



## Former Eleventh directive – Branch Directive

- Official name: 89/666/EEC; now Arts 20.1 .2 .3; 29-42, 161 CodDir
- Just for branches? Yes, subsidiaries are already protected, as they have legal personality, they are formally autonomous companies
- The background is that the company is liable for the branch's obligations
- The purpose is always disclosure-related; it deals also with consolidated accounts directive (VII directive)



## Former Eleventh directive – Branch Directive

- The BRIS applies to branches, too
- The national gazette is now optional in this case, too
- Rules also on European branches of Third countries' companies
  - Now really relevant due to Brexit



## Key principles

- Same scope of application of I Directive, same effects, same means (Register)
- Just for cross-border branches
- Not relevant the business at the main seat (see *Centros* EUCJ decision; and perhaps the *Polbud* decision as well)

## Items to be disclosed : Art. 30.1 & .2

*1. The compulsory disclosure provided for in Article 29 shall cover the following documents and particulars only:*

*(a) the address of the branch;*

*(b) the activities of the branch;*

*(c) the register in which the company file referred to in Article 16 is kept, together with the registration number in that register;*

*(d) the name and legal form of the company and the name of the branch, if that is different from the name of the company;*

*(e) the appointment, termination of office and particulars of the persons who are authorised to represent the company in dealings with third parties and in legal proceedings:*

*— as a company organ constituted pursuant to law or as members of any such organ, in accordance with the disclosure by the company as provided for in Article 14(d),*

*— as permanent representatives of the company for the activities of the branch, with an indication of the extent of their powers;*



## Items to be disclosed : Art. 30.1 & .2

*(f) — the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in accordance with disclosure by the company as provided for in Article 14(h), (j) and (k),*

*— insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;*

*(g) the accounting documents in accordance with Article 31;*

*(h) the closure of the branch.*

*2. The Member State in which the branch has been opened may provide for the disclosure, as referred to in Article 29, of*

*(a) the signature of the persons referred to in points (e) and (f) of paragraph 1 of this Article;*

*(b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument, in accordance with points (a), (b) and (c) of Article 14, together with amendments to those documents;*

*(c) an attestation from the register referred to in point (c) of paragraph 1 of this Article relating to the existence of the company;*

*(d) an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities.*



## In addition...

- The information required not by directive, but by MS
  - but pay attention to the case *Inspire Art!*
- Accounts
- Translations may be required for acts of creation and accounts
- Practically the same duties are imposed over third Countries' branches (exceptions in matter of accounts)



# That's almost all...





## Just joking!

- It seems that after the hyper-activity during the last years, we have come to a pretty stabilized situation, but...
- Never say never again: there's a looming blockchain...





# The Capital (Former Second Directive)

- The capital debate
- Capital functions:
  - Organisation
  - Production
  - Information
  - Creditors' protection???



# Is it time to replace the capital?

Enriques & Macey

SLIM Group

Winter Report

Lutter Group

Rickford Group

Dutch Group

...

Action Plan 2003



# Is capital an outdated concept?

- If we just consider the creditors' protection function, yes
- As for the remaining functions, not necessarily, but they can be replaced by means of contracts
- But is it useful to replace it? And how? ► solvability tests
- KPMG for EC (2006): more costs in replacing than in maintaining



# Capital & Shares in CodDir

- Sources
  - Official name: 2012/30/EU (recast of the II Directive: original in 1977; now CodDir arts 2.1-2; 3-6; 43-44; 46-86; 165-168; Annex I, III, IV)
- Scope of application: **just public companies**
- Topics the directive deals with:
  - Minimum capital
  - Considerations/contributions (mainly in kind) + acquisitions from members and directors
  - Shares' par value
  - Own shares' purchase by the company
  - Capital maintenance
  - Distributions
  - Financial assistance



# Minimum legal capital

## Art. 45.1 CodDir [2<sup>nd</sup> Directive, art 6(1)]

*1. The laws of the Member States shall require that, in order for a company to be incorporated or obtain authorisation to commence business, a minimum capital shall be subscribed the amount of which shall be not less than EUR 25 000.*

## ICC Art. 2327

La società per azioni deve costituirsi con un capitale non inferiore a cinquantamila euro.



# Authorised capital (notion)

## Art. 68.2 CodDir [2<sup>nd</sup> Directive, Art. 29(2)]

*2. Nevertheless, the statutes or instrument of incorporation or the general meeting, the decision of which is to be published in accordance with the rules referred to in paragraph 1, may authorise an increase in the subscribed capital up to a maximum amount which they shall fix with due regard for any maximum amount provided for by law. Where appropriate, the increase in the subscribed capital shall be decided on within the limits of the amount fixed by the company body empowered to do so. The power of such body in this respect shall be for a maximum period of five years and may be renewed one or more times by the general meeting, each time for a period not exceeding five years.*



# Considerations other than cash

## Art. 46 CodDir [2<sup>nd</sup> Directive, Art. 7]

*Subscribed capital may be formed only of assets capable of economic assessment. However, **an undertaking to perform work or supply services may not form part of those assets.***



# Shares

- Nominal value
- Accountable par (share capital amount/number of issued shares)
- Premium on the share (company's patrimony/number of issued shares)

Art. 47 CodDir [2<sup>nd</sup> Directive, Art. 8]

*Shares may not be issued at a price lower than their nominal value, or, where there is no nominal value, their accountable par.*

*However, Member States may allow those who undertake to place shares in the exercise of their profession to pay less than the total price of the shares for which they subscribe in the course of this transaction.*

Uncertain whether such a provision covers art. 2346(3) ICC





# Paid-up shares

**Arts 48.1 & 69 CodDir [2<sup>nd</sup> Directive, Arts 9.1 + 30]**

## **Art. 48.1**

*Shares issued for consideration shall be paid up at the time the company is incorporated or is authorised to commence business at not less than 25 % of their nominal value or, in the absence of a nominal value, their accountable par.*

## **Art 69 CodDir**

*Shares issued for consideration, in the course of an increase in subscribed capital, shall be paid up to at least 25 % of their nominal value or, in the absence of a nominal value, of their accountable par. Where provision is made for an issue premium, it shall be paid in full.*

**The remaining unpaid part can be requested by the directors at any moment**



## In Italy...

### ICC Art. 2342. Conferimenti

Se nell'atto costitutivo non è stabilito diversamente, il conferimento deve farsi in danaro.

Alla sottoscrizione dell'atto costitutivo deve essere versato presso una banca almeno il venticinque per cento dei conferimenti in danaro o, nel caso di costituzione con atto unilaterale, il loro intero ammontare



# Considerations

Other than in cash? Arts 48.2 & 70.1 CodDir [2<sup>nd</sup> Directive, Arts 9.2 & 31.1]

## Art 48.2 CodDir

*However, where shares are issued for consideration other than in cash at the time the company is incorporated or is authorised to commence business, the consideration shall be transferred in full within five years of that time.*

## Art 70.1 CodDir

*1. Where shares are issued for consideration other than in cash in the course of an increase in the subscribed capital, the consideration shall be transferred in full within a period of five years from the decision to increase the subscribed capital.*



## In Italy...

### ICC Art. 2342. Conferimenti, para 3

Per i conferimenti di beni in natura e di crediti si osservano le disposizioni degli articoli 2254 e 2255. Le azioni corrispondenti a tali conferimenti devono essere integralmente liberate al momento della sottoscrizione.



# Contributions other than cash

When the MS allows a delayed contribution, the **25% rule should not be applicable to such a consideration**. Simply, the consideration other than cash is to be **fully paid-in** within the maximum term.

The problem is the **assessment of the value** of the contribution



# Non-cash contributions

- General rule: **Art. 49.1 & .3 CodDir [2<sup>nd</sup> Directive, Art. 10.1 & .3]**

1. A **report** on any consideration other than in cash shall be drawn up before the company is incorporated or is authorised to commence business, by **one or more independent experts** appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies or firms under the laws of each Member State.

2. The experts' report referred to in paragraph 1 shall contain at least a description of each of the assets comprising the consideration as well as of the **methods of valuation** used and shall state whether the values arrived at by the application of those methods correspond at least to the number and nominal value or, where there is no nominal value, to the accountable par and, where appropriate, to the premium on the shares to be issued for them.

3. The experts' report shall be **published** in the manner laid down by the laws of each Member State, in accordance with Article 16.

# Italian application: ICC Art. 2343

Chi conferisce beni in natura o crediti deve presentare la relazione giurata di un esperto designato dal tribunale nel cui circondario ha sede la società, contenente la descrizione dei beni o dei crediti conferiti, l'attestazione che il loro valore è almeno pari a quello ad essi attribuito ai fini della determinazione del capitale sociale e dell'eventuale soprapprezzo e i criteri di valutazione seguiti. La relazione deve essere allegata all'atto costitutivo.

L'esperto risponde dei danni causati alla società, ai soci e ai terzi. Si applicano le disposizioni dell'articolo 64 del codice di procedura civile.

Gli amministratori devono, nel termine di centottanta giorni dalla iscrizione della società, controllare le valutazioni contenute nella relazione indicata nel primo comma e, se sussistano fondati motivi, devono procedere alla revisione della stima. Fino a quando le valutazioni non sono state controllate, le azioni corrispondenti ai conferimenti sono inalienabili e devono restare depositate presso la società.

Se risulta che il valore dei beni o dei crediti conferiti era inferiore di oltre un quinto a quello per cui avvenne il conferimento, la società deve proporzionalmente ridurre il capitale sociale, annullando le azioni che risultano scoperte. Tuttavia il socio conferente può versare la differenza in danaro o recedere dalla società; il socio recedente ha diritto alla restituzione del conferimento, qualora sia possibile in tutto o in parte in natura. L'atto costitutivo può prevedere, salvo in ogni caso quanto disposto dal quinto comma dell'articolo 2346, che per effetto dell'annullamento delle azioni disposto nel presente comma si determini una loro diversa ripartizione tra i soci.



## So...

- According to ECL no reassessment required
- In any case, remember no work or services





## In addition: simplified system

- When a reliable value assessment is already available, and always with the possibility of a new assessment on request: Art. 50 CodDir [2<sup>nd</sup> Directive, Art. 11]
- Or when there are special conditions: Art. 49.4 & .5 CodDir [2<sup>nd</sup> Directive, Art. 10.4 & .5]

## Art. 50 CodDir [2<sup>nd</sup> Directive, Art. 11]

1. **Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, transferable securities as defined in point 44 of Article 4(1) of Directive 2014/65/EU of the European Parliament and of the Council or money-market instruments as defined in point 17 of Article 4(1) of that Directive are contributed as consideration other than in cash, and those securities or money-market instruments are valued at the weighted average price at which they have been traded on one or more regulated markets as defined in point 21 of Article 4(1) of that Directive during a sufficient period, to be determined by national law, preceding the effective date of the contribution of the respective consideration other than in cash.**

However, where that price has been affected by **exceptional circumstances** that would significantly change the value of the asset at the effective date of its contribution, including situations where the market for such transferable securities or money-market instruments has become illiquid, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of such revaluation, Article 49(1), (2) and (3) shall apply.

2. **Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, assets, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as consideration other than in cash which have already been subject to a fair value opinion by a recognised independent expert and where the following conditions are fulfilled:**

(a) the fair value is determined for a **date not more than six months before** the effective date of the asset contribution;

# Art. 50 CodDir [2<sup>nd</sup> Directive, Art. 11]

and

(b) the **valuation** has been performed in accordance with **generally accepted valuation standards and principles** in the Member State which are applicable to the kind of assets to be contributed.

In the case of new qualifying circumstances that would significantly change the fair value of the asset at the effective date of its contribution, a revaluation shall be carried out on the initiative and under the responsibility of the administrative or management body.

For the purposes of the revaluation referred to in the second subparagraph, Article 49(1), (2) and (3) shall apply.

In the **absence of such a revaluation, one or more shareholders holding an aggregate percentage of at least 5 % of the company's subscribed capital on the date the decision on the increase in the capital is taken, may demand a valuation by an independent expert**, in which case Article 49(1), (2) and (3) shall apply.

Such shareholder(s) may submit a demand up until the effective date of the asset contribution, provided that, at the date of the demand, the shareholder(s) in question still hold(s) an aggregate percentage of at least 5 % of the company's subscribed capital, as it was on the date the decision on the increase in the capital was taken.



## Art. 50 CodDir [2<sup>nd</sup> Directive, Art. 11]

*3. Member States may decide not to apply Article 49(1), (2) and (3) where, upon a decision of the administrative or management body, **assets**, other than the transferable securities and money-market instruments referred to in paragraph 1 of this Article, are contributed as **consideration other than in cash the fair value of which is derived from the value of an individual asset from the statutory accounts of the previous financial year provided that the statutory accounts** have been subject to an audit in accordance with Directive 2006/43/EC.*

*The second to fifth subparagraphs of paragraph 2 of this Article shall apply mutatis mutandis.*

## Art. 49.4 & .5 CodDir [ 2° Directive, Art 10(4-5)]

4. Member States may decide not to apply this Article where 90 % of the nominal value, or where there is no nominal value, of the accountable par, of all the shares is issued to one or more companies for a consideration other than in cash, and where the following requirements are met:

(a) with regard to the company in receipt of such consideration, the persons referred to in point (i) of Article 4 have agreed to dispense with the experts' report;

(b) such agreement has been published as provided for in paragraph 3;

(c) the companies furnishing such consideration have reserves which may not be distributed under the law or the statutes and which are at least equal to the nominal value or, where there is no nominal value, the accountable par of the shares issued for consideration other than in cash;

(d) the companies furnishing such consideration guarantee, up to an amount equal to that indicated in point (c), the debts of the recipient company arising between the time the shares are issued for a consideration other than in cash and one year after the publication of that company's annual accounts for the financial year during which such consideration was furnished. Any transfer of such shares shall be prohibited during that period;

(e) the guarantee referred to in point (d) has been published as provided for in paragraph 3; and

(f) the companies furnishing such consideration shall place a sum equal to that indicated in point (c) into a reserve which may not be distributed until three years after publication of the annual accounts of the recipient company for the financial year during which such consideration was furnished or, if necessary, until such later date as all claims relating to the guarantee referred to in point (d) which are submitted during this period have been settled.

5. Member States may decide not to apply this Article to the formation of a new company by way of merger or division where a report by one or more independent experts on the draft terms of merger or division is drawn up. Where Member States decide to apply this Article in the cases referred to in the first subparagraph, they may provide that the report drawn up under paragraph 1 of this Article and the report by one or more independent experts on the draft terms of merger or division may be drawn up by the same expert or experts.



## In these cases

- New value assessment is not necessarily required
- Directors shall release a declaration within one month
- Not all the Countries decided to adopt all the five exceptions:  
e.g. Italy just those set by Art. 50: cf. Arts 2343<sup>ter</sup> and  
2343<sup>quater</sup> ICC



# Acquisitions from founders and directors

## Art. 52 CodDir [2<sup>nd</sup> Directive, Art. 13]

1. If, before the expiry of a **time limit laid down by national law of at least two years** from the time the company is incorporated or is authorised to commence business, the company acquires **any asset belonging to a person or company or firm referred to in point (i) of Article 4** for a consideration of **not less than one-tenth of the subscribed capital**, the acquisition shall be examined and details of it published in the manner provided for in Article 49(1), (2) and (3), and it shall be submitted for the approval of a general meeting.

Articles 50 and 51 shall apply mutatis mutandis.

**Member States may also require these provisions to be applied when the assets belong to a shareholder or to any other person.**

2. Paragraph 1 **shall not apply to acquisitions effected in the normal course of the company's business**, to acquisitions effected at the instance or under the supervision of an administrative or judicial authority, or to stock exchange acquisitions.



## In Italy...

- *Acquisti potenzialmente pericolosi*
- **Art. 2343bis ICC**

L'acquisto da parte della società, per un corrispettivo pari o superiore al decimo del capitale sociale, di beni o di crediti dei promotori, dei fondatori, dei soci o degli amministratori, nei due anni dalla iscrizione della società nel registro delle imprese, deve essere autorizzato dall'assemblea ordinaria.

L'alienante deve presentare la relazione giurata di un esperto designato dal tribunale nel cui circondario ha sede la società ovvero la documentazione di cui all'articolo 2343-ter primo e secondo comma contenente la descrizione dei beni o dei crediti, il valore a ciascuno di essi attribuito, i criteri di valutazione seguiti, nonché l'attestazione che tale valore non è inferiore al corrispettivo, che deve comunque essere indicato.





## In Italy...

La relazione deve essere depositata nella sede della società durante i quindici giorni che precedono l'assemblea. I soci possono prenderne visione. Entro trenta giorni dall'autorizzazione il verbale dell'assemblea, corredato dalla relazione dell'esperto designato dal tribunale ovvero dalla documentazione di cui all'articolo 2343-ter, deve essere depositato a cura degli amministratori presso l'ufficio del registro delle imprese.

Le disposizioni del presente articolo non si applicano agli acquisti che siano effettuati a condizioni normali nell'ambito delle operazioni correnti della società né a quelli che avvengono nei mercati regolamentati o sotto il controllo dell'autorità giudiziaria o amministrativa.

In caso di violazione delle disposizioni del presente articolo gli amministratori e l'alienante sono solidalmente responsabili per i danni causati alla società, ai soci ed ai terzi.



# Capital maintenance

- Dividends: broad notion comprehensive of interim dividends and voluntary capital reduction as well
- Financial Assistance (with a few consequences also on conflicts of interest)
- Capital reduction due to losses
- [Capital increase and pre-emption rights]



# Dividend distributions

- The key points are:
  - Net assets
  - Balance sheet tests

## Art. 56.1-3 CodDir [2<sup>nd</sup> Directive, Art. 17(1-3)]

1. Except for cases of reductions of subscribed capital, **no distribution to shareholders** may be made when on the **closing date of the last financial year** the **net assets** as set out in the company's annual accounts **are** or, following such a distribution, would become, **lower than the amount of the subscribed capital plus those reserves which may not be distributed** under the law or the statutes of the company.

2. Where the **uncalled part of the subscribed capital is not included in the assets** shown in the balance sheet, that amount shall be **deducted** from the amount of subscribed capital referred to in paragraph 1.

3. The **amount of a distribution** to shareholders **may not exceed** the **amount of the profits at the end of the last financial year plus any profits brought forward** and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes.



## A few remarks

1. Solvency test? No, thanks (but see SUP proposal...)

**2. Art. 56.4 [17(4)]:**

*4. The term 'distribution' used in paragraphs 1 and 3 includes, in particular, the payment of dividends and of interest relating to shares.*

3. What if an irregular dividend is paid? **Art. 57 [18]:**

*Any distribution made contrary to Article 56 shall be returned by shareholders who have received it if the company proves that those shareholders knew of the irregularity of the distributions made to them, or could not in view of the circumstances have been unaware of it.*

# Dividends? Not only the annual ones

- Interim dividends (usually: semester): **Art. 56.5 CodDir [Art. 17(5)]**:

*5. **When the laws of a Member State allow the payment of interim dividends, at least** the following conditions shall apply:*

*(a) **interim accounts** shall be drawn up showing that the funds available for distribution are sufficient;*

*(b) the **amount** to be distributed **may not exceed the total profits made since the end of the last financial year** for which the annual accounts have been drawn up, plus any profits brought forward and sums drawn from reserves available for this purpose, less losses brought forward and sums to be placed to reserve pursuant to the requirements of the law or the statutes.*



# Alternative distributions - 1

The same effect of a distribution... without a formal distribution (need to protect creditors)

1. **Capital reduction** (voluntary: see Art. 76 CodDir [2<sup>nd</sup> Directive, Art 37])

**Art. 75 CodDir (2<sup>nd</sup> Directive, Art. 36)**

1. In the **event of a reduction** in the subscribed capital, at least **the creditors whose claims antedate the publication of the decision on the reduction shall at least have the right to obtain security** for claims which have not fallen due by the date of that publication. Member States may not set aside such a **right unless the creditor has adequate safeguards, or unless such safeguards are not necessary** having regard to the assets of the company.

**Member States shall lay down the conditions** for the exercise of the right provided for in the first subparagraph. In any event, Member States shall ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate safeguards provided that they can credibly demonstrate that due to the reduction in the subscribed capital the satisfaction of their claims is at stake, and that no adequate safeguards have been obtained from the company.

2. **The laws of the Member States shall also stipulate at least that the reduction shall be void, or that no payment may be made for the benefit of the shareholders, until the creditors have obtained satisfaction or a court has decided that their application should not be acceded to.**

3. This Article shall apply where the reduction in the subscribed capital is brought about by the **total or partial waiving of the payment of the balance of the shareholders' contributions.**



# Alternative distributions - 2

## 2. Share subscription

Basic principle: The shares of a company may not be subscribed for by the company itself (**Art. 59.1 CodDir [2<sup>nd</sup> Directive, Art. 20(1)]**). Remedies in Art. 59.2-3 [2<sup>nd</sup> Directive, Art 20(2)&(3)]:

1. The shares of a company **may not be subscribed for by the company itself**.
2. If the shares of a company have been subscribed for by a person acting in his or her own name, but on behalf of the company, the **subscriber shall be deemed to have subscribed for them for his or her own account**.
3. The persons or companies or firms referred to in point (i) of Article 4 or, in cases of an increase in subscribed capital, the members of the administrative or management body shall be **liable to pay for shares subscribed in contravention of this Article**.

However, the laws of a Member State may provide that any such person may be released from his or her obligation if they prove that no fault is attributable to them personally.

Besides subscription, there are many other different transactions of shares, to be authorised by the MS



## Alternative distributions – 2

- Acquisitions (Art. 60 [21]), even by means of a subsidiary (Art. 67 [28])
- Financial assistance (Art. 64 [25])
- Acceptance of company's own shares as security (Art. 66 [27])

All of that, provided that a way for protecting creditors has been developed by MS





# Alternative distributions - 2

## A. Direct or indirect purchase of own shares

Two basic ways:

- redeemable shares
- compulsory withdrawal (see also voluntary capital reduction)



# Alternative distributions - 2

## Art. 60.1 CodDir [2<sup>nd</sup> Directive, Art. 21.1]

1. **Without prejudice to the principle of equal treatment of all shareholders who are in the same position**, and to Regulation (EU) No 596/2014, **Member States may permit a company to acquire its own shares**, either itself or through a person acting in his or her own name but on the company's behalf. To the extent that the acquisitions are permitted, Member States shall make such acquisitions subject to the following conditions:

(a) **authorisation** is given by the **general meeting**, which shall determine the **terms and conditions** of such acquisitions, and, in particular, the **maximum** number of shares to be acquired, the **duration of the period** for which the authorisation is given, the maximum length of which shall be determined by national law **without, however, exceeding five years**, and, in the case of acquisition for value, the maximum and minimum consideration. Members of the administrative or management body shall satisfy themselves that, at the time when each authorised acquisition is effected, the conditions referred to in points (b) and (c) are respected;

(b) the acquisitions, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his or her own name but on the company's behalf, **cannot have the effect of reducing the net assets below the amount** referred to in Article 56(1) and (2); and

(c) **only fully paid-up shares** can be included in the transaction.



# Alternative distributions - 2

Furthermore, **Member States may subject acquisitions within the meaning of the first subparagraph to any of the following conditions:**

(a) **the nominal value** or, in the absence thereof, the accountable par of the acquired shares, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, **does not exceed a limit to be determined by Member States; this limit may not be lower than 10 %** of the subscribed capital;

(b) the **power of the company** to acquire its own shares within the meaning of the first subparagraph, the maximum number of shares to be acquired, the duration of the period for which the power is given and the maximum or minimum consideration **are laid down in the statutes or in the instrument of incorporation of the company;**

(c) the **company complies with appropriate reporting** and notification requirements;

(d) certain companies, as determined by Member States, can be required to **cancel the acquired shares provided that an amount equal to the nominal value of the shares cancelled is included in a reserve which cannot be distributed to the shareholders**, except in the event of a reduction in the subscribed capital; this reserve may be used only for the purposes of increasing the subscribed capital by the capitalisation of reserves;

(e) the **acquisition does not prejudice the satisfaction of creditors' claims.**



## Alternative distributions – 2

The reserve is specifically required also by Art. 63.1(b) CodDir [2<sup>nd</sup> Directive, Art. 24(1)(b)], in order to avoid to distribute the same funds twice

In Italian law see Arts 2357 seqq. ICC

Same rules applicable to redeemable shares (Arts 78 & 82 [39 & 43]), and very similar to compulsory withdrawal (Arts 79 & 80 [40 & 41])



# Alternative distributions – 2

Exception to general rules as of being shares fully paid-up & acquired by means of sums available for distribution when creditors' interests are not at stake (MS)

## Art. 61 CodDir [2<sup>nd</sup> Directive, Art. 22]

1. **Member States may** decide not to apply Article 60 to:

(a) shares acquired in carrying out a **decision to reduce capital**, or in the circumstances referred to in Article 82;

(b) shares acquired as a **result of a universal transfer of assets**;

(c) **fully paid-up shares acquired free of charge or by banks and other financial institutions** as purchasing commission;



(d) shares acquired by virtue of a **legal obligation or resulting from a court ruling** for the protection of minority shareholders in the event, particularly, of a merger, a change in the company's object or form, transfer abroad of the registered office, or the introduction of restrictions on the transfer of shares;

(e) shares acquired from a shareholder in the event of **failure** to pay them up;

(f) shares acquired in order to **indemnify minority shareholders** in associated companies;

(g) fully paid-up shares acquired under a sale enforced by a court order for the payment of a debt owed to the company by the owner of the shares; and

(h) fully paid-up shares issued by an investment company with fixed capital, as defined in the second subparagraph of Article 56(7), and acquired at the investor's request by that company or by an associate company. Point (a) of the third subparagraph of Article 56(7) shall apply. Such acquisitions may not have the effect of reducing the net assets below the amount of the subscribed capital plus any reserves the distribution of which is forbidden by law.

## Alternative distributions – 2

2. Shares acquired in the cases listed in points (b) to (g) of paragraph 1 shall, however, be **disposed of within not more than three years of their acquisition** unless the nominal value or, in the absence of a nominal value, the accountable par of the shares acquired, including shares which the company may have acquired through a person acting in his own name but on the company's behalf, does not exceed 10 % of the subscribed capital.

3. If the shares are **not disposed** of within the period laid down in paragraph 2, **they shall be cancelled**. The laws of a Member State may make this cancellation subject to a corresponding reduction in the subscribed capital. Such a reduction shall be prescribed where the acquisition of shares to be cancelled results in the net assets having fallen below the amount specified in Article 56(1) and (2).



## Alternative distributions – 2

- Remedies: contraventions to Arts 60 & 61 CodDir [2<sup>nd</sup> Directive, Arts 21 & 22] are punished under Art. 62 [23]:

*Shares acquired in contravention of Articles 60 and 61 **shall be disposed of within one year of their acquisition**. If they are not disposed of within that period, Article 61(3) shall apply.*





## Alternative distributions – 3

- **Financial assistance:** the company **advances funds** or **makes loans** or **provides securities** in order to allow a third party to acquire its own shares
- **Admitted**, if MS so dispose, and **provided that there are safeguards to third parties**, similar to those in case of acquisitions



# Alternative distributions – 3

Art. 64 CodDir [2<sup>nd</sup> Directive, Art. 25]

1. *Where Member States permit a company to, either directly or indirectly, **advance funds** or **make loans** or **provide security**, with a view to the **acquisition of its shares by a third party**, they shall make such transactions subject to the conditions set out in paragraphs 2 to 5.*

2. *The transactions shall take **place under the responsibility of the administrative or management body at fair market conditions**, especially with regard to interest received by the company and with regard to security provided to the company for the loans and advances referred to in paragraph 1.*

*The **credit standing** of the third party or, in the case of multiparty transactions, of each counterparty thereto shall have been **duly investigated**.*

3. *The transactions shall be submitted by the administrative or management body to the **general meeting for prior approval**, whereby the general meeting shall act in accordance with the rules for a **quorum and a majority laid down in Article 83**.*

*The administrative or management body shall present a written report to the general meeting, indicating:*

*(a) the reasons for the transaction;*

*(b) the interest of the company in entering into such a transaction;*

*(c) the conditions on which the transaction is entered into;*

# Alternative distributions – 3

*(d) the risks involved in the transaction for the liquidity and solvency of the company; and*

*(e) the price at which the third party is to acquire the shares.*

*This report shall be submitted to the register for publication in accordance with Article 16.*

4. The **aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount specified in Article 56(1) and (2)**, taking into account also any reduction of the net assets that may have occurred through the acquisition, by the company or on behalf of the company, of its own shares in accordance with Article 60(1).

The **company shall include, among the liabilities in the balance sheet, a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.**

5. Where a third party by means of financial assistance from a company acquires that company's own shares within the meaning of Article 60(1) or subscribes for shares issued in the course of an increase in the subscribed capital, such acquisition or subscription shall be made at a **fair price**.

6. **Paragraphs 1 to 5 shall not apply to transactions concluded by banks and other financial institutions in the normal course of business**, nor to transactions effected with a view to the acquisition of shares by or for the company's employees or the employees of an associate company.

*However, these transactions may not have the effect of reducing the net assets below the amount specified in Article 56(1).*

7. Paragraphs 1 to 5 shall not apply to transactions effected with a view to acquisition of shares as described in of Article 61(1)(h).



## Alternative distributions – 3

- Financial assistance can and should be seen as a possible eventual buyback. For this reason:

### Art. 66 CodDir [2<sup>nd</sup> Directive, Art. 27]

*1. **The acceptance of the company's own shares as security**, either by the company itself or through a person acting in his own name but on the company's behalf, **shall be treated as an acquisition** for the purposes of Article 60, Article 61(1), and Articles 63 and 64.*

*2. **The Member States may decide not to apply paragraph 1 to transactions concluded by banks and other financial institutions in the normal course of business.***



## Alternative distributions – 3

- Financial assistance as a **possible extended rule for the case of conflict of interests** (even if its scope is outside ECL)
- See in particular: Art. 64.2-5 [2<sup>nd</sup> Directive, Art. 25(2-5)] (above) & Art. 65 [26]

*In cases where **individual members of the administrative or management body** of the company being party to a transaction referred to in Article 64(1) of this Directive, or of the administrative or management body of a **parent undertaking** within the meaning of Article 22 of Directive 2013/34/EU or such parent undertaking itself, or **individuals acting in their own name, but on behalf of the members of such bodies** or on behalf of such undertaking, are counterparties to such a transaction, **Member States shall ensure through adequate safeguards that such transaction does not conflict with the company's best interests.***



# Alternative distributions – 3

- This means:
  - The **board** (not the single director, in order to minimise the conflict)
  - Necessary **disclosure** in **written** of reasons, interest of the company, conditions, risks, price
  - **Fair price**
  - **Additional protections** where the purchasing party is a director (even with the difficulties of establishing what the «best interest of the company» is)
    - Short term? Long term? Does company's interest coincide with shareholders' interest?



# Capital protection

- Reduction **due to losses** and the «**recapitalise [or convert] or liquidate** rule»
- Share capital as a **benchmark** for signalling a high risk of insolvency
- This because losses have **already cancelled the reserves**, and are now having an impact on the capital



## Art. 58 CodDir [2<sup>nd</sup> Directive, Art. 19]

1. In the case of a **serious loss of the subscribed capital**, a **general meeting** of shareholders shall be called within the period laid down by the laws of the Member States, **to consider whether the company should be wound up or any other measures taken.**

2. The **amount of a loss** deemed to be serious within the meaning of paragraph 1 **shall not be set by the laws of Member States at a figure higher than half the subscribed capital.**





## Art. 77 CodDir [2<sup>nd</sup> Directive, Art. 38]

*The **subscribed capital** may not be reduced to an amount **less than the minimum** capital laid down in accordance with Article 45.*

***However, Member States may permit** such a reduction **if they also provide** that the decision to reduce the subscribed capital may take effect **only when** the subscribed capital is **increased to an amount at least equal** to the prescribed **minimum**.*



## Remarks

- Questioned whether effective
- A two-steps solution can be admitted (e.g.: ICC Arts 2446-2447)
- There is always the third possibility: conversion...



# Capital increases

- Arts 72 & 83 CodDir [2<sup>nd</sup> Directive, Arts 33 & 44]: **reinforced majority** (it is also required in some cases such as the redemption of shares not provided for by the statutes)

## Art. 83 CodDir [2<sup>nd</sup> Directive, Art. 44]

*The **laws of the Member States** shall provide that the decisions referred to in Article 72(4) and (5) and Articles 73, 74, 78 and 81 are to be taken at least by a **majority of not less than two thirds of the votes** attaching to the securities or the subscribed capital represented.*

*The laws of the **Member States** may, however, lay down that a **simple majority** of the votes specified in the first paragraph is sufficient when **at least half the subscribed capital is represented**.*

## Art. 72 CodDir [2<sup>nd</sup> Directive, Art. 33]

1. Whenever the **capital is increased by consideration in cash**, the shares shall be offered on a **pre-emptive basis** to **shareholders** in proportion to the capital represented by their shares.

2. The **laws of a Member State**:

(a) **need not apply paragraph 1 to shares which carry a limited right to participate in distributions** within the meaning of Article 56 and/or in the company's assets in the event of liquidation; or

(b) may permit, where the subscribed capital of a company **having several classes of shares** carrying different rights with regard to voting, or participation in distributions within the meaning of Article 56 or in assets in the event of liquidation, is increased by issuing new shares in only one of these classes, the **right of pre-emption of shareholders of the other classes to be exercised only after the exercise of this right by the shareholders of the class in which the new shares are being issued.**

## Art. 72 CodDir [2<sup>nd</sup> Directive, Art. 33]

3. Any offer of subscription on a pre-emptive basis and the period within which this right shall be exercised shall be **published in the national gazette** appointed in accordance with Article 16. However, the **laws of a Member State need not provide for such publication where all of a company's shares are registered**. In such case, **all the company's shareholders shall be informed in writing**. The right of pre-emption shall be exercised within a period which **shall not be less than 14 days** from the date of publication of the offer or from the date of dispatch of the letters to the shareholders.

4. The right of pre-emption **may not be restricted or withdrawn by the statutes or instrument of incorporation**. This may, however, be done by **decision of the general meeting**. The administrative or management body shall be required to present to such a meeting a **written report** indicating the reasons for restriction or withdrawal of the right of preemption, and justifying the proposed issue price. **The general meeting shall act in accordance with the rules for a quorum and a majority laid down in Article 83**. Its decision shall be published in the manner laid down by the laws of each Member State, in accordance with Article 16.



## Art. 72 CodDir [2<sup>nd</sup> Directive, Art. 33]

5. The laws of a Member State may provide that the statutes, the instrument of incorporation or the general meeting, acting in accordance with the rules for a quorum, a majority and publication set out in paragraph 4 of this Article, may give the power to **restrict or withdraw the right of pre-emption to the company body which is empowered to decide on an increase in subscribed capital within the limit of the authorised capital.** This power may not be granted for a longer period than the power for which provision is made in Article 68(2).

6. Paragraphs **1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities,** nor to the exercise of the right to subscribe.

7. The **right of pre-emption is not excluded for the purposes of paragraphs 4 and 5 where, in accordance with the decision to increase the subscribed capital, shares are issued to banks or other financial institutions with a view to their being offered to shareholders of the company in accordance with paragraphs 1 and 3.**



## Remarks

1. **General rule is for pre-emptive rights**
2. A general exception to pre-emptive rights is not allowed;  
**Exceptions on a meeting-by-meeting basis are allowed**
3. **General terms of exercise of the right not less than 14 days**
4. Possible withdrawal of pre-emptive rights when banks are involved
5. Capital increases by issuing just one class shares are allowed (and pre-emptive rights are limited to those shareholders – the others come later)
6. Convertible bondholders... Art. 72.6 CodDir [2<sup>nd</sup> Directive, Art. 33(6)], but also... ECJ in *Commission v. Spain*