

Companies limited by shares

Italian and European Company Law – A.A. 2022/2023

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The amendments to the bylaws

These amendments refers to all changes to the **objective content** of the bylaws or the instrument of incorporation. Amendments of the subjective content of these documents are not considered amendments (in particular, those involving the persons of directors, statutory auditors, and shareholders).

From a formal point of view, amendments are the removal or the modification of clauses contained in the bylaws and the introduction of new clauses.

The following rules will applies only in the case of change to the objective content.

Procedure (art. 2346 c.c.)

1. extraordinary shareholders' meeting resolution

2. notary checks

→ 2.1. (eventually) judicial control

3. recording in the Business register

1. extraordinary shareholders' meeting resolution

→ Article 2365 c.c.

→ In some cases, the bylaws may give to the administrative body the competence for amendment (art. 2365, par. 2, c.c.) → the same rules of procedure will apply

→ In non-listed companies, higher deliberative quorums for the second call of the shareholders' meeting are required for some amendments (art. 2369, par. 5, c.c.)

2. notary checks (art. 2346, par. 1, c.c.)

→ the minute is drawn up by a notary (the amendments of the bylaws are subject to the same form provided for the drawing up of this document: public deed)

→ legal control (not just a formal check)

3. recording in the Business register

→ the notary must apply for registration of the resolution within 30 days

→ formal control by the Business register Office

2.1 (eventually) judicial control

→ If during the checks, the notary finds that the conditions required by law are not met, he shall promptly notify the directors

→ directors have two options: call a shareholders' meeting to take appropriate action or apply to the court to see if the conditions required by law are met (art. 2346, par. 3, c.c.)

→ If the directors do not provide the resolution will have no effect

- effectiveness of the resolution: it shall not take effect until it has been recorded in the Business register (there are, however, cases in which effectiveness is conditioned or deferred)
- legal publicity: in order to allow the current content of the bylaws to be known, an updated copy of the bylaws must be filed in addition to the resolution of amendment

The right of withdrawal

→ ratio legis

→ grounds of withdrawal

→ liquidation of the shares

Grounds of withdrawal

A. mandatory (not derogable)

B. derogable by the bylaws

C. provides for by the bylaws (closed companies)

D. withdrawal in case of indefinite-term company (art. 2437, par. 3, c.c., non-listed companies)

E. withdrawal in case of delisting (listed companies, art. 2437-*quinquies*, c.c.)

A. **mandatory** (not derogable) → shareholders absent, dissenting, abstaining can exercise the right of withdrawal, for all or part of their shares, in those cases:

- a. Amending of the corporate purpose
- b. Transformation of the company
- c. ~~[Transferring the company's headquarter abroad]~~: abrogated
- d. Revoking liquidation status
- e. Elimination of one or more of the derogable grounds of withdrawal
- f. Changes of the criteria to value the shares in the event of withdrawal
- g. Changes concerning the voting rights or the participation rights

→ in these cases any agreement aimed at excluding the right of withdrawal or making the latter more difficult is null and void (2437, par. 6, c.c.)

B. **derogable** by the bylaws

a. Extension of the term of the company's duration

b. Introduction or removing of restrictions on the circulation of shares

Terms and procedure for exercising the right of withdrawal (art. 2347-*bis*, c.c.)

- registered letter
- within 15 days from the recording of the resolution in the Business register
- if the ground of withdrawal doesn't refer to a resolution, within 30 days from the day the shareholder becomes aware of the fact

- Non-transferability and deposit of shares
- When the right of withdrawal has no effect or can't be exercised (art. 2437-*bis*, par. 3, c.c.)

Criteria to determine the value of the shares (art. 2347-*ter*, c.c.)

- unlisted companies limited by shares
- listed companies limited by shares

- alternative criteria established by the bylaws
- shareholder's opposition

Procedure to liquidate shares (art. 2437-*quater*, c.c.)

- a. Offer to shareholders and convertible bondholders
- b. non-listed companies: offer to third parties; listed companies: offer on regulated markets
- c. reimbursement through purchase of the own shares by the company
- d. capital share reduction (creditors opposition) or dissolution of the company

The Civil Code provides specific regulations for certain amendments to the bylaws: the increase and the reduction of share capital; transformations, mergers and divisions of the companies.

The amendments to the share capital

Increase of the share capital:

- material increase (or paid increase)
- nominal increase (or free increase)

Reduction of the share capital:

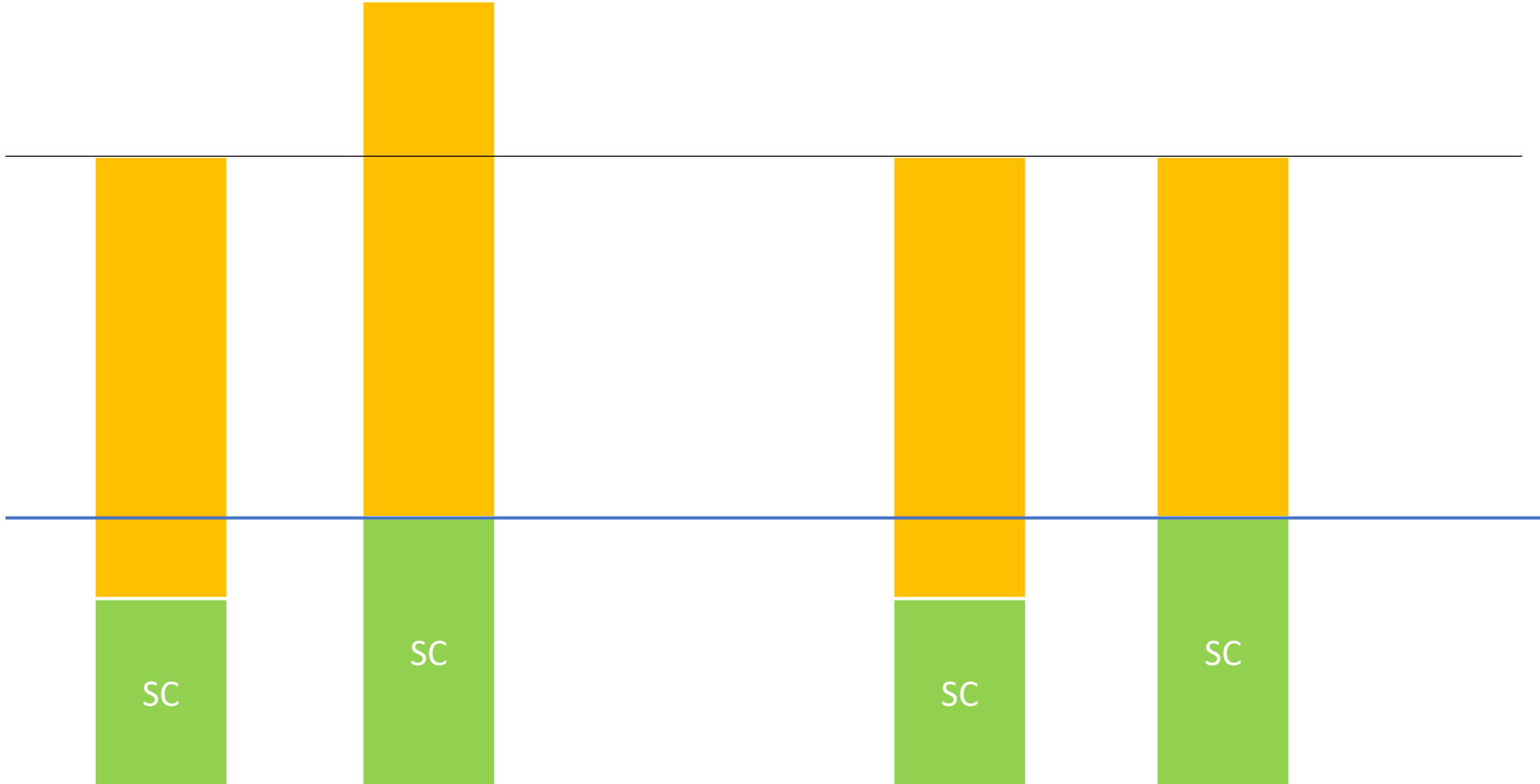
- material reduction
- nominal reduction (reduction for losses)

- cases other than losses where reduction is mandatory

Increase of the share capital

material increase
(or paid increase)

nominal increase
(or free increase)



Material (or paid) share capital increase

- new financial resources = new contributions
- issuance of new shares
- conditions: previous contributions have to be fully paid-up; there must be no losses that would require a compulsory reduction
- competence
- the delegated increase (art. 2443 c.c.)
- term for the subscription of the new shares
- non-divisible and divisible increase
- rules for new contributions



Directive (EU) 2017/1132

Article 68 - Decision by the general meeting on the increase of capital

1. Any increase in capital shall be decided upon by the general meeting. Both that decision and the increase in the subscribed capital shall be published in the manner laid down by the laws of each Member State, in accordance with Article 16. (in Italy: through the Business register)
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.



Directive (EU) 2017/1132

Article 69 - Paying up shares issued for consideration

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.



Directive (EU) 2017/1132

Article 70 - Shares issued for consideration other than in cash

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.
2. The consideration referred to in paragraph 1 shall be the subject of a report drawn up before the increase in capital is made by one or more experts who are independent of the company and appointed or approved by an administrative or judicial authority. Such experts may be natural persons as well as legal persons and companies and firms under the laws of each Member State.

The right of pre-emption (art. 2441 c.c.)

- persons entitled to exercise the pre-emption right
- ratio legis
- term for the exercise
- shares on which pre-emption rights have not been exercised (preferential right on the inopted shares)
- circumstances in which the right of pre-emption can be excluded (cases in which the shares have to be issued with a premium)
- indirect exercise of the pre-emption rights
- Recording in the Business register



Directive (EU) 2017/1132

Article 72 - Increase in capital by consideration in cash

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.

[...]

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 pre-emption, 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.

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).



[...]

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.

→ so-called indirect exercise of the pre-emption rights.



Directive (EU) 2017/1132

Article 84 - Derogation from certain requirements

1. Member States may derogate from the first paragraph of Article 48, the first sentence of Article 60(1)(a) and Articles 68, 69 and 72 to the extent that such derogations are necessary for the adoption or application of provisions designed to encourage the participation of employees, or other groups of persons defined by national law, in the capital of undertakings.

→ Exclusion of pre-emptive right in case the new shares are offered to the company's employees

Nominal (or free) share capital increase
(art. 2442 c.c.)

→ assets that can be used for the free share capital increase

→ methods that can be used for the free share capital increase

Reduction of the share capital

Material share capital reduction (art. 2445 c.c.)

- causes and conditions
- ways of execution
- the shareholders' meeting notice of call
- recording, execution and creditors' opposition



Directive (EU) 2017/1132

Article 73 - Decision by the general meeting on reduction in the subscribed capital

Any reduction in the subscribed capital, except under a court order, shall be subject at least to a decision of the general meeting acting in accordance with the rules for a quorum and a majority laid down in Article 83 without prejudice to Articles 79 and 80. Such decision shall be published in the manner laid down by the laws of each Member State in accordance with Article 16.

The notice convening the meeting shall specify at least the purpose of the reduction and the way in which it is to be carried out.



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.

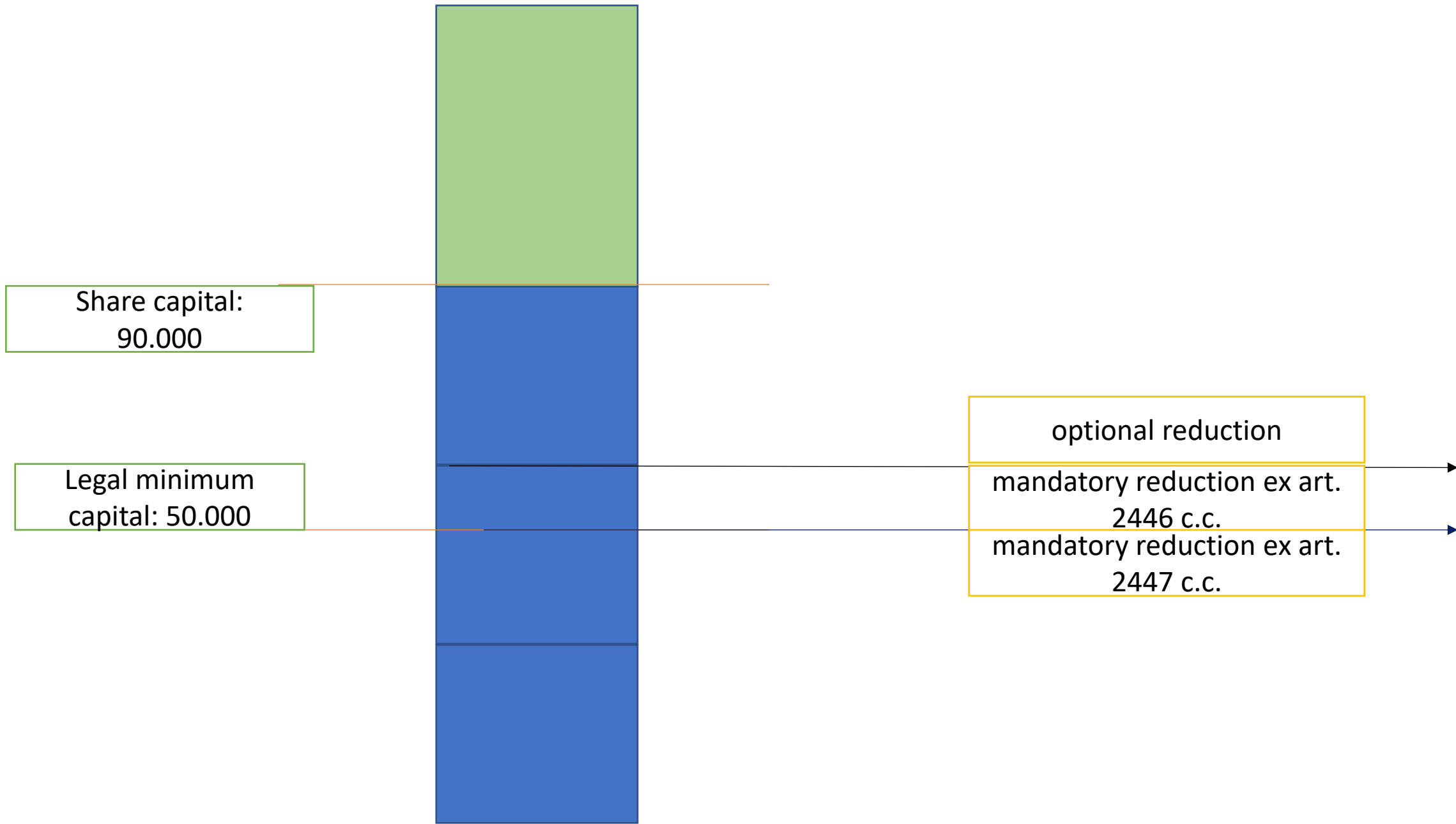
Nominal share capital reduction (due to losses)

1. The optional reduction (decrease of less than 1/3 of the share capital): there are no rule, hence in this event the reduction is optional, but if there are losses profits cannot be distributed...

2. Mandatory reduction:

2.1 Decrease of more than 1/3 of the share capital that does not affect the legal minimum capital

2.2. Decrease of more than 1/3 of the share capital affecting the legal minimum capital



Share capital:
90.000

Legal minimum
capital: 50.000

optional reduction

mandatory reduction ex art.
2446 c.c.

mandatory reduction ex art.
2447 c.c.

2.1 Decrease of more than $\frac{1}{3}$ of the share capital that does not affect the legal minimum (art. 2446 c.c.)

- calling of the shareholders' meeting
- up-to-date balance sheet, directors' report and observations of the board of statutory auditors
- appropriate measures of the shareholders' meeting
- compulsory reduction: within the next financial year the loss has not decreased to less than $\frac{1}{3}$ (ordinary shareholders' meeting)



Directive (EU) 2017/1132

Article 76 - Derogation from safeguards for creditors in case of reduction in the subscribed capital

1. Member States need not apply Article 75 (Safeguards for creditors in case of reduction in the subscribed capital) to a reduction in the subscribed capital the purpose of which is to offset losses incurred...

2.2. Decrease of more than $\frac{1}{3}$ of the share capital affecting the legal minimum capital (art. 2447 c.c.)

- calling of the shareholders' meeting
- measures that must be taken



Directive (EU) 2017/1132

Article 77 - Reduction in the subscribed capital and the minimum capital

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.