



# 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



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- 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.



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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.**



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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.





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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).



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- 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;*



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*(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.*



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- 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.***



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- 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**
- 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**
- Possible withdrawal of pre-emptive rights when banks are involved
- Capital increases by issuing just one class shares are allowed (and pre-emptive rights are limited to those shareholders – the others come later)
- Convertible bondholders... Art. 72.6 CodDir [2<sup>nd</sup> Directive, Art. 33(6)], but also... ECJ in *Commission v. Spain*