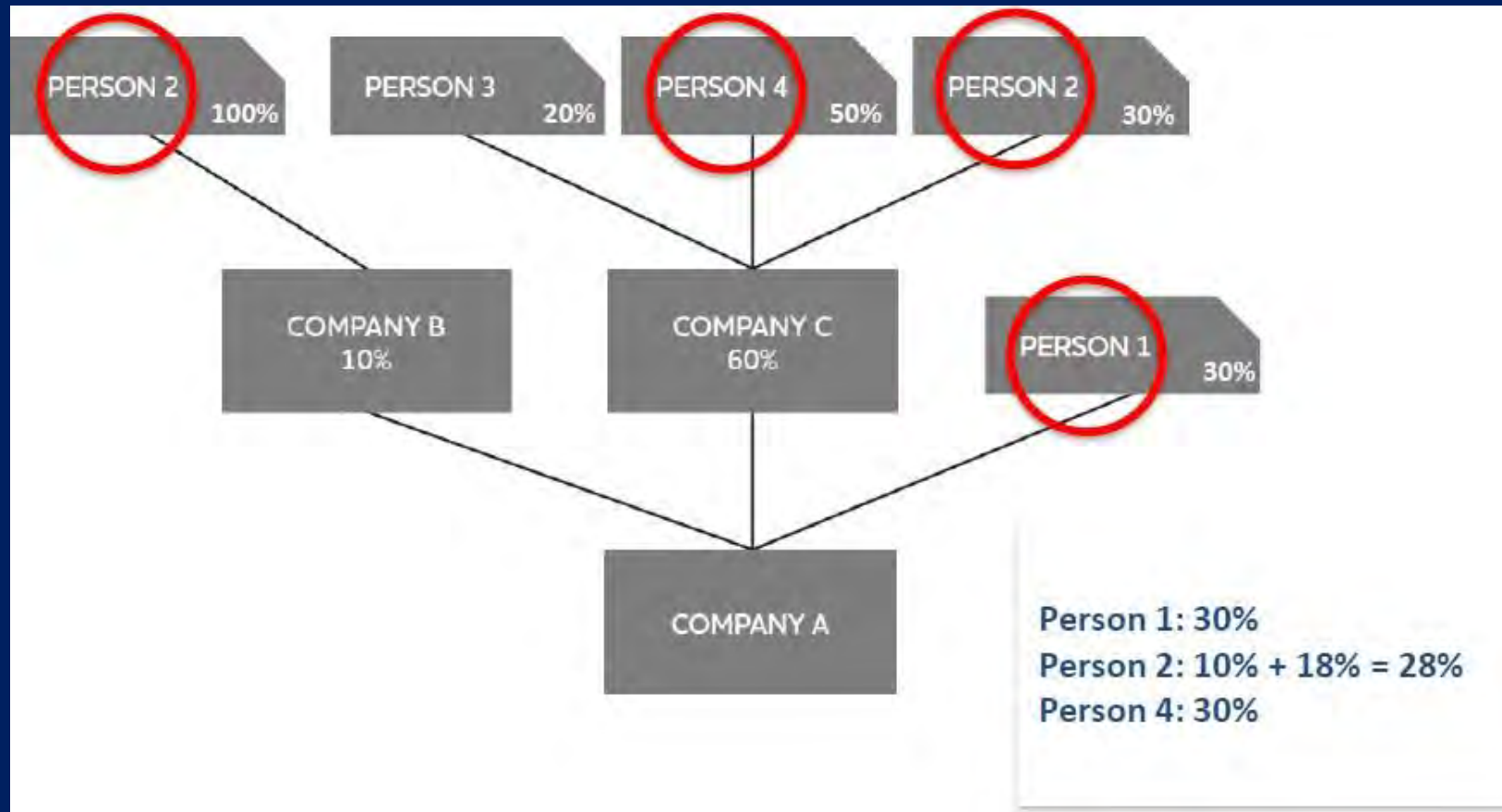
Section B :

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



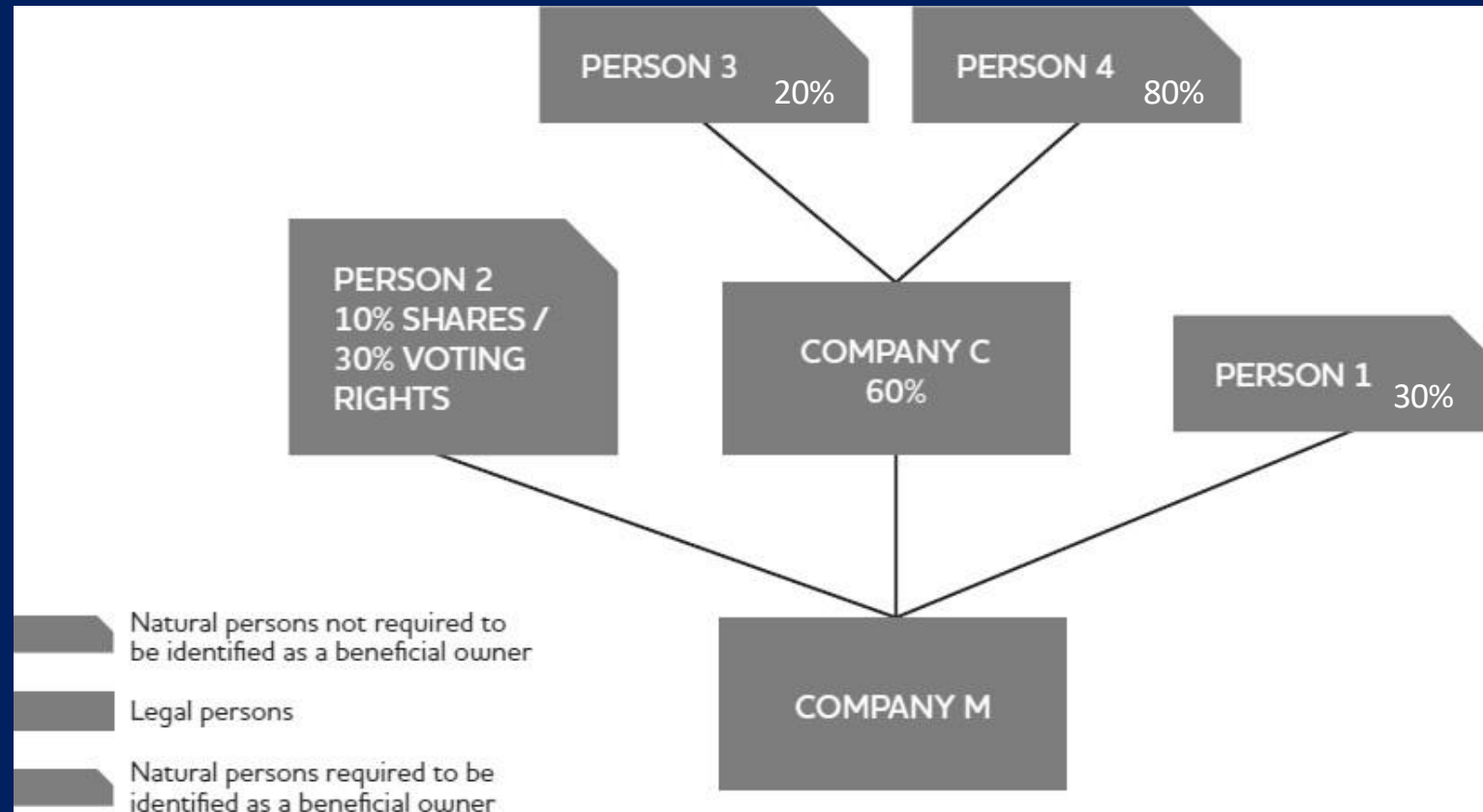
Beneficial Ownership – Example 1

Key take away

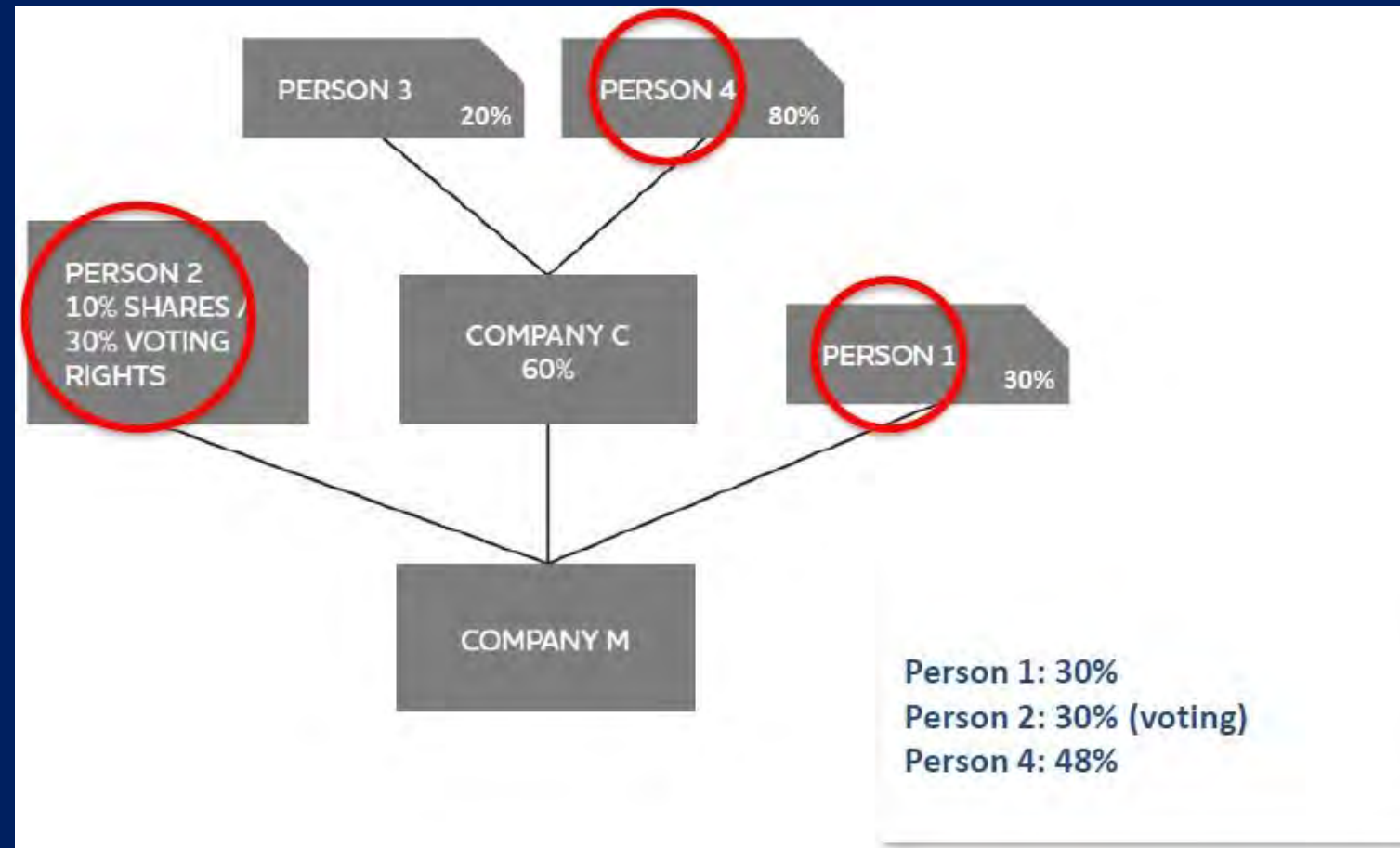
It is important to establish and figure out the customer's entire corporate structure to be in a position to understand whether an individual features within an ownership structure through more than 1 entity. In such cases, all holdings of that same individual are to be assessed since, through the different 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.



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