# EUROPEAN COMPANY LAW

Giulia Serafin

A.A. 2025/2026

# DIRECTIVE (EU) 2017/1132 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 14 JUNE 2017 RELATING TO CERTAIN ASPECTS OF COMPANY LAW (CODIFICATION)

# SUBJECT MATTER

- the **coordination of safeguards** which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty, in respect of the **formation of public limited liability companies and the maintenance and alteration of their capital**, with a view to making such safeguards equivalent,
- the **coordination of safeguards** which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty, in respect of disclosure, **the validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability**, with a view to making such safeguards equivalent,

# SUBJECT MATTER

- the rules on **online formation of companies**, on **online registration of branches** and on **online filing of documents and information by companies and branches**,
- the **disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State**,

# SUBJECT MATTER

- mergers of public limited liability companies,
- cross-border conversions, cross-border mergers and cross-border divisions of limited liability companies,
- the division of public limited liability companies.

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

Shareholders:

- The Directive contain no limitation and the trend in Europe is clearly oriented towards the elimination of any minimum number of shareholders.
- If a company is formed by a sole shareholder, specific rules apply.

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- The First Directive requires that company to be set up by means of an instrument of incorporation.
- Some jurisdiction provides the option of a set up by means of an initial public offering or an establishment in subsequent phases.
- the minimum terms that had to be indicated in the instrument are: type, name, objects of the company; amount of subscribed legal capital (which cannot be less than euro 25,000); appointment of the management and the supervisory bodies and allocation of their powers; duration (except where this is indefinite).

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- The fact that the amount of the legal capital has to be indicated in the instrument has an important consequence in terms of the distribution of powers between shareholders and managers and the actual functioning of the company. Since the amount of the legal capital is fixed in the company's charter, the shareholders have the right to change it.
- The power to issue new shares – and thus modify the share capital – may however be delegated to a certain extent by the shareholders to the directors, rendering the transaction more flexible.

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- Other elements – if not indicated in the instrument of incorporation – have to be inserted in a separate document, called the "statutes" or "articles of association" or "bylaws", including the nominal value of subscribed shares (or the number of subscribed shares without stating the nominal value, where said shares may be issued under the national law); the special conditions limiting the transfer of shares; whether there are several classes of shares and the rights attached; the rules on the functioning of the company bodies; etc. (see art. 4)

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- Both documents (instrument of incorporation and statutes) have to be published in the companies register, as key information for shareholders and third parties (they must be made publicly available also electronically).
- Matters which are not included in the published documents cannot be enforced against the company or its shareholders. At the same time, these documents may be relied on by the company against third parties after they had been disclosed (before disclosure has taken place, the company may however prove that the third parties had Knowledge thereof).

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- The disclosure is made at the company's register of the place where the company has its registered office. If the company has established branches in other member states, the information, translated, has to be filled at the register of those states as well.
- Information that is compulsory to disclose in the register: see art. 16.

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- Shares are to be paid up at the time the company is incorporated, at not less than 25% of their nominal value.
- The timing for payment of the balance is different from state to state (directive is silent on this point): it must be paid up within some months from the company's registration under some laws, while the decision to call up the balance is left to the directors' discretion in others.

# FORMATION OF THE COMPANY: INSTRUMENT OF INCORPORATION AND STATUTES

- If the consideration is not in cash (contributions in kind), directive state that the consideration shall be transferred in full within five years. This provision has also been implemented in different ways.
- The company acquires legal personality (i.e. comes into existence) with registration. Third parties contracting with the company at its formation stage are protected by the provision that persons who acted before the company was registered are jointly and severally liable.

# NULLITY OF THE COMPANY

- One important principle laid down in the first directive – that was further developed by subsequent directives – is that the protection of third parties (and shareholders) should be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered in the name of the company are invalid.
- The corporate contracts and the activity of the company involve several parties. Both the charter and the activity may be affected by irregularities. In such a case, the simple termination of the contract or of its effects - often after a significant lapse of time – could produce more harm than advantages for the parties affected.
- As a consequence, the general rules on the validity and ability to terminate contracts – which normally result in the elimination of the effects produced once invalidity has been ordered by the court (both in civil and common law) – are considered inadequate in the field of company law.

# NULLITY OF THE COMPANY

- The first directive stipulated that the invalidity of the contract setting up the company can be ordered only in cases of significant irregularities and that a court always has to rule on the invalidity.
- Originally the cases leading to nullity of the company were numerous. The consolidation directive has reduced them to six.

# NULLITY OF THE COMPANY

Article 11 - Conditions for nullity of a company

Nullity may be ordered only on the grounds:

(i) that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;

(ii) that the objects of the company are unlawful or contrary to public policy;

(iii) that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company;

(iv) of failure to comply with provisions of national law concerning the minimum amount of capital to be paid up;

(v) of the incapacity of all the founder members;

(vi) that, contrary to the national law governing the company, the number of founder members is less than two.

# NULLITY OF THE COMPANY

- Two other important rules were introduced by the First Directive: on the one hand, the effect of a decision of nullity will be to wind up the company, taking its effects from the date of the court's ruling (and not the elimination of the company contract from the beginning); on the other hand, nullity as such does not affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's winding up.
- Moreover, holders of shares in the capital shall remain obliged to pay up the capital that they agreed to subscribe to, but is still unpaid, to the extent that the commitments entered into with creditors so require.

# SINGLE-MEMBER COMPANY

- The Twelfth Directive (later re-codified by Directive 2009/102/EC) Introduced the possibility of setting up a private company with a sole member.
- That directive does not consider the public company with a sole member, but stipulates that its rules may be applied where member states allow public companies to be a single-member company.

# SINGLE-MEMBER COMPANY

The main features of the single-member company, as outlined by the directive, are the following:

- the company can be established by a unilateral act
- only the company with its assets is liable for the corporate obligation
- the fact of the sole ownership (together with the identity of the sole member) must be entered in the companies register
- contracts between the sole member and the company as represented by the former must be recorded in minutes or drawn up in writing

# SHARE CAPITAL

- The capital is the amount necessary to provide the minimal resources to start up the company's activity.
- As already seen, the mandatory minimum capital is set by the directive as euro 25,000; however, many laws have set a higher threshold; moreover, shareholders are always free to establish a superior amount in the articles of association.
- After a long debate on the function of legal capital in corporate law, the main opinion currently considers that sum of money as the amount deemed compulsory for the company in order to "commence the business". Therefore, the initial capital is not actually intended to protect creditors or others, but only to properly start the activity of the company.

# SHARE CAPITAL

- This sum of money has however to remain at the disposal of the company during its lifetime. If the net assets go significantly below the amount of the share capital fixed the in the instrument of incorporation, the directors will have to intervene and basically ask the shareholders to provide extra capital in order to cover the losses.
- Moreover, some corporate transactions - which are considered risky and potentially harmful for the company - may only be executed with the amounts that a company has in excess of the legal capital. The amount of that capital therefore provides a benchmark below which corporate money cannot be used in order to pursue such transaction.
- Profits can also be distributed by the company to shareholders only as long as the legal capital remains intact.
- Therefore, the amount of capital established in the instrument of incorporation is especially meaningful during the life of the company, in order to govern a series of transactions which are considered worthy of attention since they could put the sum originally provided for by the shareholders at risk and which the company is expected to release at its termination. Rules on legal capital had thus been put in place with reference both to its "formation" and to its "maintenance".

# SHARE CAPITAL

- As said, a minimum amount of capital has to be provided by the shareholders and that capital has to be effectively assessed.
- Of course, the best and easiest way to provide "effective" capital is to contribute cash. Other assets - other than in cash - may however be contributed.
- Those assets must be "capable of economic assessment" (art. 46). The meaning is that these assets should be of actual value for the operations of the company. Therefore, real estate assets, credits, trademarks, etc., are allowed; on the contrary, the undertaking to perform work or supply services is forbidden (which is deemed to be too risky in the medium-long term to be considered effective).
- The concept of "assets capable of economic assessment" is rather general and is thus interpreted in slightly different ways in the member states: the prevailing view holds that contributions in kind must consist of assets that are "accountable in the balance sheet" (their evaluation has to follow the strict principle laid down for the preparation of the financial statements); this opinion is shared also by the jurisprudence, even though opinions sometimes diverge.

# SHARE CAPITAL

- Another fundamental rule contained in the directive aims to avoid non-cash contribution from being overvalued and requires an independent evaluation to be made by professionals appointed by the court or an administrative body who must write up an "experts' report".
- Article 49 of the directive clearly states that «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».
- The experts' report must 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».

# SHARE CAPITAL

- However, this type of evaluation becomes both complex and costly. That is why EU rules have provided for the possibility of derogation from the requirement of the experts' report.
- This is the case if: (i) the consideration has already been subject to a fair value opinion by an independent expert (at a date not more than six months before the date of the contribution); (ii) the consideration consists of securities or money-market instruments, the value of which is derived from another company's financial statements (of the previous financial year), provided that these financial statements have been subject to an audit by an audit firm; (iii) the consideration consists of securities or money-market instruments traded on a regulated market.

# SHARE CAPITAL

- The aim of these rules is well expressed in the whereas of directive 2006/68/EC, which set forth that member states should be able to permit public limited liability companies to allot shares for consideration other than in cash without requiring them to obtain a special expert valuation in cases in which there is a clear point of reference for the valuations of such consideration.
- In any case, the directors must still verify whether the expert's assessment is fair and make a revaluation whenever deemed necessary (this is clearly stated in Art. 50 also for the cases of derogation from the report). If an asset that is contributed does not correspond to its fair value, the shareholder who has made that contribution is liable for the difference; if the sum needed is not promptly paid up, the company must reduce its capital.

# SHARE CAPITAL

- Finally, in order to avoid shareholders and directors evading the law once the capital has been correctly established, article 52 establishes a further safeguarding mechanism.
- Before the expire of a time limit (which has to be fixed by national law, but cannot be less than two years from the date of the company incorporation), if the company acquires any asset belonging to a shareholder for consideration of not less than 1/10 of the subscribed capital, the acquisition must be subject to an independent experts' assessment and, moreover, to the approval of the general meeting (the rule does not apply to acquisitions made in the normal course of the company's business, or at the instance or under the supervision of an administrative or judicial authority, or to stock exchange transactions). This type of rule has been implemented similarly by almost all member states.

# RULES ON CAPITAL PROTECTION

As we have seen, even if mandatory legal capital is losing its importance with regard to some aspects, it remains at the core of the EU legislation, as the measuring stick that has to be taken into account for a series of corporate transactions which are considered lawful only if the company has an amount of assets corresponding to the sum of capital fixed in the instrument of incorporation: distributions of dividends, acquisition of own shares, financial assistance. Therefore, rules on capital maintenance are still at the centre of EU laws on public companies.

# RULES ON CAPITAL PROTECTION DISTRIBUTION

- Starting from distributions, dividend payments to shareholders are admissible only if the legal capital remains intact after the distribution.
- Art. 56 of the directive is clear in this regard: «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».
- The provision also adds that «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».

# RULES ON CAPITAL PROTECTION DISTRIBUTION

- Therefore, the proposed distribution requires the directors to run a preliminary test based on the profits and losses that emerge from the financial statements, which has the capital as the main benchmark: the so-called "balance sheet test".
- These rules have been studied in comparison with the ones set out in the US. As is well known, profits can be distributed without limits in many North American States as long as the distribution does not render the company insolvent. The "balance sheet test" is replaced by a much more flexible standard which only requires directors to perform a forecast-orientated ("ability to pay") "solvency test" before the distribution takes place.
- Under EU legislation, therefore, the concept of legal capital introduces more stringent limits on distributions: requiring a certain capital buffer to always be present, aiming to reduce the risk that the directors bring the company to the brink of insolvency.

# RULES ON CAPITAL PROTECTION DISTRIBUTION

- At the same time, however, this framework significantly constrains the ability to make payments to shareholders, even when the company is financially fit, leaving them often unsatisfied and consequently less disposed to invest further.
- Furthermore, the distribution of dividends also depends on how the provisions of the directive are interpreted within member states.
- In any case, dividends received in good faith by shareholders are safe. Pursuant to article 57 of the directive, 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.

# RULES ON CAPITAL PROTECTION SHARE BUY-BACKS

- Originally laid down in the second directive, which aims to protect stakeholders from the risk that the company loses its share capital, there is the rule which limiting share buy-backs.
- The safeguards introduced by the directives in this regard are both procedural (in particular, the transaction has to be approved by the shareholders) and quantitative (the purchase is legitimate only if it leaves intact an amount of assets corresponding to the legal capital and the reserves).
- The transaction is therefore considered – per se – risky and unworthy to be left totally to the discretion of the directors.

# RULES ON CAPITAL PROTECTION SHARE BUY-BACKS

- The directive provides the member states with an alternative option: either to prohibit the opportunity for such a purchase or to limit it. Indeed, art. 60 states that «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 […] conditions».
- Actually, some member states refuse to allow companies to purchase their own shares. Others member state have taken a more permissive approach and then have adopted rules implementing the article 60.

# RULES ON CAPITAL PROTECTION SHARE BUY-BACKS

Under the directive, the conditions under which the purchase is allowed are the following:

1. the transaction must be authorised by the shareholders general meeting (which shall determine the terms and conditions of such acquisitions: the maximum number of shares to be acquired, the duration of the period for which the authorization is given, without exceeding five years, and the maximum and minimum price);
2. the purchase cannot have the effect of reducing the net assets (legal capital plus reserves) below the minimum amount of the company subscribed capital;
3. only fully paid-up shares can be acquired.

# RULES ON CAPITAL PROTECTION SHARE BUY-BACKS

Furthermore, member states may subject acquisitions to other conditions, among which:

1. The nominal value of the shares does not exceed the limit to be determined by member states, not lower than 10% of the subscribed capital;

2. an amount equal to the nominal value of the shares purchased must be included in a reserve which cannot be distributed to the shareholders (these shares are thus not treated as an ordinary assets and they must be neutralised on the company's balance sheet).

# RULES ON CAPITAL PROTECTION SHARE BUY-BACKS

- Shares acquired in contravention of the provisions of the directive must be disposed of within one year of their acquisition. If they are not disposed of within that period, they must be cancelled.
- During the period that the shares are held by the company, the right to vote attaching to the shares must be suspended (in order to avoid any abuse by the directors).

# RULES ON CAPITAL PROTECTION FINANCIAL ASSISTANCE

- In this field only a specific kind of financing transaction has been considered by directives (thus, on an exceptional basis) since the 1970s: the company providing loans or securities to third parties or shareholders for acquisition of the company's own shares.
- Second directive was particularly restrictive in this regard and simply banned the possibility. The main reasons for the ban had to do with the risk of abuse by directors and the need for capital protection.
- Actually, the directive of 2017 allows this kind of financial assistance. More precisely the directive gives member states an alternative: either to prohibit companies from providing financial assistance or to limit it.

# RULES ON CAPITAL PROTECTION FINANCIAL ASSISTANCE

- In this field member states have taken different approach. Some member state have maintained an absolute prohibition of financial assistance; others permit a company to advance funds or make loans or provide security with a view to the acquisition of its shares by a third party but make such transactions subject to some conditions.
- These conditions are stated in the article 64 of the directive… (see the following slide)

# RULES ON CAPITAL PROTECTION FINANCIAL ASSISTANCE

1. 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.
2. The transactions shall be submitted by the administrative or management body to the general meeting for prior approval (which must be achieved by a reinforced majority provided for by the member states).
3. The administrative or management body shall present a written report to the general meeting, indicating: the reasons for the transaction; the interest of the company in entering into such a transaction; the conditions on which the transaction is entered into; the risks involved in the transaction for the liquidity and solvency of the company; and the price at which the third party is to acquire the shares.

# RULES ON CAPITAL PROTECTION FINANCIAL ASSISTANCE

Two other conditions must be respected:

1. The aggregate financial assistance granted to third parties shall at no time result in the reduction of the net assets below the amount of the legal capital plus reserves, taking into account also any reduction of the net assets that may have occurred through the acquisition by the company of its own shares.

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

# RULES ON CAPITAL PROTECTION
# RELEVANT LOSSES AND COMPULSORY RECAPITALIZATION

- As noted above, the capital supplied by shareholders at the stage of the set-up of the company (or the capital provided with subsequent capital increases) has to remain at the disposal of the company during its entire lifetime. If the net assets of the company go significantly below that amount (as a consequence of losses deriving from corporate activity), the directors must intervene and ask shareholders to provide extra capital in order to cover losses.
- More precisely, should it become apparent (in the course of drawing up the annual financial statements or interim documents) – or if it can be assumed when duly assessing the circumstances – that there has been a loss of share capital, the directors will have to call a general meeting without undue delay.

# RULES ON CAPITAL PROTECTION
# RELEVANT LOSSES AND COMPULSORY RECAPITALIZATION

- This is the general principle that can be derived from the directive: article 77 states that the subscribed capital may not be reduced to an amount less than the legal minimum capital laid down in the national company's law.
- Moreover, the art. 58 adds that 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. 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.
- This is the rule known as “recapitalized or liquidate”. It has been implemented in different ways by the member states, and the issue has – notwithstanding the (in fact very laconic) wording of the directive – not been harmonised to a great extent.

# THE REDUCTION OF CAPITAL IN EXCESS

- The establishment of a certain amount of share capital in the instrument of incorporation produces in any case a sort of (positive) "signalling effect" for creditors. Often, they decide to provide financing – or supply goods or services – deliberately relying on the fact that the company has a certain amount of capital, that is to say a definite amount of assets represented by that figure (which are protected by the rules described above).
- This is why legal capital cannot be freely reduced by a general meeting resolution amending the articles of association and shareholders cannot be spontaneously repaid by directors. Creditors' legitimate expectations also have to be safeguarded.

# THE REDUCTION OF CAPITAL IN EXCESS

- EU rules on this regard are particularly strict. First of all, article 73 of the directive states that any reduction in the legal capital shall be subject to a decision of the general meeting with at least a supermajority of two third (the notice convening the meeting must also specify the purpose of the capital reduction and how it is to be carried out).
- The most important provision is contained in the article 75. At least the creditors whose claims predate the publication of the decision on the capital reduction shall have the right to obtain security for claims which had not fallen due by the date of that publication. Member states may not waive this type of right unless the creditor has adequate safeguards (or unless such safeguards are unnecessary having regard to the assets of the company). In any event, member states must ensure that the creditors are authorised to apply to the appropriate administrative or judicial authority for adequate protection, 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 not what safeguards have been obtained from the company.

# THE REDUCTION OF CAPITAL IN EXCESS

- The principle is rather clear, but at the same time it needs to be implemented. National rules differ greatly, and the analysis of these dissimilar provisions is very interesting, since it clearly demonstrates how the issue of the creditor protection can be handled within various legal frameworks and by means of different technical solutions.
- Sweden: company law provides for a kind of "solvency test". Whenever the directors should take action to reduce the legal capital for repayment to the shareholders, a statement as to whether the proposed repayment is justifiable must be appended to the proposal; as a matter of fact, the transaction can be carried out by the directors, even though it is under their own responsibility.
- Germany: creditors' protection is very intensive; shareholders shall not receive any payment resulting from the capital reduction until six months have elapsed since the registration of the resolution, during which time creditors who are entitled to and have requested a security or payment of their claim have received it.
- Italy: company law gives to the creditors the right to oppose the reduction, but on the condition that they demonstrate that the transaction is potentially harmful for their credit.