



Considerations other than cash

Art. 46 CodDir [2nd 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 [2nd 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 [2nd 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 [2nd 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 [2nd 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 [2nd Directive, Art. 11]
- Or when there are special conditions: Art. 49.4 & .5 CodDir [2nd Directive, Art. 10.4 & .5]



Art. 50 CodDir [2nd 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 [2nd 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 [2nd 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^{ter} and
2343^{quater} ICC



Acquisitions from founders and directors

Art. 52 CodDir [2nd 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 [2nd 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 [2nd Directive, Art 37])

Art. 75 CodDir (2nd 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.**