

Legal Capital and Finances of the Company*

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1. Introduction

This chapter examines core questions of corporate finance law, including the notion of legal (share) capital, increase and reduction of that capital, doctrine of capital maintenance, and dividends distribution. Many jurisdictions prescribe minimum capital thresholds for particular legal forms of corporations (e.g. most notably joint-stock companies and, in some systems, limited liability companies) intended to ensure that companies commence operations with adequate resources to absorb initial business risks. The formation and maintenance rules that surround legal capital are therefore fundamental. At incorporation, shareholders must contribute to the required share capital, whether in cash or in kind. Capital-maintenance constraints then police subsequent outflows, such as distributions, share buy-backs, or other equity-reducing transactions, such that the company's financial baseline is not unduly eroded.

In company law, legal capital denotes the portion of equity that must be preserved as a creditor buffer. It functions as a financial cushion, limiting the extent to which assets can be distributed to shareholders and ensuring, at least theoretically, that a

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minimum, durable layer of equity remains available to meet obligations. Because it allocates risk between creditors and owners, legal capital sits at the heart of corporate governance and is typically the subject of detailed statutory provisions. Legal capital is commonly tied to the aggregate nominal (par) value of issued shares, sometimes augmented by statutory non-distributable reserves.¹ Its protective purpose is realised by restrictions on withdrawals by shareholders, as well as through by procedural and substantive safeguards around profit distributions and other equity transactions. Preservation is achieved through the following: rules that confine distributions to realised and distributable profits or reserves in such a way that the legal capital itself is not consumed; limits and formalities governing repurchases and redemptions to avoid undue equity depletion; creditor-oriented protections (e.g. notice, opposition, or security) where transactions may materially affect the company's capital position.

Although the rationale for legal capital is creditor protection, the model has attracted sustained criticism in modern finance. Critics contend various points, including that rigid capital rules can over-constrain growing businesses, especially start-ups; sophisticated creditors increasingly rely on covenants, security interests, guarantees, and disclosure rather than nominal capital; a focus on par values says little about actual solvency or going-concern viability. In response, a number of legal systems have shifted their emphasis toward solvency-based tests and director duties calibrated to financial distress, seeking to ensure that companies remain able to meet debts as they fall due and maintain assets in excess of liabilities, rather than simply preserving a historically-stated capital figure.

In general, companies deploy a spectrum of financing tools beyond legal capital to tailor their capital structure to evolving needs, without immediately altering nominal share capital. Debt financing (e.g. bank loans, bond issuances, and committed credit facilities) can mobilise substantial funds without diluting ownership, albeit it introduces fixed-charge obligations and refinancing risk. Hybrid financing instruments bridge debt and equity. For example, convertible bonds defer potential dilution while offering creditors a conversion option. Preference shares can deliver fixed dividends and embed redemption or conversion mechanics to meet bespoke financing objectives. Asset leasing conserves cash by substituting periodic rentals for upfront expenditure, while receivables factoring accelerates liquidity by monetising trade debts at a discount. Internally, retained earnings provide non-dilutive funding by reinvesting profits, which preserves control but presupposes sustained profitability.

1 Statutory non-distributable reserves are equity amounts that the law requires a company to retain and not pay out to shareholders. They exist to protect capital and creditors; distributions may not reduce net assets below the sum of subscribed/registered capital plus all legally non-distributable reserves. They usually can be used only for tightly-defined purposes (e.g., covering losses) or become distributable only when "realised". Some examples of statutory (jurisdiction-dependent) non-distributable reserves: (a) legal reserve (a mandated part of annual profits until it reaches a set percentage of share capital); revaluation reserve (gains from asset revaluations; not distributable until realised through sale/consumption); reserve for own shares/treasury shares (an amount equal to the cost of treasury shares that must be locked).

For early-stage and scaling firms, venture capital and private equity supply risk-bearing funds and strategic support in exchange for governance rights and a path to exit. Non-dilutive grants and subsidies (domestic or supranational) can underwrite research, innovation, or projects with public-interest features, albeit subject to use conditions. Crowdfunding and other alternative-finance channels widen the investor base (or lenders in peer-to-peer models) and may incorporate revenue-sharing arrangements. Strategic alliances and joint ventures mobilise partner resources and allow cost sharing, functioning as indirect financing while aligning incentives on targeted projects, markets, or technologies. Finally, asset-based finance (secured loans or sale-and-leaseback transactions) leverages existing collateral to obtain liquidity. In practice, firms mix these modalities to balance flexibility, cost, control, and risk.

Importantly, increases and reductions in legal capital remain essential corporate mechanisms allowing the company's financial structure to adapt, but only within legal frameworks designed to safeguard shareholders and creditors. Increases of legal capital may serve for growth, acquisitions, and operational scaling, or signal balance-sheet strength to investors and trading partners. They are commonly implemented by issuing new shares to existing members (with pre-emptive rights where applicable) or to new investors, capitalising reserves or retained earnings into share capital, or converting debt into equity to deleverage and improve solvency metrics. Each pathway is conditioned on corporate approvals (typically through a general meeting), compliance with filing and disclosure obligations, and, in some systems, independent valuation for in-kind contributions to ensure fair and transparent pricing.

In contrast, reductions of legal capital are employed to return surplus funds to shareholders, right-size an over-capitalised balance sheet, or absorb losses and restore balance-sheet integrity. They may be impacted by cancelling shares, repaying paid-in amounts to shareholders, or reducing share nominal value. Because reductions alter the creditor buffer, they are subject to tighter procedures, including the following: shareholder resolutions of an enhanced majority; public notice and waiting periods; creditor opposition rights and, where appropriate, the provision of security or full payment of objecting claims before the reduction takes effect. Some systems additionally require disclosure in official journals and court oversight where disputes arise. These safeguards inevitably add time and cost to the process, but are calibrated to protect legitimate creditor reliance on the company's stated equity base. In general, the regulatory architecture around increases and reductions in legal capital seeks to reconcile corporate flexibility with stakeholder protection. When properly observed, it enables firms to respond to market conditions and strategic imperatives without compromising solvency or the priority structure that creditors and minority shareholders reasonably expect.

Capital maintenance is at the basis of this architecture, preserving the integrity of the equity base as established at formation or as later augmented, and it disciplines the use of corporate assets in relation with shareholders. This doctrine bars the arbitrary erosion of legal capital and permits returns to shareholders, even if only within statutory conditions. This means that distributions (e.g. dividends, redemptions, and

buy-backs) are confined to distributable profits or free reserves after provisioning for losses and mandatory reserves; equity-reducing transactions must follow prescribed procedures and, where applicable, creditor-protection steps; in many jurisdictions, the financial assistance rules prevent a company from materially financing the acquisition of its own shares in ways that would undercut its capital position. These rules frequently operate alongside solvency requirements, obliging boards to certify that the company can pay its debts as they fall due and that net assets remain adequate after the transaction. These legal constraints are reinforced by accounting, audit, and disclosure duties that provide transparency and permit monitoring by shareholders, creditors, regulators, and courts.

The law of dividends has a central role in this framework, being at the intersection of shareholder reward and balance-sheet prudence. Dividends are distributions of profits to shareholders and ordinarily depend on properly-determined, distributable earnings after operating expenses, taxes, and statutory allocations. Most systems prohibit distributions that would reduce net assets below the sum of share capital and non-distributable reserves, thereby protecting creditors and the capital floor. The general meeting typically authorises dividends based on the board's recommendation, aligning payout policies with the company's strategy, investment policy, and liquidity needs. Thus, directors who authorise unlawful distributions risk personal liability for breach of duty and may be obliged to procure restitution from shareholders who knew or should have known of the irregularity.

Dividend policy must create a compromise between investor expectations and resilience. Regular, sustainable payouts can signal performance and attract capital, but excessive distributions may starve the firm of funds for innovation, acquisitions, or downturn buffers. Minority-protection concerns can arise if controlling shareholders press for distributions that disproportionately serve their interests, or if remedies in company law (e.g. unfair-prejudice claims or fiduciary-duty enforcement) respond to such conflicts. Finally, the form and timing of distributions (i.e. cash, stock dividends,² or distributions in specie)³ carry distinct legal and financial consequences, whereby boards must select modalities consistent with the corporation's statutory constraints, strategy, and solvency profile.

2 The company issues new shares to shareholders instead of cash, sometimes as an elective alternative to cash, increasing the legal capital; this capitalises reserves but can dilute holdings of non-electing or future shareholders.

3 The company distributes non-cash assets to shareholders, such as property, shares in a subsidiary, equipment, or receivables, valued at fair market value and subject to the usual solvency/capital-maintenance rules.

2. The Czech Republic

2.1. Introduction to Legal Capital in the Czech Republic

Share capital is one of the methods available for financing company activities. In Czech law and in continental law, it is understood as a liability item (balance sheet) expressing the value of the assets contributed by shareholders at the time of establishment or during the life of the company against the acquisition or increase of participation in the company.⁴ The share capital is therefore not a company asset but an expression of the value of the assets received from shareholders when they acquire or increase their participation in the company in exchange for these assets.⁵ The assets contributed may be freely disposed of by the company without affecting the share capital amount.⁶ Still, shareholders can finance the company using methods other than share capital. Share premium, additions to the share capital outside the share capital, or donations may be considered as part of equity,⁷ and so can be the profit generated by the company's activities. The company may also obtain resources from shareholders or third parties in other ways, such as through loans, a silent partnership contribution, or the issue of bonds.

Czech legislation, following Directive 2017/1132, contains a number of rules on the protection of the company's share capital in connection with formation, as well as rules on the maintenance of the company's capital during its existence. Various rules that the Directive requires to be transposed into the law on shares are also applied by the Czech legislator to private companies.

2.2. Minimum Legal Capital Requirements

The statutory requirement for the minimum amount of contribution in a private company in Section 142(1) Business Corporations Act (BCA) indirectly determines the statutory minimum share capital. In a private company, this minimum share capital is symbolic, which could imply to some extent the abandonment of the guarantee function of share capital. Still, various pursuing the real creation and maintenance of share capital are retained for a private company (see below). The share capital of a private company may be expressed only in Czech koruna.

The minimum share capital of a private company is based on the number of shares created in its memorandum of association and the amount of contributions

⁴ Štenglová et al., 2023, p. 13.

⁵ Černá et al., 2021, p. 198.

⁶ Štenglová et al., 2023, p. 13.

⁷ Černá et al., 2021, p. 198.

attributable to them.⁸ If only one share is created (the company has a single shareholder with one share), the minimum share capital is 1 Czech koruna. If more than one share is created, regardless of shareholder numbers, the minimum amount of the share capital corresponds to the number of shares (e.g. 3 Czech koruna for three shares). In certain areas of the economy, sectoral laws may set higher minimum capital or contribution requirements (e.g. minimum capital requirements for a securities trader).

For public companies, the law stipulates that the share capital is at least two million Czech koruna or 80 thousand EUR [Section 246(2) BCA]. The requirements of the Czech law are therefore stricter than the requirements of Directive 2017/1132, according to which the minimum amount of the share capital of a public company should be 25 thousand Czech koruna. The possibility to express the share capital in EUR is subject to the condition that a specific law allows the company's accounts to be kept in EUR [Section 246(1) BCA]. This special law is Act no. 563/1991 Sb. on Accounting, which does not, however, provide any explicit rules for keeping accounting records in EUR. J. Dědič suggests that the creation of share capital in EUR is only possible if the company keeps its entire accounting records in EUR. This, in turn, is only permissible if the company is an issuer of securities admitted to trading on a European regulated market.⁹

Importantly, the Czech legislator does not expressly require that the share capital amount at the time of company incorporation reasonably corresponds to the purpose for which the company is established.¹⁰ Still, this objective is pursued in certain cases where the company is under a special legal regime, such as banks or insurance companies, for which the relevant laws provide for a significantly higher minimum share capital than is required for public companies in general. Despite the absence of a general rule preventing the initial undercapitalisation of companies, I believe that this loophole can be bridged through the principle of fairness under Section 6 of the Czech Civil Code (Czech CC). Therefore, it cannot be excluded that a deliberate undercapitalisation of a company to the detriment of particularly involuntary creditors could be assessed as an abuse of law and lead to the imposition of the liability of shareholders for the company's debts for deliberate breach of good morals [Section

8 Pursuant to Section 108, CC, a minimum share capital of 100,000 Czech koruna was required for a private company established by 31 December 2000, and a minimum share capital of 200,000 Czech koruna for companies established from 1 January 2001. Companies established before 1 January 2001 were not obliged to make up the amount of the share capital to Czech koruna 200,000 (transitional provision of Article VIII, point 18 of Act No. 370/2000 Sb.). The minimum amount of a shareholder's contribution was Czech koruna 20,000 as of 1 January 1992 pursuant to Section 109 CC. A shareholder could only contribute a single contribution and the amount of the contribution had to be divisible into thousands. These requirements are no longer laid down in the Business Corporations Act (BCA); however, they could become part of the autonomous regulation of companies as a result of their enshrinement in the articles of association.

9 Štenglová et al., 2023, pp. 12, 13.

10 Černá et al., 2021, p. 198.

2909 Czech CC] or to their punitive liability as a result of the assessment of the matter as an influence [Section 71(3) BCA].¹¹

The BCA prohibits the issuance of shares at a lower issue price than their nominal or non-par value share (i.e. below price). For a public company, this rule is expressly enshrined in the law (Section 247 BCA) and corresponds to the requirements of Directive 2017/1132. For a private company, it follows indirectly from the provisions of Section 15 (1)(4), taking into account Section 28 BCA. An exception is the case of the benefit of employees of a public company, where it is possible, when increasing the share capital, for such persons to acquire shares in the company below the price if the articles of association or the resolution of the general meeting to increase the share capital so provides, and if the difference between the paid-up part of the issue price and the price or issue price is covered by the company's own resources (Section 258 BCA). This rule is mainly used by start-ups.

In summary, the share capital is the aggregate of all contributions (Section 30 BCA). For shareholders of both private and public companies, the contribution obligation is mandatory, and in neither can a share be created without a contribution obligation.

2.3. Rules for Contributions to the Legal Capital

Czech law requires that the contribution obligation be fulfilled before the company is formed only in the case of contributions in kind [Section 23(3) BCA]. Meanwhile, it does not require that upon the establishment of a company the cash contributions be paid in full before the company is established or before the increase of the share capital takes effect. It only requires that the entire share premium and at least 30% of the nominal value of the shares subscribed for in the case of a private company [Section 148 BCA]), and the entire share premium and in aggregate at least 30% of the nominal value of the shares subscribed for in the case of a public company [Section 253(1) BCA], be paid up before the company is incorporated or the share capital is increased. The time for the payment of the balance is to be determined by the memorandum and articles of association. For a private company, the period of repayment shall not exceed five years [Section 150(1) BCA], and shall not exceed one year from the incorporation of a public company or increase in its share capital [Section 344(1) BCA].

The conditions for the repayment of cash contributions, and for providing contributions in kind, are stricter than those set out in Directive 2017/1132. This means that shareholders may fall into default on their contribution obligation. Moreover, delays in fulfilling the contribution obligation accompany various negative consequences for shareholders, which should motivate them to fulfil the contribution obligation on time. These consequences are:

- a) the company may enforce the defaulting shareholder's claim for satisfaction of the contribution obligation by action in court.

11 Lokajíček, 2016, pp. 115 et seq.

- b) may claim damages to the extent that it is not covered by default interest (Section 1971 Czech CC).
- c) may claim interest for default at the rate specified in the memorandum of association, otherwise at twice the statutory rate [Section 151(1) and 344 (2) BCA].
- d) may demand payment of a contractual penalty if it is agreed in the memorandum or articles of association in case of default in the fulfilment of the contribution obligation.
- e) may initiate exclusion proceedings (*kadukční řízení*). This may result in their expulsion from the company by a resolution of the general meeting or the statutory body in the case of a public limited company (Section 151 and 345 BCA), or a private company may apply to the court for a decision on his/her expulsion (Section 204 BCA).¹²
- f) a shareholder may not exercise the voting rights attached to a share in respect of which he/she is in default of a contribution obligation to the extent of such default [Section 173(1)(d) and Section 426(c) BCA].

Failure to meet the contribution obligation is also a bar to the right to withdrawal of a member from a private company in the cases provided for by law [cf. Section 164(3) BCA and the referring Sections 202 and 207(3) BCA]. The exercise of the right to withdraw from the company is conditional on the extinction of the contribution obligation, not merely the absence of its default. In other words, a shareholder cannot withdraw from the company if they have not fulfilled the contribution obligation, and it is irrelevant whether they are in default in fulfilling it. These rules should also motivate a shareholder to fulfil the contribution obligation, even before they are obliged to do so, if they wish to exercise their right to withdraw from the company.

The statute of limitations for the contribution obligation is the general limitation period (Sections 609, 629 and 630 Czech CC). If the right to fulfil the contribution obligation is time-barred, the shareholder cannot be expelled from the company,¹³ and releasing a shareholder from the contribution obligation is prohibited. This prohibition is set out for private companies in Section 150(2) BCA and for public companies in Section 344(3) BCA. The essence of the prohibition on the waiver of the contribution obligation is that a company cannot enter into an agreement with a shareholder to extinguish the contribution obligation pursuant to Section 1981 Czech CC or an agreement to waive a debt pursuant to Section 1995 Czech CC. An exception is the reduction

¹² The reason is that the law provides that the general meeting decides on the exclusion of a shareholder from a private company. Therefore, it is possible that if there is no consensus on shareholder exclusion, then the court may decide on their exclusion. This is not an option in the circumstances of a public company, where the decision to exclude a shareholder is taken by the board of directors and its members are obliged to act with due care in making that decision.

¹³ Judgments of the Supreme Court, case No. 29 Cdo 631/2010 and 29 Cdo 1553/2007. Judgment of the High Court in Prague, case No. 14 Cmo 190/2019. Černá et al., 2021, p. 372.

of the share capital. The question remains, what about the set-off. We shall elaborate on this further.

The termination of the contribution obligation ideally occurs upon fulfilment, but can also occur as a result of a reduction of the share capital. This last point entails a waiver of the contribution obligation [Section 233(c) BCA], setoff in the case of the realisation of a guarantee for the debts of a private company [Section 134(1) BCA], in the case of the capitalisation of a claim in the event of a capital increase [Section 224(3) BCA], and in other cases. The latter case is contentious.

The BCA, as opposed to Section 108(2) Commercial Code (CC), does not contain an express prohibition on the setoff of a shareholder's claims against a private company's claim to satisfy a contribution obligation, except for a capital increase. A setoff cannot be considered a form of waiver within the meaning of Section 150(2) BCA. J. Pokorná is inclined to the conclusion that a setoff is not possible except in cases of capital increase,¹⁴ while B. Havel takes the opposite view.¹⁵ I am inclined to the second view, namely that a setoff agreement is possible also in relation to a cash contribution to a private company arising on company incorporation, not only on a capital increase. Under Section 21(3) BCA, a unilateral setoff is excluded. Moreover, a setoff agreement must be made in writing [Section 21(3) BCA], and its conclusion is subject to approval by the general meeting and a two-thirds majority vote of all shareholders in a private company [Section 171(1)(c) BCA]; in a public company, a two-thirds majority vote of the shareholders present is required [Section 416(1) BCA]. Dishonest legal conduct is also prevented by the statutory prohibition on setoff of uncertain or indeterminate claims [Section 1987(2) Czech CC].

Contributions in kind are subject to mandatory evaluation. In the case of an item of consideration in kind, which may be anything that can be valued in a monetary equivalent pursuant to Section 15(3) BCA, a valuation report by an independent expert is required in the cases of both private and public companies (Section 143 BCA). This is based on the requirement of Directive 2017/1132 in respect of a public company. The object of the contribution in kind must not be an obligation to do work or perform services [Section 17(3) BCA], and the contribution in kind must be fully paid before the company is formed or the application for registration is made [Section 23(3) BCA].

Unlike the CC, it is no longer required that the object of the contribution in kind be economically usable by the company and be valued by two court-appointed experts. A valuation report by one expert selected from the list of experts maintained by the Ministry of Justice is sufficient. The approval of the expert by the court is no longer required.

In the event of a capital increase, the subject of a contribution in kind is subject to valuation by an expert selected from a list of experts, unless exceptions to the valuation by an expert apply, in which case the value of the contribution in kind is ascertained in another manner permitted by law (Sections 468–473 BCA).

¹⁴ Lasák et al., 2021, p. 841.

¹⁵ Štenglová et al., 2020, p. 370.

These procedures cannot be used in the formation of a corporation,¹⁶ specifically because the departure from the general requirement for an expert valuation must be appropriate, and that appropriateness must be judged with due care by the members of the managing board.¹⁷

Performance contributions are prohibited. In the case of both private and public companies, the subject of the contribution must not be obligation to do work or perform services [Section 17(3) BCA]. This statutory requirement is consistent with Directive 2017/1132.

The capitalisation of claims on incorporation is prohibited, such that it is forbidden to include as the subject of the contribution the shareholder's claim against the private and public company at its incorporation (i.e. at the initial creation of the share capital) [Section 21(3) BCA]. This is because, as a result of the capitalisation of the claim, the debt of the company is converted into an interest in the company, meaning that the company reduces the extent of its indebtedness but does not acquire any assets to start its business. Moreover, when a company is established, in principle, there can be no question of the company's debts (cf. on this point the act for the so-called pre-company; Section 127 Czech CC; on setoff, cf. in more detail under (d)).

Paid-up cash contributions before the company is formed are protected. Cash contributions in private companies and public companies are paid into a special account with a bank or credit union, and may be disposed of only after company formation, unless it is for the payment of establishment costs [Section 23(1) BCA]. An exception to the obligation to establish a special account with a bank is made in cases where cash contributions to a private company do not exceed 20,000 Czech koruna in aggregate [Section 23(2) BCA]. In such cases, they may also be paid to the hands of the contribution administrator in cash or by transfer to their account. The aim of this regulation is not to reduce the amount of funds invested before the company is established below the amount of cash contributions, but to ensure that the company has cash available in the expected amount to start its business.

The shareholders must make up the value of the contribution in kind. A shareholder who has made a contribution in kind to the company, in respect of which the company has either not acquired the ownership right at all or has acquired it, but its value on the date of acquisition of the ownership right was lower than the amount of the issue price, is obliged to make up the value of the contribution in money [Section 26 and 28 BCA]. Again, the purpose of this rule is to achieve a situation where the company has, in connection with its formation, real assets with a value that corresponds to the amount at which the share capital is to be paid up. I judge that this rule is only part of the contribution obligation, not an obligation distinct from the contribution obligation. I am therefore inclined to the conclusion that a default in

16 Lasák et al., 2021, p. 818.

17 Černá et al., 2021, p. 333.

complying with the replacement obligation has the same consequences as a default in complying with the contribution obligation [see (b)].¹⁸

Attempts at circumventing the rules on contributions in kind are prohibited (prohibition of “hidden contributions”). For public companies, the insurance against circumvention of the rule on the valuation of contribution in kind and the prohibition to issue shares “sub pari” is the prohibition to acquire the company’s assets for consideration from the founders or shareholders within two years of company incorporation, unless the statutory conditions are met. The statutory regulation complies with the requirements of Directive 2017/1132. The purpose here is to ensure that the shareholder does not inject cash into the company and then have the company buy the item from them at a price higher than its value, thereby circumventing the rules on contributions in kind. For this reason, for a public company and following the requirements of the Directive, it is stipulated that within two years of its formation, if more than 10% of the subscribed share capital is to be paid for, property may only be acquired for a consideration which does not exceed the value of the property to be acquired, as determined by an expert’s valuation report and with the approval of the general meeting; this is not required in the case of acquisition of property in the ordinary course of business or on a European regulated market [Section 255 BCA]. Section 255(4) BCA contains a special regulation of the consequences of the absence of an expert’s valuation report: the shareholder or founder is obliged to return to the company the part of the consideration exceeding the price determined by the expert valuation report. In the absence of approval by the general meeting, the juridical act in question is relatively invalid under Section 48 BCA, and the invalidity may be invoked by the company or its shareholder. There is no similar express rule for a private company in the BCA. However, very similar in nature is the prohibition on the return of contributions and the prohibition on gratuitous benefits to members contained in Section 40(5) BCA.

Share transfers are subject to a legal guarantee. Upon the transfer of a share for which the contribution obligation has not been fully met, the transferor shall be liable for its fulfilment. This applies in the case of both companies, regardless of whether the transfer is of a certificated or an uncertificated share. If the new transferee fails to fulfil the contribution obligation, the company is entitled to claim performance from the transferor as guarantor by operation of law [Section 209(1), 256(3) and 285(3) BCA].

2.4. Capital Maintenance and Protection

The law does not require a company, throughout its existence, to have assets corresponding to the current value of its share capital. If a company is not successful in business, the value of its assets may fall below the value of its share capital. The rules governing the maintenance of the share capital should prevent the company’s

18 In the same sense, see Janošek, 2015, as well as a contrary judgment of the Supreme Court, case No. 29 Odo 760/2006.

assets from falling in value on purpose (i.e. the company should not purposefully favour its shareholders over its creditors), and the guarantee function of the share capital should be fulfilled to a certain extent. While the distribution of profits will be discussed separately below (see subchapter 3.5), many of the rules relating to the distribution of profits are a manifestation of the capital maintenance principle – particularly the second balance sheet test.

Section 16(1) BCA prohibits the return of the object of the contribution to the shareholder.¹⁹ However, it is modified by other rules, the fulfilment of which may lead to the return of the object of the contribution (e.g. upon reduction of the share capital, payment of the share of the liquidation balance, and payment of the settlement share). Flidr interprets the rule as:

prohibiting disguised payments of profit shares and requiring that in commercial transactions between a capital company and a shareholder, the agreed mutual benefits be equivalent. If the company does not receive equivalent consideration under the contract with the shareholder, the shareholder must make up the difference in consideration after the fact.²⁰

I add that this conclusion, while generally valid, does not apply in a situation where the concern privilege under Section 72 BCA applies.

Closely related to the previous rule is the prohibition of a shareholder's withdrawal from the public company, unlike the case for a shareholder in a private company.²¹ If a shareholder no longer wishes to be a shareholder, one may sell the shares to another or, in the cases provided for by law, require them to be purchased from them by the company, the principal shareholder, or the controlling person. Such a transaction shall be neutral with respect to the company's equity and share capital. A shareholder's participation in a public company may also be extinguished as a result of a reduction in the share capital.

In the case of a shareholder in a private company, it is possible to withdraw from the company in statutory cases if the shareholder's contribution obligation is fully paid [Section 164 (3) BCA and Section 202 and 207 (3) BCA referring to it]. If the released share is not sold or does not pass to other shareholders, then the private company must also proceed to a reduction of the share capital, otherwise it risks dissolution (Section 215 BCA). The reason again is that this operation should not cause the equity capital to fall below the statutory capital. Section 16(2) BCA provides that interest on the issue price cannot be agreed or paid. According to P. Kuhn,

19 However, this view is not uniformly accepted. For example, Kříž and Kubík are inclined to the conclusion that Czech law does not contain a prohibition on the return of the object of contributions, and that Section 16 BCA only negatively establishes the rights of a shareholder (see the contribution of the authors in Lasák et al., 2021, p. 104).

20 Flidr, 2018, p. 241.

21 Exceptionally, the law provides for the shareholder's right to withdraw from the company when regulating certain transformations.

[a]ccountable interest [...] is to be understood as any fixed or floating amount, the amount of which is derived from the issue price or part thereof (whether expressed as a percentage or otherwise) and which is to be paid to the shareholders in excess of the net profit or loss which is by law intended to be paid to the shareholders.²²

For public companies, the prohibition to attaching to shares a right to receive a certain interest independently of the company's results is also enshrined in Section 276(4) BCA. Such an agreement would make the shareholder's claim a fixed claim, as in the case of creditors, which would completely negate the principle that the nature of the shareholder's claim is residual.

In accordance with Directive 2017/1132, the managing board in a public company must convene a general meeting without undue delay after becoming aware that the total loss of the company on the basis of the financial statements has reached such an amount that, if it were to be covered from the company's available resources, the unpaid loss would amount to half of the share capital or could be expected to do so considering all the circumstances, or for any other serious reason, and to propose to the general meeting the dissolution of the company or the adoption of any other appropriate measure [Section 403(2) BCA]. Failure to do so will generally constitute a breach of due care by directors. A similar rule can be encountered for private companies, where the managing director is required to convene a general meeting without undue delay after becoming aware that the company is threatened with bankruptcy or for other serious reasons, in particular if the objective pursued by the company is threatened. The managing director is also required to propose to the general meeting the dissolution of the company or the adoption of any other appropriate measure [Section 182 BCA]. Other than company dissolution, appropriate measures may be to increase the share capital, to effect a conversion, among others. The regulation of this issue is also part of the broader concept of capital maintenance, which is discussed, along with financial assistance, in more detail in Chapter 6.

2.5. Increase and Reduction of Legal Capital

The determination of the share capital amount is an obligatory element of the memorandum and articles of association, which is entered in the Commercial Register. The share capital of private and public companies is based on the principle of a fixed amount of share capital,²³ such that the law prescribes a detailed procedure by which a change in the share capital can be achieved.

These are mandatory rules designed to protect company shareholders and creditors. For private companies, the change of share capital is decided by the general

²² Štenglová et al., 2020, p. 52.

²³ An exception is a public company with variable share capital (also known as SICAV), the regulation of which is governed by Act No. 240/2013 Sb. on investment companies and investment funds.

meeting and requires the consent of a qualified two-thirds majority of all shareholders. If the process of amending the share capital is not successfully completed (e.g. no one assumes the contribution obligation, the application for registration is not submitted in time, or it is finally rejected or refused), the resolution of the general meeting is cancelled or does not take effect. A change in share capital amount results in a change in the content of the memorandum and articles of association. The decision to change the share capital amount falls within the competence of the general meeting even if it is not entitled to decide on a change in the content of the memorandum of association (e.g. in the case of a private company, this competence must be conferred on it by the memorandum of association). For public companies, the general meeting also decides in principle, requiring approval by a qualified majority of the votes of the shareholders present and voting according to share type. Under certain conditions, the managing board may decide to increase the share capital. A notarial record must always be made of the decision to change the share capital amount.

The reasons for changing the share capital amount can vary from the company's need to raise additional funds to finance its business, reimburse losses, and the shareholders' request for a partial return of their contributions if the company does not need such a large amount of share capital for its own financing. The entry of a new shareholder as a strategic partner in the company may also be a reason for increasing share capital.

We distinguish between nominal and effective changes in share capital in the cases of both increases or decreases. In practice, a combination of these methods may also be encountered. If participating securities (e.g. registered shares and certificated share) are issued, the process ends, as the case may be, with their surrender, exchange, or the indication of their new nominal value. In the case of dematerialised shares, it is then necessary to order a change in their nominal value or the issue of new dematerialised shares. A nominal capital increase means that the company's resources are used to increase the share capital. The company may thereby increase its credibility or do so in other cases where a greater involvement of own resources is required (e.g. a bank requires a nominal increase in share capital as a condition for granting a loan). A nominal capital reduction is then the solution chosen to cover the company's losses. In both nominal changes, the company does not acquire or lose any new assets; in other words, it is an accounting operation with no direct impact on the shareholders and creditors. In cases of a nominal increase in share capital, an indirect effect on shareholders may be that the scope for the payment of profit shares is reduced, since this operation reduces the difference between equity and share capital and thus the amount that can be distributed to shareholders as profit shares (cf. the requirement of the second balance sheet test to maintain equity at least equal to the share capital).

Regarding an effective increase in share capital, the increase is made by new contributions or by increasing the existing contributions, hence increasing the company's assets. While this is in principle favourable for creditors, seeing that the company acquires additional assets, it may be unfavourable for shareholders because the

increase in share capital may result in a subsequent change in their position if they do not want to or cannot participate in the share capital increase (e.g. the amount of new contributions is beyond their means or the memorandum and articles of association excludes a preferential right to participate in the increase in share capital). In the case of a capital increase by new contributions, the capitalisation of claims is permissible. A conditional increase of the share capital of a public company is an example of an effective share capital increase, taking place principally when exchangeable or senior bonds are issued. Regarding an effective capital reduction, the company's assets are reduced, and the difference is usually paid to shareholders. Here, it is creditors who may now be endangered.

The law establishes the shareholders' preferential right to participate in a share capital increase by cash contributions in principle in proportion to the amount of their shares. The right of first refusal is the most effective instrument for preventing a subsequent change in a shareholder's position in the company, ensuring that the shareholder participates in the share capital increase and maintains own position in the company. If a shareholder has a pre-emptive right, they may waive it for a particular capital increase or not use it. However, the memorandum of association of a private company may exclude, limit, or determine a different ratio for the assumption of the contribution obligation. Such a provision in the memorandum of association may be risky for shareholders. By contrast, the articles of association of a public company can neither limit nor exclude the right of first refusal, as only the general meeting can decide on this if it is in the important interests of the company.

For a share capital increase by contributions in kind, by the nature of the matter, the shareholders are not granted a preferential right to participate in the increase. In such situations, the non-cash object of the contribution is rarely of a divisible nature to maintain proportionality in the increase in participation. The protection of shareholders is ensured by a share capital increase by means of contributions in kind being only permissible if it is justified, that is, if it is more advantageous for the company to obtain a contribution in kind than a cash contribution.

For a share capital reduction, the protection of shareholders is ensured by the legal requirement for an equal reduction of the shareholders' contributions, and this cannot be excluded or limited by the memorandum and articles of association. An unequal reduction can only be made in a particular case with the consent of all shareholders. In public companies, the withdrawal of shares by lot, which is a method of unequal share capital reduction, is permitted.

The protection of creditors in the event of a capital increase is ensured by the following rules. It shall be prohibited for a company to increase the share capital from own resources beyond the amount of the shareholders' equity. Changes in the share capital may be made on the basis of annual, extraordinary, or interim accounts audited by an auditor with an unqualified opinion, and the applicability of the accounts is limited in time. Increases in cash may be made only after the existing cash contributions have been repaid.

When there is a share capital reduction, the law distinguishes whether it is an effective or nominal reduction, or whether it is aimed at covering a loss. If the nominal share capital reduction is not intended to cover a loss, the managing board must inform known creditors of the resolution of the general meeting to reduce the share capital. The managing board is also obliged to inform creditors by means of a notice in the Commercial Bulletin, providing protection in particular for unknown creditors. The notification must be made twice consecutively, 30 days apart. Only if the share capital reduction would impair the enforceability of creditors' claims against the company is the satisfaction of creditors or their adequate security a condition for a successful share capital reduction; namely, if the share capital reduction would have a negative effect on creditors, the creditors can prevent the reduction, otherwise they cannot.

The amount corresponding to the share capital reduction may be paid to shareholders only after the registration of the reduction in the Commercial Register (i.e. only if it is verified that the reduction does not endanger creditors). This is a concretisation of the principle that the claims of shareholders are residual (subordinate) and cannot "overtake" the fixed claims of creditors. We hold that the insolvency test under Section 40(3) BCA (i.e. the payment of the amount corresponding to the reduction to shareholders must not result in the company's insolvency) is also to be enforced in the case of a share capital reduction. Any opposite conclusion is contrary to the fundamental principle of company law that the claims of shareholders are residual. Importantly, there are some cases provided for by law wherein the company is obliged to reduce its share capital, usually as a penalty for non-compliance with certain rules (e.g. acquisition of treasury shares).

When increasing the share capital, the general meeting must first decide on this increase. When the increase stems from new contributions, this is followed by the assumption of the contribution obligation by the existing or new shareholders or the subscription of new shares. In essence, this is a contract between the company and the contributor or subscriber, since the contributor or subscriber accepts in the declaration or subscription the conditions set by the company during the decision of the general meeting regarding the increase in share capital. Subsequently, in accordance with the decision of the general meeting, contributions are made (i.e. those in kind are made immediately; those in cash may be paid in stages). The process is completed by entering the new share capital amount and other related facts in the Commercial Register (e.g. new amount of contributions and shares).

When reducing the share capital, the process is also initiated by a decision of the general meeting on this reduction. This is followed by a double announcement in the Commercial Bulletin, addressed to known creditors, and satisfaction or securing of creditors whose claims are threatened by the reduction. The process is completed with the registration of the reduction and the related data in the Commercial Register. For a public company, for the reduction of the share capital to be entered in the Commercial Register, there is the need first for a resolution of the general meeting on this reduction; then, the registration procedure is carried out only after all the steps

required by law have been completed twice: once for the registration of the resolution on the reduction of share capital; the second time for the registration of the reduced share capital. For a private company, the registration procedure for the reduction of share capital is carried out only once after all the steps required by law have been completed. Only after the reduction of the share capital is registered in the Commercial Register can the company dispose of the amount corresponding to the reduction of the share capital (e.g. pay it out to shareholders).

If the share capital of a private company is increased exclusively by new contributions or by increasing the existing contributions, the effects of the increase occur upon the assumption of the contribution obligation and the fulfilment of the contribution obligation to the prescribed extent [216(2) BCA]. Additionally, the entry in the Commercial Register has declaratory effects. The same conclusion shall apply if the share capital is increased by a public company whose shares are admitted to trading on a European regulated market or whose issue is the last condition for their admission to a European regulated market [464(1) BCA]. For other cases where the share capital of a privacy company is increased, the related effects shall be registered in the Commercial Register, and the registration shall have constitutive effects. An entry of a reduction of the share capital in the Commercial Register shall always have constitutive effects.

2.6. Rules for Profit Distribution and Dividends

The rights to a share of profits and to a share of other own resources are two separate rights, and their legal regulation is identical only to a certain extent. The regulation in the memorandum and articles of association may be different for the two rights.²⁴

We distinguish between a general right to a share of profits or to other own resources and a claim for payment of a specific share of profits or for other own resources. While a general right cannot be separated from the share, a claim for payment of a specific share can be separated on assignment, or its isolation occurs in the law of shares under Section 281 read with Sections 351 and 352 BCA.²⁵ If the claim is not separated, it remains part of the share.²⁶

The right to a share in the profits accrues to the shareholder by law, albeit companies can create shares without the right to a share in the profits [cf. Section 135(2), Section 256(1), and Section 276 BCA], or even modify the scope of this right by creating different types of shares.²⁷ In order for persons other than the shareholders to share in the distribution of profits or other own resources, this possibility must be expressly permitted by the memorandum and articles of association [Section 34(1) BCA]. This applies, for example, to royalties to directors, silent partnership agreements, and

²⁴ Lasák et al., 2021, p. 174.

²⁵ Lasák et al., 2021, p. 176; Štenglová et al., 2020, p. 87.

²⁶ Judgment of the Supreme Court, case No. 27 Cdo 1499/2017.

²⁷ For an overview of the development of the views of individual authors, see Lasák et al., 2021, pp. 174–176.

other agreements granting a third party a share in the profits (e.g. in a collective agreement).²⁸

The distribution of profits or other own resources is decided by the general meeting based on the annual or extraordinary accounts [Section 34(1) BCA], unless fixed profit shares are created. The approval of the underlying financial statements must take place before the end of the next financial year. Failure to comply with the time limit for approval of the financial statements means that the statutory requirements for the distribution of profits and other equity are not met, and neither are the requirements for their payment. In the case of such failure, the decision of the general meeting has no legal effect.²⁹ In other words, after the expiry of the period in the next financial year for which the financial statements are drawn up, the financial statements cease to be valid for a decision on the distribution of profits or other own resources. A resolution of the general meeting on the distribution of profits is an essential condition for the payment of profits or other equity, but is not required for fixed profit shares [Section 161(3) and Section 348(3) BCA]. If the distribution of other own resources is involved, a resolution of the general meeting on the distribution is always necessary.³⁰

The decision must be made by the end of the following financial year. There may be more than one decision at a given time and, if they do not have irreversible legal effect, they may be revoked.³¹ Failure to comply with the time limit for making a decision means that the legal prerequisites for either the distribution/payment of profits and other own resources are not met; nonetheless, any overrun of the statutory time limit for approval of the accounts, if approval is eventually granted, does not affect the possibility of making a decision on the distribution of profits. A decision based on ineligible accounts (i.e. for which balance sheet tests cannot be conducted) does not have legal effect because the law expressly provides that the decision does not have legal effect if balance sheet tests cannot be conducted.

The first prerequisite for a decision on the distribution of profits or payment of other own funds is the approval of the financial statements by the general meeting.³² In the cases of both private and public companies, three balance sheet tests must be met, the first under Section 34(2) BCA, the second and third under Section 40(1), (2) BCA. Failure to comply with the balance sheet tests renders the decision to distribute profits or other own resources without legal effect, therefore not an eligible basis for the payment of profit sharing. The first balance sheet test provides that the amount available for distribution must not exceed the sum of the profit for the last completed financial year, the profit for previous years, and such other funds as the company may use at its discretion, minus allocations to reserves and other funds in accordance with the law and the memorandum of association.

28 Judgment of the High Court in Olomouc, case No. 8 Cmo 102/2019.

29 Judgment of the Supreme Court, case No. 27 Cdo 1306/2023.

30 Lasák et al., 2021, p. 188.

31 Lasák et al., 2021, p. 194.

32 Judgment of the Supreme Court, case No. 27 Cdo 1457/2018.

The second balance sheet test provides that a company may not distribute profits or other equity resources if, at the end of the last financial year, the equity resulting from the annual or extraordinary accounts – or the equity after such distribution – falls below the amount of the subscribed capital plus any funds that cannot be distributed under the law or the memorandum of association. In other words, as a result of a distribution of profits or other own funds, the equity capital may not fall below the share capital. The third balance sheet test relates to development costs and sets limits on the distribution of profits or own resources in relation to them.

In public company law, case law has established that the profit may only be retained among shareholders for important reasons and in compliance with the prohibition of abuse of the majority of votes.³³ For a private company, the Supreme Court departed from these conclusions.³⁴ In my view, it is also in the interest of the public company that a certain portion of the profits should not be distributed to the shareholders and remain with the public company for its needs,³⁵ making it therefore questionable whether the Supreme Court will not change or at least moderate its view in time. However, no one doubts that more detailed rules can be laid down in the articles of association.

A share in the profits or other own resources is paid in cash unless the memorandum articles of association allow for consideration in kind (Section 161 and 348 BCA). Following the decision of the general meeting on the distribution, if required, the managing board decides on the payment of dividends or other own resources. The managing board must check that the statutory conditions are met, namely, that:

- a) the balance sheet tests have been met on the demerger
- b) the payout does not contravene the solvency test under Section 40(3) BCA;
- c) the other statutory requirements are met (e.g. the timing test for both the financial statements and the general meeting resolution).

If the conditions for payment are not met, the dividends or other own resources may not be paid and the company is not in default. If the dividends or other own resources would nevertheless be paid out, managing board members who agreed to the decision to pay it out must prove that they did not breach the duty of care. The shareholders are obliged to repay the amount paid as unjust enrichment [the exception is in accordance with Directive 2017/1132 Section 348(4) BCA, falling on shareholders who have wrongfully received the amount paid in good faith].

According to Section 35(1) BCA, interim dividends can only be paid based on interim financial statements showing that the company has sufficient resources to distribute the profits according to the first balance sheet test, and without considering capital funds. Interim dividends can only be paid in respect of a dividend, not a share of other own resources, and the memorandum and articles of association may exclude

33 Judgments of the Supreme Court, cases Nos. 27 Cdo 3885/2017 and 27 Cdo 2864/2020.

34 Judgment of the Supreme Court, case No. 27 Cdo 1306/2023.

35 The same opinion is also held by Dědič and Lasák. See Lasák et al., 2021, p. 197.

the possibility of paying interim dividends or tighten the legal conditions for its payment.³⁶ The underlying financial statements need not be approved by the general meeting, even if their approval is otherwise required in the case of a distribution of profits, unless the memorandum and articles of association provide otherwise.

Interim financial statements are prepared during the financial year for the purpose of the payment of interim dividends. They may be used as a basis for decisions throughout the financial year, unless the company's economic situation has changed. Nonetheless, the usefulness of interim financial statements diminishes over time. Ordinary and extraordinary financial statements may also serve as a basis for decisions.³⁷

The management board decides on the payment of the interim dividends based on residual powers (Section 163 Czech CC),³⁸ and cannot delegate the decision on this matter to some of its members or to outsiders because it is a matter concerning the relationship between the company and its members. The general meeting may instruct the management board to pay interim dividends, as this decision is not part of business management.³⁹

Under Section 35(2) BCA, interim dividends are refundable within three months of the date on which the ordinary or extraordinary accounts were or should have been approved. The exception is if the amount of profit to be distributed resulting from the ordinary or extraordinary accounts is at least the sum of the interim dividends paid in accordance with the Act, and the general meeting has decided to distribute that amount. The obligation to settle interim dividends is part of the share, even in a public company, and passes with the share to the new shareholder.⁴⁰

3. Croatia

3.1. Introduction to Legal Capital in Croatia

Members of a joint-stock company and a limited liability company contribute money, things, and/or rights to it when it is established. By investing their capital in the company, members shape the enterprise through which the company appears on the market and achieves its goals. Long-term profitability has a beneficial effect on asset increase, whereas unsuccessful and/or risky operations can reduce assets or lead to their loss if the company goes bankrupt. In addition to financing by its own capital, the company can also be financed by other (external) capital obtained by creditors. It is not an easy task to balance the different and possibly-conflicting interests of

36 Štenglová et al., 2020, p. 100.

37 Eichlerová, 2014, p. 44; Lasák et al., 2021, pp. 215–216.

38 Judgment of the Supreme Court, case No. 27 Cdo 3330/2020.

39 Judgment of the Supreme Court, case No. 27 Cdo 3330/2020. Eichlerová, 2014, p. 46; Lasák et al., 2021, p. 219; Čech and Skálová, 2014, p. 242.

40 Eichlerová, 2014, p. 46; Lasák et al., 2021, pp. 233–235; Čech and Skálová, 2014, p. 248. Kuhn expresses a contrary opinion. Štenglová et al., 2020, p. 102.

shareholders, who provide the company with its own capital, and the creditors, who finance it by loans. Since companies are most often financed by their own and other people's capital, creditors are, with regard to the possibility of failure of the entrepreneurial venture, more exposed to risks compared to members of the joint-stock company and limited liability company, as these stakeholders can directly affect company operations. This asymmetry in risk sharing regarding the operations of capital companies is overcome by special rules on the basis of which priority is given to the rights of creditors over the property rights of members in such companies.

The share capital is that part of own capital that the members contribute when establishing the company or later by increasing the share capital. It is not capital in the economic or credit sense,⁴¹ but an accounting category included in the liabilities of the company, and with this capital the company is not liable for obligations.⁴² For the security of creditors, the essential assets of the company are the ones which make up its assets and with which the company is liable for its obligations. This is because when a company enters the market as an enterprise holder, its net assets can "sink" below the nominal value of the share capital as a result of a loss, without affecting the member's settlement obligations or a subsequent increase in the share capital. For this reason, it is not correct to label it as "guarantee capital/amount" or "liability fund", because creditors have no certainty that the company will have assets in the future that are at least equal to the amount of the share capital, nor that their claims will be protected to the extent corresponding to that amount. As a signal of the seriousness of entering into an entrepreneurial venture and of creditor protection, the share capital serves as a buffer against the occurrence of reasons for bankruptcy. The importance of share capital in the service of creditor protection is manifested as follows: a) initial capital supply for the start of the company's economic activity; b) protection against the latent insolvency of the company; c) as a signal of the seriousness and preparedness of entering into an entrepreneurial venture.⁴³ In addition to this protective role, the share capital is also important for regulating internal relations in the company. The membership strength, based on the provisions of Article 398(2) Companies Act (CA), unless otherwise specified by the company contract, is reflected in monetary value based on what the members have contributed to the company through the payment of the share capital.

There are two basic principles on which it is determined that the company has at least the amount of assets that correspond in value to the share capital, and on which creditors are provided with the assurance that the company has enough to settle claims whose value reaches the amount of the share capital. The first is the principle of capital input, while the second is the principle of maintenance capital. Both principles can be subsumed under the higher concept of capital supply. The obligation for

41 Veil expresses a similar opinion. See Scholz, 2022, § 5 rbr. 7.

42 For more information, see Barbić, 2010, pp. 45 et seq.

43 For more on this, see Hennrichs, 2009, pp. 292 et seq.

the company to supply capital is correlated with the member's personal non-liability for the company's obligations.

The founding of the company, along with the distribution of profits and a state of crisis, is the central point pertaining to creditor protection where the interests of shareholders and creditors are in direct conflict.⁴⁴ The members are not required to prove that a certain amount of share capital is sufficient for the achievement of their entrepreneurial goals, nor does the registry court verify the company's capital supply in terms of the possibility of achieving the company's goals, but only checks whether the founders have brought assets into the company that it can dispose of. Accordingly, whether the company's business failure will have a negative impact on the company's creditors is a problem that is solved by the provisions on the protective effect of share capital.

3.2. Minimum Legal Capital Requirements

The mandatory provisions of the CA prevent the possibility of entering into a company less than what is stated as its share capital, that is, the company's initial assets being less than the amount of share capital.⁴⁵ The minimum amount of share capital for a joint-stock company is 25,000 EUR, and for a limited liability company 2,500 EUR.⁴⁶ Shares contributions can be paid to the company by entering money, things, and rights into it, depending on what kind of obligation is established by the company contract or its statement of establishment. The input of money is the simplest subject of payment of share capital and is the basic method of input of contributions to the company, and if there are obstacles to the fulfilment of the contract on the entry of things and rights, the obligation to pay the contribution to the company remains in money.

3.3. Rules for Contributions to the Legal Capital

If the founders assume the obligation of *al pari* payment, everything they bring into the company on that basis must correspond to the amount of the company's share capital. A permanent supply of capital is achieved by means of the principle of capital preservation, to which the company is subjected *ex lege* from its establishment until its termination. It is not possible by regulations to ensure that the company always makes favourable deals and that it does not run into losses, and thus the shareholders do not have the obligation to ensure that the company always has certain net assets.⁴⁷

Based on the provisions of Article 406(1) CA, members may not demand that the company return what they paid as a contribution, and neither be paid even interest on the basic contribution paid. Based on Article 407(1) CA, payments to shareholders

⁴⁴ For more on this, see Höfer, 2016, p. 399.

⁴⁵ In this regard, the provisions of Articles 389, 390, 392, 393, 394, 399, CA.

⁴⁶ Article 162 and 389(2), CA. As an alternative to the establishment of an "ordinary/classic" limited liability company, since 2012, the Croatian legal order allows the establishment of a simple limited liability company whose minimum share capital is 1 euro (Art. 390a, CA).

⁴⁷ For more on this, see Bezenberger, 2005, p. 17.

from the company's assets which correspond in value to the amount of the share capital are not allowed. This determines which part of the company's assets should be protected. The company may pay an amount to members only if its own assets exceed the amount determined by the accounting rules on financial reporting. The company's liabilities, shown on the liability side of the statement of financial position (balance sheet), should be included in the equation for calculating the amount of assets from which payments to members are allowed. It can be said that payments are allowed from own assets (i.e. assets whose value exceeds the sum of the company's share capital and liabilities). On the passive side of the balance sheet, there may be capital reserves (e.g. reserves provided for in the company contract or other reserves arising from payments for which share contributions were issued above par or arising from additional actions of members) and comparable own capital positions that do not reduce the company's net assets (e.g. retained earnings). Conclusions about which payments can be considered permissible should be made from the annual financial report on the company's financial position.⁴⁸

3.4. Capital Maintenance and Protection

When the company's own (net) assets fall below the amount of the share capital (i.e. when the assets of the company are less than so-called true liabilities), it is a negative report on the company's financial position. In that case, payments to members based on the provisions of Article 407(1) CA are not permitted. Nevertheless, the fact that the company operated at a loss does not necessarily lead to a ban on payments to members, because the company can, for example, cover the loss from retained earnings from previous periods or capital reserves, and pay the available excess assets above the share capital to members.⁴⁹ The assessment of the permissibility of each payment from the company's assets is therefore based on the principles of capital input and maintenance and on the rules for compiling a report on the company's financial position.⁵⁰

3.5. Increase and Reduction of Legal Capital

When the report on the financial position of the company is positive, the shareholders can take part in the company's assets, and as long as the company exists, the

48 According to Article 19(2) Accounting Act and in accordance with Article 407 CA. This report should not be equated with the report on the state of the company, which is not required to be prepared by a small entrepreneur according to accounting regulations in accordance with Article 431.bu related to Article 250.a(1), CA.

49 When a company operates at a loss, it is a passive report on the financial position of the company. Loss is an accounting term and represents a value that occurs as a result of the difference between income and expenses that the company realises during the business year. Income is the receipt from natural or legal persons in money or monetary value expressed in goods and services obtained as a counter value (consideration) for sold goods or services, sale or rental of real estate, interest on loans given, among others. Cerovac, 2004.

50 For more on this, see Winnefeld, 2015, § 13 rbr. 57.

members have the right to request that they be paid annually or retained profits.⁵¹ Apart from the basis of annual payment or retained earnings, there are other possible ways of acquiring the company's assets. Both the accounting criteria (e.g. those from the report on the state of the company)⁵² and the relevant assessment of the economic effects of the intervention are relevant for the assessment of the permissibility of the intervention. An intervention in the company's assets is inadmissible when its value corresponds to the amount of the share capital, and when it is an intervention for which the company has not received an appropriate counterobligation. The first intervention on the company's property is prevented or compensated by the provisions on illegal income from Article 407 CA, and others on the basis of liability for damage or of mandatory legal liability for the return of what was acquired without a basis.⁵³

The CA for a joint-stock company provides for three ways through which the company acquires new own capital and can raise the share capital: an increase in share capital through contributions; a conditional increase in share capital and authorised capital; an increase in share capital from the company's funds, meaning only an internal redistribution of already existing capital of the company.⁵⁴ Conditional capital increase is not possible in a limited liability company owing to their differential characteristics; their share contributions are not represented by securities, similar to a joint-stock company, and they do not always give the same rights nor entail the same obligations when it comes to the same nominal values of these shares. That is why it would not be easy, as is the case in a joint-stock company, to determine in advance the conversion of convertible bonds into business shares, nor to exercise the right of company employees to convert their claims against the company in money based on the right to participate in the company's profits into business shares. The share capital of a limited liability company can be increased based on Articles 457 to 461 CA, as follows:

- a) through contributions, which represents an effective increase;
- b) by transformation the company's reserves into share capital, which means a nominal increase in share capital;

51 Article 406, paragraph 1, CA.

52 Article 431.bu related to Article 250.a, CA. Statements in the balance sheet are adjusted according to accounting regulations.

53 Liability for damage is based on Article 430 in connection with Article 273, CA, and the responsibility for the return of what was acquired without a basis in Articles 1111–1120 Law on Obligatory Relations, Official Gazette, Nos. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22. Members may unlawfully encroach on the assets of the company in various ways: by extracting liquid assets from the company, *know-how*, key workforce or business connections in favour of the member or another company over which the member has control, by managing the company's affairs with the aim of favouring the member or another company over which the member has control, or by unfairly competing with the company. For more on this, see Širola, 2011, p. 1689.

54 The increase of share capital in a joint-stock company is governed by the provisions of Articles 304–341, and in the limited liability company Articles 457–461, CA.

- c) if the Board of directors is authorised in the memorandum of association to increase the share capital, if it deems it expedient, during a certain period which may not exceed five years from the date of the company's registration in the Court Register (authorised capital).

The fact that existing share contributions have not been paid in full does not prevent the decision to increase the share capital. Existing shareholders have the right of priority to take over new share contributions in proportion to the nominal values of their share contributions in the company. Since the actions of the company's bodies during an increase of the share capital in both joint-stock and limited liability companies are similar, only the increase of share capital of joint-stock companies is regulated by Articles 304 to 342 CA.

According to Article 304 CA, the decision to increase the share capital by stakes is made by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is made. The company's statute may stipulate that a different majority is required for this (e.g. it can be a larger majority or a smaller majority than three quarters of the share capital, but cannot be less than at least two thirds of that capital), but if non-voting preferred shares are issued, the stipulation can only involve a majority of the represented capital when making a resolution. If the company has more than one class of shares, the shareholders of each class must vote in favour of the resolution by the majority required by law or the Statute. The resolution of the general meeting must then be applied for registration in the court register, and the share capital cannot be increased until all the previous contributions have been paid in full, except in the case that the unpaid part is insignificant.

The share capital may only be increased by issuing new shares, but not, if shares with a nominal value have been issued, by increasing the nominal value of existing shares. In the case of a company which has issued shares without nominal value, the total number of such shares must be increased in proportion to the increase in the share capital and to the share capital before the increase. Existing shareholders have the right to subscribe for new shares in proportion to their previous participation in the company's share capital. It is about their right of priority, but the registration for new shares is not an obligation of the shareholders, being rather dependent on whether they will exercise it. This right of priority can be excluded in whole or in part if a resolution on this is passed by the general meeting with a majority of at least three quarters of the share capital represented at the general meeting when the resolution is made. However, the statute may stipulate that a larger majority (not a smaller one) is required for this along with the fulfilment of additional assumptions.

New shares may be paid for in cash or through the investment of movable property, real estate, or rights. The rules applicable to the payment of shares during company incorporation shall apply *mutatis mutandis*. After the necessary payments are made, the application for registration of the capital increase in the court register can be submitted. The share capital is considered to have been increased on the day of

the entry of the increase in the court register (i.e. the entry of an already implemented increase).

A conditional share capital increase occurs when, at the time the resolution is adopted, it cannot be said in advance whether and by how much the capital will actually be increased. This is because it would depend on the persons who are authorised to acquire shares based on this capital increase and their willingness to actually acquire these shares. Based on Article 313(2) CA, the resolution on conditional share capital increase can only be made for the following purposes:

- a) preparations for the merger of several companies;
- b) preparations for the merger of companies in accordance with the provisions of the CA on affiliated companies, which sometimes requires an increase in the share capital of a company to be able to issue shares that should belong to the shareholders of one of the companies participating in the merger (e.g. in case of merger);
- c) realisation of the right of company employees and management board members to acquire shares in the company based on their investment in the company or their claims against the company based on the right to participate in the company's profits;
- d) exercise of the right of the company's creditors to convert their convertible or variable rate bonds into shares of the company or to exercise their right of priority in the registration of new shares.

Regarding point d) pertaining to the conditional capital increase, several comments should be made. There is a specific situation, for example, when bonds are acquired by bondholders as a result of some action by the company, such as the granting of loans. Bonds generally give their holders the right to be paid interest by the company on a specified amount of debt at specified intervals; exchangeable, convertible bonds give the bondholder the right to be exchange these bonds for shares within a specified period, while the amount of interest paid by the company for variable-rate bonds is affected by the rate at which dividends are paid to shareholders. Finally, bondholders, as creditors of the company, can be given the right of priority to acquire new shares in the case of a new issue of shares (options), similar to the one that previous owners of shares have when increasing the share capital.

The decision on the conditional share capital increase is made by votes representing at least three quarters of the share capital represented at the general meeting when the decision is made. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions.

The general meeting can, based on Article 323 CA, make a decision authorising the management board or the board of directors to increase the share capital up to a certain amount within a certain period, making the increase a matter of authorised capital. This decision, accordingly, does not actually mean that the share capital will be increased, but only that the management board or the board of directors is authorised to decide on such increase. In the case of an authorised capital increase,

the approval of the supervisory board is required for the management board to make decisions on the content of the rights regarding shares and the conditions for the issuance of shares. The purpose of the resolution of the general meeting authorising the management or the board of directors to increase the share capital is to enable these bodies, which are best acquainted with the company's state and operations, to assess when it is necessary for the company to raise new capital. Still, the management board or the board of directors can only be authorised to increase the share capital by means of stakes, meaning that all rules that apply to this method of share capital increase should be appropriately applied. The management board or the board of directors may also be authorised to decide on the partial or total exclusion of the pre-emptive rights of existing shareholders to the registration of new shares.

A resolution of the general meeting authorising the management board or board of directors to increase the share capital is made by votes representing at least three quarters of the share capital represented at the general meeting when the decision is made. However, the statute may stipulate that a larger majority is required and that additional conditions be met. If there are several classes of shares in the company, the shareholders of each class of shares must vote for the decision with the prescribed majority. The decision of the general meeting must be entered in the court register. The authority of the management or the board of directors to increase the company's share capital may, by resolution of the general meeting, be limited to a maximum period of five years from the date of registration of the company in the court register on the occasion of its incorporation (i.e. from the date of the amendment of the company's statute). After the necessary payments have been made, an application for the registration of the share capital increase in the court register can be made. The share capital is deemed to have been increased on the date of the registration of the increase.

An increase in share capital does not bring new capital into the company, but changes the status of the company's existing assets, and is a consequence of the company's good operating performance. It also achieves a more secure position for the company because, owing to the application of the principle of maintaining the company's share capital, stricter rules apply to the part of the company's assets corresponding to the share capital than to the part exceeding the share capital. Concomitantly, an increase in the company's share capital can affect the amount of dividends the company pays, in turn affecting the market price of the shares. In order to avoid abuses, the decision to increase the share capital from the company's funds must be based on the company's financial reports, and it can only be made after determining the profit and loss account for the previous business year.

The decision to increase the share capital from the company's funds based on Article 328(2) CA is passed by votes representing at least three quarters of the share capital represented at the general meeting in which the decision is made. However, the statute may stipulate that a different majority is required for this (e.g. a smaller majority than three quarters of the share capital, but it cannot be less than two thirds of that capital) along with the fulfilment of additional assumptions. With this increase

in the share capital, a separate decision of the shareholders of each class of shares is not required. The decision of the general meeting to increase the share capital from the company's funds must be registered in the court register, and the share capital increase is valid from the registration of that decision.

A reduction in the share capital is any reduction in the amount of that capital specified in the company's statute. The share capital can be reduced effectively or nominally. For an effective reduction, the purpose may be to return the paid contributions to the shareholders or to release them from the obligation to pay the unpaid part of the contributions. These actions are only possible when the share capital is reduced, and are otherwise prohibited considering that they go against the principle of maintaining the share capital. For a nominal reduction, it generally does not serve for the payment of what was paid into the company, but serves primarily to cover company losses. A reduction of the share capital in a joint-stock company is possible based on the provisions of Articles 342 to 354 CA through regular, simplified, and withdrawal of shares. Meanwhile, the reduction of the share capital in a limited liability company is based on Articles 462 to 466 CA and may be carried out:

- a) by returning the contributions to the shareholders;
- b) by reducing the nominal value of the contributions;
- c) by releasing the members in full or in part from the obligation to pay their contributions to the company.

The resolution of the general meeting on the regular reduction of the share capital is actualised by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is made. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions. If the company has several classes of shares, the shareholders of each class must vote in favour of the resolution by the required majority. The resolution on the regular reduction of the share capital must be entered in the court register. Additionally, the resolution of the general meeting must state the purpose of the reduction of the share capital (i.e. whether part of the investment in the company is to be returned to the shareholders) and the method of the reduction of the share capital (i.e. if shares with a nominal value have been issued, whether this should be done by reducing the nominal value of the shares or by consolidation of the shares). Importantly, the share capital can only be reduced by merging shares if the lowest nominal value of the shares can no longer be reduced, as this would lead to a violation of the rule on the lowest nominal value of the share (one euro).

The provisions of the CA contain special rules to protect the position of creditors in the event of a periodic reduction of the company's share capital, providing that their claims must either be settled or adequately insured if the creditors make themselves known to the company within a certain period. The share capital may not be reduced below the minimum amount required by the CA, with the exception being when a resolution to increase the share capital is passed concomitantly to another to reduce the share capital. This means that when the share capital is reduced, the amounts of

assets and liabilities are first reconciled in the accounts (i.e. the differences between them are eliminated), and then fresh capital is brought into the company by payments that can only be made in money and not in movables, real estate, and rights. The share capital shall be deemed to have been reduced on the date on which the resolution on the ordinary share capital reduction is entered in the court register.

A simplified reduction of the share capital can only be used for the purposes of restructuring the company, and only if parts of the company's assets (reserves) that could otherwise be used for this purpose have already been used for this purpose. The resolution of the general meeting on the simplified reduction of the share capital is passed by votes representing at least three quarters of the share capital represented at the general meeting when the resolution is passed. However, the statute may stipulate that a larger majority is required for this along with the fulfilment of additional assumptions. If the company has several classes of shares, the shareholders of each class must vote in favour of the resolution with the required majority. The resolution on the simplified reduction of the share capital must be entered in the court register. The resolution of the general meeting must state the purpose and the method of the reduction of the share capital. Amounts obtained through a simplified reduction of the share capital may not be paid to shareholders and may not be used to release shareholders from the obligation to pay contributions.

3.6. Rules for Withdrawal, Profit Distribution, and Dividends

The reasons for reducing the share capital by withdrawing shares may be to restructure the company, to exclude individual shareholders from the company, or to return to shareholders what they have invested in the company. In contrary to the reduction of the share capital by a regular or simplified method, the withdrawal here does not apply to all, but only to precisely-specified shares. Shares can be withdrawn compulsorily and by withdrawing company's own shares. The general meeting is always authorised to do this, but the matter must be decided on in any case if the legal requirements for the acquisition of own shares are met. The compulsory withdrawal of shares is possible on an orderly basis (i.e. the statute can specify the cases and the conditions under which the management board or the board of directors must decide on the redemption of shares; e.g. at the request of a shareholder) and a voluntary basis (i.e. the statute can specify that, in some cases, the general meeting is authorised to make a decision on the withdrawal of some shares).

The right to the payment of dividends is a fundamental property right of shareholders.⁵⁵ Based on the law, shareholders have the right to participate in the profit made by the company, which may be limited by statute only if and to the extent permitted by law. Article 220(1) CA prescribes the exact purposes for which the profit of a joint-stock company realised in a certain business year can be used, and the order in which the profit must be used for the prescribed purposes. The order serves for

55 For a joint-stock company, this right is governed by the provisions of Article 220(4) and 223, CA; for a limited liability company, Article 406, CA.

prescribing the hierarchy of purposes listed there.⁵⁶ The company's management board are obliged to follow this order when compiling the annual financial reports. For profit use, the following order of settlement is prescribed: a) coverage of losses carried over from previous years; b) entry into legal reserves of the 20th or a larger part of the profit of the current year, minus the amount of the loss from the previous year, until these reserves, together with the capital gain, reach the amount of 5% of the company's share capital; c) entry into reserves for the acquisition of own shares, if the company has acquired them or intends to acquire them; d) entry into statutory reserves, if the company has them.

4. Hungary

4.1. Introduction

The concept of a business association is that all members are obliged to make a financial contribution, albeit their contributions can differ. The amount of the financial contribution of the members is the subscribed capital.⁵⁷

4.2. Capital Contributions: Forms and Regulations

The instrument of the constitution of a legal person shall contain the capital contributions prescribed, the value of such contributions, and how and when such assets are to be made available. The capital contribution may be provided in the form of cash or in the form of contribution in kind. An asset contribution can be the ownership rights of tangible or intangible assets, a right with a financial value, or a receivable, provided that it is acknowledged by the debtor or if it is based on a final court ruling. Commitments of members for performing work or for any other personal involvement or service shall not be accepted as a form of capital contribution.⁵⁸

The value of the asset contribution must be determined by the member, except for limited companies. If the value of the asset contribution does not reach the value indicated in the instrument of constitution, the legal person may demand payment of the difference from the person having provided the asset contribution within five years from the date of transfer.

4.3. Obligations and Consequences of Non-compliance

If a member fails to provide the contribution as undertaken in the instrument of constitution by the prescribed time limit, the management shall call upon such member, with the applicable consequences indicated, to provide the contribution within 30

⁵⁶ See Barbić, 2010, pp. 588 et seq.

⁵⁷ According to subsection 3 of Section 35, Act C of 2000 on Accounting, in the case of public limited companies, private limited liability companies and other companies (if required to be registered by the court of registry in this respect), subscribed capital shall mean the capital registered by the court of registry in the amount specified in the instrument of constitution.

⁵⁸ Article 46, Directive (EU) 2017/1132.

days. In case of non-compliance within the 30-day time limit, the membership of this member who failed to provide the capital contribution shall be terminated on the day following the expiration of such time limit. The management shall notify the former member of membership termination. The former member shall be held liable for damages caused to the business association by virtue of the failure to provide the contribution in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation.

Directive (EU) 2017/1132 requires the insurance of the minimum equivalent protection for both shareholders and creditors of public limited liability companies, with a special emphasis on the coordination of national provisions regarding the formation of such companies and on the maintenance, increase, or reduction of their capital. Act V of 2013 on the Civil Code, which contains the legal material relating to companies, incorporated the provisions of the directive into its regulations, which are indicated in a footnote. Although the aforementioned Directive basically applies to limited companies, the Civil Code also applies certain provisions of the Directive to private limited liability companies.

4.4. Limited Liability Companies

Private limited liability companies (*korlátolt felelősségű társaság* or *kft.*) are founded with an initial capital comprising capital contributions of a predetermined amount. One of their characteristics is that both the member's financial contribution and the subscribed capital have specific names: *core deposit* and *initial capital*. The Civil Code stipulates a mandatory capital minimum for the initial capital, which cannot be less than *three million Hungarian forints*. For members of the company, the Civil Code requires a minimum financial contribution, where the core deposit of a member cannot be less than *one hundred thousand Hungarian forints*. The core deposits of members may differ in terms of value. Moreover, the Civil Code provides flexible rules for the fulfilment of the financial contribution, thereby facilitating the establishment of the company:

- a) The member can pay the full amount of the core deposit until the company registration application is submitted.
- b) The member can pay only the part of the cash contribution agreed in the memorandum of association until the company registration application is submitted (this can also be 0 Hungarian forints). In this case, the remaining part must be paid no later than three months after the acceptance of the annual report of the second complete financial year. The exact date of completion must be specified in the memorandum of association.

If the company member does not have enough money, it is allowed for him/her to pay the cash contributions from the profits distributable according to the provisions on the payment of dividends in whole or in part. In this case, the company cannot pay the member a dividend, as it must be accounted for the member's unpaid core deposit. It is forbidden to deviate from the final delivery deadline specified by the Civil Code.

If the value of asset contributions at the time of foundation reaches or exceeds half of the initial capital, it shall be made available to the company in its entirety before the time of submission of the application for registration. If the value of the asset contributions does not reach half of the initial capital, the remaining asset contribution shall be provided within three years at the latest. The due time for the provision of the asset contribution has to be specified in the memorandum of association, which in turn cannot specify a deadline longer than three years from the time of registration.

For private limited liability companies, the members are not liable for the company's obligations. Therefore, as a general rule, only the own capital of the company⁵⁹ provides coverage for the claims of the company's creditor. In view of this, company law regulations limit the conditions under which the initial capital can be reduced by payments to the members within a strict framework. The company may make any distribution from its own funds to a member, on account of his/her membership, during the company's existence solely in the cases defined in the Civil Code, and, with the exception of the reduction of the initial capital, from the untied retained earnings supplemented by the previous financial year's after-tax profit. Importantly, this provision concerns payments to members, and thus does not include payment to third parties (e.g. employees, contractual partners, and other creditors). Meanwhile, members of the company may receive payments from the company under several legal titles on account of their legal membership (e.g. dividend, interim dividend, and personal contribution fee).

It is the responsibility of the member's meeting to approve the annual account, as prescribed in the Accounting Act, which reveals whether the company generated a taxable result or profit during the activities of the previous year. The company can decide to pay this profit in the form of a dividend or create a reserve from it. The company can create reserve in more years. If, according to the company's books, the retained earnings, or a part of it, is not tied up for a specific purpose (i.e. it is free), then it can be used for payment. If the initial capital decreases as a result of the losses of previous years, it can be supplemented (i.e. corrected) from the taxed profit (retained earnings). If the initial capital is not available in this way, the payment cannot be made. Even if the initial capital is available, dividends cannot be paid if the company has liquidity problems, does not have enough cash to meet its current obligations, or is struggling with payment difficulties. In summary, no payment can be made if:

- a) there is no taxed profit after the previous business year or retained earnings from previous years;
- b) the initial capital is missing;

⁵⁹ According to subsection 2 of Section 35, Act C of 2000 on Accounting, a company's equity shall consist of subscribed capital (decreased by the amount which has not yet been paid up), capital reserve, retained earnings, tied-up reserves, valuation reserve, and the results after tax for the current year.

- c) the company would not be able to meet its payment obligations owing to payment.

The Civil Code also contains limits for cases where the company provides payments to its members for reasons other than membership (e.g. wages and commission fees). If these payments are incompatible with the principle of prudent corporate management, the payment cannot be made. Any distribution made despite these prohibitions must be reimbursed by company members, regardless of whether the member was aware of the lack of payment conditions or not.

One of the rights of members is that they can receive a share from the company's profits, which is called dividend. The condition for the payment of dividend is that the members' meeting expressly decides on it when accepting the annual report, at which point the taxable result (retained earnings), or a specified part thereof, can be paid to the members as a dividend. It is not obligatory for companies to pay dividends, as they can also decide to use taxable results increase the company's own capital. The members' meeting can decide on the payment of dividends once a year, simultaneously to the approval of the financial report. Members are entitled to dividends only to the percentage consistent with their core deposit already paid, meaning that until the core deposit is fully paid, the member is only entitled to the proportional part of the dividend. Only those who were members when the decision on the payment of a dividend was made are entitled to dividends.

The initial capital of a company can be increased in two ways, namely a) by the payment of additional financial contributions, and b) by converting company assets in excess of the initial capital into initial capital. The legal condition for increasing the initial capital by completing new core deposits is that the members have provided their respective share of capital contribution in full. The members may decide on the increase of the initial capital by a resolution, which shall contain the amount of the increase, adopted by at least a three-quarters majority. The initial capital can be increased by financial or asset contribution, and the date of payment of the capital contributions has to be determined. Where the initial capital is increased by financial contribution, the members shall have preferential rights within 15 days following the date of decision for the capital increase. If all members fail to exercise their preferential rights, the members' meeting shall designate other persons upon whom to confer the right to provide the financial contribution. In the process of increasing the initial capital through the provision of additional capital contributions, the regulations on the provision of capital contributions, on the applicable deadlines and consequences in the event of delay, and on the liability for the value of asset contributions shall be duly applied. The company is then required to amend its memorandum of association so as to reflect the increase of capital. The new members participating in the initial capital increase shall supply a statement executed in an authentic instrument or in a private deed representing conclusive evidence for acknowledging the provisions of the memorandum of association as binding.

With a decision of at least a three-quarters majority of the members meeting, the company can increase its initial capital from its assets available in excess of the initial capital. The condition for this is that there are sufficient funds available for the capital increase according to the balance sheet of the annual account prepared for the previous financial year, or according to the interim balance sheet of the current year. Any increase of the initial capital from assets in excess of the initial capital shall increase the capital contributions of members consistent with the percentage of their previous contributions.

The private limited liability company can decide to reduce the initial capital for several reasons, such as through a capital withdrawal, referring to when a member wants to get back a part of his/her financial contribution. The private limited liability company can also operate loss-making, in which case it can use a part of the initial capital during management. The initial capital must then be reduced to the amount reduced due to the loss, and the reason for the capital reduction may be the reorganisation of the own capital components (e.g. by reducing the share capital and increasing the reserve). Members may tender the decision for the reduction of the initial capital by at least a three-quarters majority, and the capital contributions of members shall be decreased by the amount of the reduction in the percentage of their existing core deposits.

Considering that the reduction of the initial capital leads to a decrease in the assets that form the basis for the satisfaction of creditors, the Accounting Act determines several requirements, describing that the company's resolution shall specify:

- a) the amount of reduction;
- b) the core deposit of each member after the capital reduction;
- c) the reason for the reduction.

The managing director shall notify the Court of Registry of the reduction of the initial capital within 30 days thereof and take measures for the disclosure of the capital reduction in the Company Gazette at least on two occasions. The two disclosures shall be made at least 30 days apart. The public notice shall contain the essence of the decision on the capital reduction, and - if the company's creditors are likely to request safeguards - a call to the company's creditors to make their request for safeguards known. The company shall directly send a copy of the public notice to the company's known creditors at the time of publication of the first public notice.

The holders of any claim against the company arising before the first disclosure of a public notice on the initial capital reduction may demand adequate safeguards from the company. There are some examples, such as if the creditor's claim is already secured, if it is not justified in light of the company's assets and liabilities and financial position, or if a capital restructuring has taken place. If the claim of the creditor is rejected, the creditor may turn to the court. A reduction of the initial capital may not be registered until the creditor entitled thereto is provided adequate safeguards, or until the court ruling on the refusal of the creditor's request becomes operative. In case of a reduction of capital, the memorandum of association has to be amended.

The reduction of capital can only be registered if the company is able to provide evidence for the notification of creditors and that the eligible creditors received adequate safeguards.

4.5. Limited Companies

A limited company (*részvénytársaság*, or *rt.*) is a business association founded with a share capital comprising shares of a pre-determined number and nominal value. The name of the subscribed capital is here share capital. The sum total of the nominal value of all shares shall comprise the share capital of a limited company. The obligation of shareholders to the limited company extends to the provision of funds covering the nominal value or the accounting par value of shares. The shareholder's financial contribution is the fulfilment of the nominal value or the accounting par value of the share subscribed by him/her. The amount of cash contributions at the time of foundation may not be less than 30% of the share capital, and a limited company cannot be founded only by asset contribution.

Limited companies can assume two types of operation:

- a) if its shares are listed on a stock exchange, it shall be recognised as a public limited company (*nyrt.*),
- b) if its shares are not listed on any stock exchange, it shall be recognised as a private limited company (*zrt.*).

The share capital of a private limited company may not be less than five million Hungarian forints, while that of a public limited company may not be less than twenty million Hungarian forints. Asset contribution⁶⁰ is regulated in the following manner. In the case of a limited company, it is a guarantee rule that the value of the asset contribution is not determined by the member. It can have an officially-accepted value or a professionally-assessed value, as follows:

- a) it can be evaluated by an auditor or another expert qualified for the asset in question. In the report, the auditor or expert shall provide a statement indicating whether the value of such contribution complies with the quantity and nominal value of the shares to be provided in exchange.
- b) It can be regarded as an accepted value if the shareholder that has provided the asset contribution has an audited financial report (containing the value of the contribution) prepared within three months from the date when the contribution was provided.
- c) It can be regarded as an accepted value if the contribution comprises assets whose price are listed on the stock exchange.

A limited company may be registered only if, prior to the submission of the application for registration, the following is done:

60 Articles 49 and 50, Directive (EU) 2017/1132.

- a) the founders who agreed to provide contributions in cash have paid at least 20% of the nominal value or accounting par value of the shares which they have committed to subscribe for;⁶¹
- b) asset contributions have been made available to the company, with the exception being if the value of such asset contributions is less than 20% of the share capital.

Shareholders shall pay up the nominal value or accounting par value of the shares to the limited company in full within one year from the date when the limited company is registered, and shall place asset contributions at the limited company's disposal in whole within three years from the date of registration. The articles of association cannot provide for a later date.

Shareholders may benefit from the distribution of assets under the conditions⁶² presented herein. For a limited company, the shareholders are not liable for the company's obligations, and thus, as a general rule, only the own capital of the company⁶³ provides coverage for the claims of the company's creditor. In view of this, company law regulations limit the conditions under which the share capital can be reduced by payments to shareholders. Specifically, the company may make any distribution from its own funds (i.e. the assets of the company available at a given time, including the share capital) to a shareholder, on account of his membership, during the company's existence solely in the cases defined in the Civil Code, and from the untied retained earnings supplemented by the previous financial year's after-tax profit – except in cases of the reduction of the share capital. The provision concerns payments to shareholders and does not include payment to third parties (e.g. employees, contractual partners, and other creditors).

It is the responsibility of the general meeting to approve the annual account, as prescribed in the Accounting Act, which reveals whether the company generated a taxable result or profit during the activities of the previous year. The company can decide to pay this in the form of a dividend or create a reserve from it. The company can create reserve in more years. If, according to the company's books, the retained earnings, or a part of it, is not tied up for a specific purpose (i.e. it is free), then it can be used for payment. If the share capital decreases as a result of the losses of previous years, it can be supplemented (i.e. corrected) from the taxed profit (retained earnings). If the share capital is not available in this way, then payments cannot be made. Even if the share capital is available, dividends cannot be paid if the company has liquidity problems, does not have enough cash to meet its current obligations, or is struggling with payment difficulties. In summary, no payment can be made if:

61 Article 48, Directive (EU) 2017/1132.

62 Article 56, Directive (EU) 2017/1132.

63 According to subsection 2 of Section 35, Act C of 2000 on Accounting, a company's equity shall consist of subscribed capital (decreased by the amount which has not yet been paid up), capital reserve, retained earnings, tied-up reserves, valuation reserve, and the results after tax for the current year.

- a) there is no taxed profit after the previous business year or retained earnings from previous years;
- b) the share capital is missing;
- c) the company would not be able to meet its payment obligations due to the payment.

The Civil Code also contains limits for cases where the company provides payments to its shareholders for reasons other than membership (e.g. wages and commission fees). If these payments are incompatible with the principle of prudent corporate management, the payment cannot be made. Any distribution made despite these prohibitions must be reimbursed by shareholders to the company, regardless of whether the shareholder was aware of the lack of payment conditions or not.⁶⁴

The Civil Code provides the rights to a group of shareholders (controlling at least 5% of the voting rights in a private limited company, or at least 1% of the votes in a public limited company), and to any creditor of a limited company who has a claim that is not yet due at the time of distribution and reaches 10% of the share capital, to request the Courts of Registry to appoint an independent auditor to examine the legality of such distribution within a preclusive period of one year from the time of distribution.

Shareholders are entitled to receive a share from the limited company's taxed profit that is available and has been ordered for distribution by the general meeting in the percentage consistent with the nominal value of their shares. Dividends shall be paid to shareholders listed in the register of shareholders at the time when the general meeting adopting the decision for the payment of dividends was held. Shareholders shall be entitled to receive dividends based on the capital contributions they have already paid up.

Additionally, the general meeting of a limited company decides on the increase of the share capital, for which there are different types, and which are explored below.

1. Share capital increase through the issue of new shares

The share capital increase through the issue of new shares takes place in a similar way to the increase of the initial capital: the increase of the share capital is determined by a resolution of the general meeting, and the articles of association must be modified. Where the share capital is increased by way of a cash infusion, the shareholders have preferential rights for share subscription.⁶⁵ If they do not use this right, third parties can subscribe to new shares.

⁶⁴ Article 57, Directive (EU) 2017/1132.

⁶⁵ Article 72, Directive (EU) 2017/1132.

2. Share capital increase from assets not part of the share capital

A limited company may transfer all or part of its assets, other than the share capital, to increase the share capital. This is possible if according to the balance sheet of the annual account for the previous financial year or the interim balance sheet of the current year, there are sufficient additional funds available for the capital increase.

3. Share capital increase through the issue of employee shares

The company gives employee shares free of charge or at a discount. In such a situation, the employee shares shall be covered from the limited company's assets not forming part of the share capital

4. Share capital increase through the conversion of convertible bonds

Here, bonds are issued first and shares are issued later, and the latter occurs along an increase in the share capital, since the sum of the nominal value of the shares gives the share capital. When the bonds are issued, the shareholders only decide on a conditional share capital increase by creating the basis for the subsequent, future share capital increase. Two types of bonds can be issued, which are convertible or equity bonds. Convertible bonds shall be exchanged for shares at the request of the bondholder; equity bonds shall be converted into shares upon the subsequent occurrence of certain requirements specified in the bonds.

The share capital of a limited company may be reduced for the same reasons as those relevant and applicable to the reduction of the initial capital, which are a) withdrawal of equity, b) consolidation of losses, and c) capital structure transformation. The decision for the reduction of the share capital lies with the general meeting, and the articles of association has to be modified.⁶⁶ Additionally, the general meeting must determine the amount by which the share capital is being reduced, the shares affected by the capital reduction, and the procedure for the implementation of the reduction of share capital. The resolution of the general meeting on the reduction of share capital shall be considered effective if the holders of shares considered affected under the articles of association grant their explicit consent to the reduction of the share capital by way of the means specified in the articles.⁶⁷

The reduction of the share capital shall be implemented by reducing the quantity or the nominal value of the share, or by using these two methods in tandem. The reduction of the share capital also affects the creditors of the limited company, and thus the Civil Code, in accordance with Directive (EU) 2017/1132, regulates it with almost the same regulations as for private limited liability companies, as follows:⁶⁸

⁶⁶ Article 73, Directive (EU) 2017/1132.

⁶⁷ Article 74, Directive (EU) 2017/1132.

⁶⁸ Article 75, Directive (EU) 2017/1132.

- a) publication of the reduction of share capital in the Company Gazette;
- b) direct notification of the known creditors;
- c) provision of safeguards to creditors if the legal conditions are met;
- d) reference to the Court of Registry by the creditor in the event of a dispute.

The reduction of the share capital may not be registered until the creditor is provided adequate safeguards or the court ruling on the refusal of the creditor's request becomes operative.

4.6. Protection of Creditors and Equity Maintenance

In accordance with Directive (EU) 2017/1132, the regulations of both private limited liability companies and limited companies provide that the member's meeting or the general meeting must be called in order to provide for the necessary measures in case of the serious loss of the subscribed capital.⁶⁹ Cases of mandatory convocation include those outlined here:

- a) company's equity has dropped to two-thirds of the share capital due to losses;
- b) company's equity dropped below the amount limit defined by law;
- c) company is on the brink of insolvency or has stopped making payments;
- d) company's assets do not cover its debts.

5. Poland

5.1. Limited Liability Company

In a limited liability company, the minimum amount of share capital is 5,000 PLN (Art. 154§1 Commercial Companies Code, CCC).⁷⁰ The amount of share capital should be expressed directly in a specific quantity. It is not acceptable to determine the amount of share capital in a foreign currency (e.g. as the equivalent in PLN) because the share capital, as a numerical size, must have a fixed, precise amount. Otherwise, it would not be possible to include this quantified amount in the liabilities of the company's balance sheet, and the floating exchange rate would violate the requirement to determine the share capital in a fixed amount. Only a precise designation in the Polish currency will ensure the principle of constancy. An unprecise amount would also be contrary to the principle of permanence to determine the amount of the share capital "from amount to amount". The share capital may be divided into shares of equal or unequal nominal value, and the amount of the share of individual owners may be less than the value of assets contributed by them to the company. This surplus is called *agio* and shown as supplementary capital.⁷¹

⁶⁹ Article 58, Directive (EU) 2017/1132.

⁷⁰ Code of Commercial Companies (Journal of Laws 2000 No. 94, item 1037).

⁷¹ Hejnar and Micherda, 2011, p. 38.

In a limited liability company, the provisions of the CCC specify only the minimum statutory amount of share capital, while the upper limit is left to the discretion of the shareholders as to what is the necessary or adequate amount or how they intend to finance the company's operations. In this sense, the minimum amount of share capital is, at most, the so-called seriousness threshold (Germ. *Seriositätsschwelle*). If the contribution to the company in order to cover the share is an in-kind contribution, the articles of association should specify in detail the subject of this contribution and the person of the partner making the contribution, as well as the number and nominal value of the shares taken up in exchange (Art. 158 § 1 CCC).

The increase of the share capital from own funds is regulated in Article 260 § 1 CCC, consisting in the transference of funds from the supplementary and/or reserve capital created from the company's profit to the share capital. An increase in the share capital usually involves an amendment to the articles of association, unless these articles state that the increase to a certain value does not constitute an amendment to the articles.⁷²

A limited liability company may be established using an information technology system in the case of a company whose agreement was concluded using the template included in the system, and only cash contributions can be made to cover the share capital. The share capital should be paid up no later than within seven days from the date of its entry in the register. An increase in the share capital made after the entry in the register of the company whose agreement was concluded using the model agreement may be covered only by cash contributions; this occurs if the amendment to the articles of association was made using the template resolution amending the articles of a limited liability company, and if the amendment to the articles was made in the form of a notarial deed - also requiring contributions in kind.

The share capital may be increased in a limited liability company under the existing provisions in the articles of association providing for the maximum amount of the share capital increase and the date of its increase, or as a result of an amendment to the articles (Art. 257 CCC). In the first case, the shareholders adopt a resolution by an absolute majority of votes (unless the agreement provides otherwise) and the resolution does not have to be recorded by a notary public. This allows the company to significantly speed up the proceedings and reduce their costs. The second case involves the need to amend the articles of association, which then also gives rise to the need for the shareholders' resolution being adopted by a two-thirds majority of votes and recorded by a notary public.

Pursuant to Article 257 § 2 CCC, the share capital is increased by increasing the nominal value of existing shares or establishing new ones. As a result, not every capital increase results in a real inflow of new funds to the company, but rather only in the case of new contributions made by existing or new ones. The increase through capitalisation of profit or conversion of receivables into shares will be nominal because it entails a lack of a new source of financing concomitant to an increase in

72 Spoz, 2017, p. 199.

the part of the company's assets that is subject to a specific legal regime,⁷³ and may authenticate the entity.⁷⁴

A reduction of the share capital in a limited liability company below the minimum amount is unacceptable, unless the share capital is increased at least to the original amount at the same time it is reduced (Article 264 § 2 CCC),⁷⁵ as a result of which the share capital will amount to at least 5,000 PLN. A resolution to reduce the share capital below the statutory limit is invalid as it is contrary to the Act (Article 58 § 1 of CC).^{76,77} Therefore, maintaining the minimum amount of share capital applies not only at the time of establishment but also in the course of the company's activity.

Article 263 § 1 CCC allows for the possibility of reducing the share capital in a limited liability company. Apart from the exception specified in Article 199 §§ 4 and 5 CCC,⁷⁸ the share capital may be reduced only by way of a shareholders' resolution on the reduction of the capital by amending the articles of association. It is not possible to reduce it under the existing provisions of the articles of association.⁷⁹ A resolution on the reduction of the share capital should specify the manner of reducing the capital, and since the nominal value of the sum of all shares must be equal to the share capital, the reduction in capital must be reflected in the shareholding structure. A reduction may be effected, analogous to an increase, by redeeming a part of the shares, reducing the nominal value of the shares, or combining both methods.⁸⁰

73 Weiss, 1994, p. 2.

74 Reasons of the resolution of the Supreme Court of 11 March 1997, III CZP 6/97.

75 Article 264 § 1. The Management Board shall immediately announce the adopted reduction of the share capital, calling on the company's creditors to lodge objections within three months from the date of announcement, if they do not agree to the reduction. Creditors who have lodged an objection within this period should be satisfied or secured by the company. Creditors who have not raised objections are deemed to have agreed to the reduction of the share capital.

§ 2. The provisions of § 1 shall not apply if, despite the reduction of the share capital, the payments made to the share capital are not returned to the shareholders, and at the same time the share capital is reduced, it is increased at least to the original amount.

76 Civil Code of 23 April 1964. Journal of Laws, 1964, Nr 16, item 93. Journal of Laws 2022, item 1360.

77 Article 58 § 1. A juridical act contrary to the law or intended to circumvent the law shall be null and void unless the relevant provision provides for another result, in particular that the invalid provisions of the legal transaction shall be replaced by the relevant provisions of the law [...].

78 Pursuant to Article 199 §§ 4 and 5, CCC, the articles of association may provide that the share shall be redeemed in if a specific event occurs without a resolution of the shareholders' meeting. The provisions on redemption shall then apply. In the occurrence of an event specified in the articles of association, the management board should immediately adopt a resolution to reduce the share capital, unless the redemption of the share is made from net profit. Thus, in the case of redemption of a share from pure profit (i.e. from the amount that can be allocated for distribution among the shareholders), there shall be no reduction in the share capital or amendment of the articles of association. The basis for payment by the management board of remuneration to a shareholder from pure profit is a redemption resolution. Siemiątkowski and Potrzebszcz, 2001, p. 342.

79 Szajkowski and Tarska, 2005, p. 794.

80 Judgment of the Provincial Administrative Court in Warsaw of 2 June 2015, III SA/Wa 942/15.

A resolution on the reduction of the share capital, both adopted by the shareholders and management board, becomes effective upon entry in the register (Article 255 §§ 1 and 2 CCC).

The share capital shall be reduced in accordance with the convocation procedure specified in Article 264 CCC. This means that the management board must immediately announce the adopted reduction of the share capital in *Monitor Sądowy i Gospodarczy*,⁸¹ calling on the company's creditors to raise objections within three months from the date of announcement if they do not agree to the reduction. Creditors who have lodged an objection within this period should be satisfied or secured by the company. Creditors who have not raised objections are deemed to have agreed to the reduction.

Regarding dividends, as a rule, shareholders have equal rights and obligations in the company. If the articles of association provide for interests with special rights, those rights should be specified in the articles (preference shares). Preference may concern, in particular, voting rights, the right to dividends, or the manner of participating in the distribution of assets in the event of the liquidation of the company. Pursuant to Article 196 CCC, a preferential dividend may be granted to the holder of dividends which does not exceed by more than half the dividend to which non-preferential shares are entitled (preferential dividend). Preferential dividend shares shall not enjoy priority satisfaction over other shares, unless otherwise provided in the articles of association.

Shareholders entitled to the dividends for a given financial year are shareholders who were entitled to shares on the day of adopting the resolution on profit distribution. The articles of association may authorise the general meeting of shareholders to determine the date on which the list of shareholders entitled to dividends for a given financial year (dividend date) is established. If the company has sufficient funds for payment, the articles of association may authorise the management board to pay shareholders an advance towards the expected dividend for the financial year.⁸²

5.2. Simple Joint-Stock Company

In a simple joint-stock company, the legislator introduced that the share capital should be at least 1 PLN. Pursuant to Article 300(3) § 2 CCC, the amount of share capital is not specified in the articles of association, and the provisions on amending the articles of association do not apply to changes in share capital amounts. The reduction, or in fact the complete exclusion, of the need for the founders of the company to acquire funds to cover the share capital (compared to a joint-stock company, where it is 100,000 PLN) is considered to be the “driving force” for the process of creating simple joint-stock companies in Poland.⁸³ The asset structure based on share capital is a response to

81 A nationwide official journal, in which announcements and announcements required by the CCC, the Code of Civil Procedure, the Act on the National Court Register, the Accounting Act and other acts are published.

82 Articles 193 and 194, CCC.

83 Nędzyński, 2021, p. 242.

the growing criticism of the institution of share capital.⁸⁴ This model refers to the solutions of American law, which for a long time has not required companies to have a share capital. The property structure of a simple joint-stock company is based on the model of shares without par value, also known as non-nominal shares, as well as share capital. Albeit the same name is used, the share capital for simple joint-stock companies is not the same as that used in limited liability companies and joint-stock companies. The legislator's intention was to create the most flexible property structure possible, which is particularly appropriate for the case of contributions in the form of work and services in exchange for shares, hence adapting the structure to the conditions of various ventures, especially start-ups. This is to facilitate starting and conducting business activity in the form of a capital company for all investors, and therefore increase the attractiveness of Polish company law in the era of increasing competition between the regulations of European Union countries.⁸⁵

The issues of dividend payment in a simple joint-stock company differ from those in a limited liability company and a regular company, with Article 300(15) CCC being crucial in this respect.⁸⁶ It describes two ways of limiting payments to a shareholder, namely 1) carrying out the balance sheet test provided for in Article 300(15) § 2, and 2) conducting the solvency test provided for in Article 300(15) § 5. These requirements must be met cumulatively.

84 Kotowicz, 2014, pp. 26–27.

85 Explanatory memorandum to the bill, p. 17.

86 Article 300(15), CCC § 1. A shareholder shall have the right to participate in the profit and make a disbursement from the share capital in the amount as shown in annual financial statements, said amount being allocated for being paid out in a resolution of shareholders, unless the company deed provides otherwise.

§ 2. An amount to be distributed among shareholders shall not exceed the aggregate profit for the last financial year, undistributed profits from previous years created from the profit from reserve capital which may be allocated for the disbursement of the dividend and the amount from the share capital which has been allocated for disbursement of the dividend. This amount shall be reduced by uncovered losses, own shares, and sums which under this Act or under the company deed should be allocated from the last financial year's profit for the supplementary capital which shall not be allocated for the disbursement of the dividend.

§ 3. Save as otherwise provided in the company deed, the dividend shall be distributed in relation to the number of shares.

§ 4. Disbursement from the share capital for the benefit of shareholders shall not lead to reduction of the amount of this capital below 1 zloty. The provisions of Article 456(1) and (2) shall apply accordingly to the disbursement from the share capital from the part of this capital constituting 5 per cent of the aggregate liabilities of the company as shown in the approved financial statements for the last financial year.

§ 5. Disbursement for the benefit of shareholders shall not lead to loss, on the part of company, in normal circumstances, of a capability to satisfy matured pecuniary liabilities within six months from the day of making the disbursement.

§ 6. Disbursement from the share capital may be made after entry of a change in the amount thereof in the register. In the case referred to in paragraph 4, the provision of Article 458, paragraph 2, subparagraph 4 shall apply accordingly to an application for making an entry into the register of the share capital amount.

The balance sheet test is commonly used to describe methods to limit distributions to shareholders. This test permits payments to shareholders only to the amount that results from a calculation based on certain amounts resulting from the company's balance sheet (balance sheet surplus test).⁸⁷ The new treatment of distributions for a limited liability company and a simple joint-stock company is manifested mainly in Article 300(15) § 2 CCC, which allows distributions to shareholders also from a fund created from contributions (i.e. in this case from share capital). The only restrictions in this case are that 1) such a payment may not lead to a reduction of the share capital to an amount lower than 1 PLN [Art. 300(15) § 4 CCC], 2) and the payment from share capital is subject to prior entry in the register and, in some cases (e.g. when the payment exceeds 5% of the company's total liabilities resulting from the approved financial statements for the last financial year), also to a convocation procedure.

Another important novelty in a simple joint-stock company is the solvency test described in Article 300(15) § 5 CCC, which states that, in normal circumstances, disbursement for the benefit of shareholders shall not lead to loss, on the part of company, of a capability to satisfy matured pecuniary liabilities within six months from the day of making the disbursement.

5.3. Joint-Stock Company

In a joint-stock company, the share capital should be at least 100,000 PLN, while the nominal value of shares may not be lower than 1 PLN (Art. 308 CCC). Therefore, the law sets a minimum threshold for the share capital of a joint-stock company, and the company's statute may stipulate the minimum or the maximum amount of the share capital. In such a case, the company shall be formed upon subscription by shareholders for such a number of shares - whose total nominal value equals at least the minimum amount of the share capital determined in Article 308 § 1 CCC (100,000 PLN) and upon their creation by the management board - of a representation in the form of a notarial deed on the amount of the subscribed share capital. The amount of the subscribed capital shall fall within the limits stipulated in the statutes.

In the event of a reduction in the share capital, its amount, as well as the nominal value of the shares, may not be lower than the statutory minimum, that is, lower than 100,000 PLN (Art. 455 § 4 in conjunction with Art. 308 § 1 CCC). A reduction of the initial capital shall be effected by way of an amendment to the company articles, by reducing the nominal value of shares, consolidating shares, redeeming a proportion of shares, and in the case of division by separation (art. 455 § 1 CCC). The management board shall immediately announce the adopted reduction of the share capital, calling on creditors to submit claims against the company within three months from the date of announcement (Article 456 § 1 CCC). There is no obligation to conduct a convocation procedure (i.e. to announce a reduction in the share capital and call creditors) if the conditions specified in Articles 360 § 2 and 457 § 1 CCC meet Article 457 § 1 point 1 CCC. The latter refers to a situation in which despite the reduction of the share

87 Komarnicki, 2004, p. 103.

capital, no payments are made to shareholders, in particular the contributions made by them are not returned to shareholders, there are no payments for the redeemed shares, nor shall they be exempt from contributions to the share capital. In such a case, together with the reduction, the share capital must be increased at least to the original amount (i.e. the amount before the resolution on the reduction) by way of a new issue, in which the shares are fully paid up. Therefore, there is no obstacle to an increase by a larger amount in this mode.⁸⁸

An increase in the share capital of a joint-stock company can be carried out in several ways. The ordinary share capital increase is described in Article 431 CCC. The share capital increase is a formalised process, but since currently there are various types of increase, certain common rules set out in Articles 431–433 CCC apply to all procedures, at the same time that each type of increase features individualised procedures. Therefore, we can distinguish a simple increase in the share capital (e.g. increase using the company's own funds, although it is a specific procedure) from an increase based on the target capital and from a conditional increase in the share capital.⁸⁹

Shareholders have the right to participate in the profit shown in the audited financial statements that have been allocated by the general meeting for distribution to shareholders. The profit is distributed in relation to the number of shares, and if the shares are not fully paid, the profit is distributed in relation to the contributions made to the shares. The statutes may provide for a different method of distribution of profits.⁹⁰ The amount to be distributed to shareholders may not exceed the profit for the last financial year, increased by undistributed profits from previous years and by amounts transferred from supplementary and reserve capital created from profit, which may be allocated for dividend payments. This amount should accordingly be reduced by uncovered losses, own shares, and amounts which, in accordance with the law or statutes, should be allocated from the profit for the last financial year to supplementary or reserve capital. It is possible to pay an interim dividend, and the provisions CCC allow the payment of advances towards future (possible) dividends. In contrast to a limited liability company, the provisions concerning a joint-stock company seem to be better formulated in this respect, mainly owing to more detailed regulations on the procedure for payment of advances towards profit and provisions defining the principles of liability for unlawfully-collected advances.⁹¹

88 See Kidyba, 2023.

89 See Kidyba, 2023.

90 Considering Articles 348, 349, 351§4, and 353, CCC.

91 See Kidyba, 2023.

6. Romania

6.1. Legal (Share) Capital

The term *company capital* (*capital social*) refers to the portion of assets explicitly designated as such in a company's founding documents. This capital represents the contributions made by the company's members or shareholders to establish and operate the business, and is not synonymous with the company's total assets. While total assets include all resources the company owns (e.g. cash, inventory, property, and investments), *company capital* is merely a subset of these resources, recorded as the initial or subsequent contributions specified for this purpose.

The total assets of a company are better captured by the concept of *equity* (*capital propriu*), representing the residual interest in the company after all liabilities have been accounted for.⁹² Unlike company capital, equity reflects the company's actual financial standing, incorporating not only the original investments but also the effects of retained earnings, accumulated profits or losses, and other adjustments over time. Thus, while company capital serves as a fixed, legally-defined benchmark of shareholder contributions, it is the equity that provides a more dynamic and comprehensive picture of the company's current financial health. This distinction is crucial for understanding the financial structure of a company and evaluating its performance or solvency.

It is important to recognise that *company capital* is not inherently illiquid; it can be employed for the company's operational and strategic interests in accordance with legal and regulatory requirements. Moreover, the company's liability is not confined to the amount of its registered capital; instead, a company is fully liable for its obligations, and this liability extends to the entirety of its assets, including those that exceed the registered capital. In the case of a joint-stock company, the company's total assets may exceed its company capital even at the time of establishment. This situation arises when shares are issued at a price above their nominal value, with the surplus (referred to as share premium) contributing to the company's additional equity.

In Romania, a joint-stock company can be established through two primary methods, either by the full and simultaneous subscription of capital by the signatories of the founding document, or by initiating a public offering to gather the necessary capital. When the establishment occurs through the full and simultaneous subscription of capital by all signatories, there is a regulatory requirement that at least 30% of the subscribed capital must be paid in at the time of incorporation. This stipulation highlights that the entirety of the subscribed capital is not required to be fully paid at the time of the company's establishment. This distinction forms the basis for differentiating between *subscribed capital*, which represents the total amount of capital

committed by shareholders, and *paid-in capital*, which is the portion of this commitment that has actually been fulfilled at a given time.

The unpaid portion of the subscribed capital must nonetheless be contributed within legally defined timelines. For shares issued based on cash contributions, the remaining unpaid capital must be fully paid within a period of 12 months from the date of the company's registration. For shares issued in exchange for in-kind contributions, the period within which the remaining portion must be paid extends to a maximum of two years from the date of registration. These provisions aim to ensure that the company gradually secures the full amount of its subscribed capital while offering some degree of flexibility to shareholders in fulfilling their financial obligations.

For limited liability companies, the regulatory framework originally imposed a stricter requirement: they companies were mandated to have their subscribed capital fully paid at the time of establishment. Partial payment of capital at the time of incorporation was not permitted for such entities, reflecting a more conservative approach to ensuring financial stability from the outset. However, significant changes to these regulations were introduced in 2022, according to which limited liability companies are now required to pay at least 30% of their subscribed capital within a period of three months following registration, and before any operation is performed in the name of the company. Worthy of note is that this initial payment must be completed before the limited liability company can commence operations under its registered name, thereby maintaining a safeguard for financial accountability.

The remainder of the subscribed capital for a limited liability company must also be contributed within specific deadlines, which are aligned with the principles applied to joint-stock companies. For monetary contributions, the unpaid portion of the subscribed capital must be paid within 12 months from the date of the company's registration. For in-kind contributions, the unpaid portion must be contributed within no more than two years from the date of registration.

This regulatory evolution reflects the effort to offer greater flexibility to entrepreneurs and shareholders in fulfilling their financial obligations over a reasonable period. By distinguishing between subscribed capital and paid-in capital, and by introducing staggered payment schedules, the legal framework governing both joint-stock companies and limited liability companies has become more accommodating to the practicalities of business operations, while still maintaining safeguards to protect creditors and ensure the financial viability of corporate entities.

The capital of a joint-stock company, and that of a limited partnership with shares (a corporate form that, while legally recognised, is not commonly utilised in Romania), must comply with the legal requirement of maintaining a minimum threshold of 90,000 RON. This minimum capital requirement serves as a safeguard to ensure that such companies have a baseline level of financial stability and credibility. Furthermore, the government has the authority to adjust this minimum capital

amount every two years based on exchange rate fluctuations, with the goal of aligning the minimum capital requirement with the RON equivalent of 25,000 EUR.⁹³

The reduction of company capital below the legal minimum is strictly regulated, reflecting the importance of maintaining this threshold as a critical benchmark. A reduction in company capital below the legal minimum is permissible only under specific conditions, a prominent exception being when a company transitions to a different corporate form. Other more sparse conditions involve a reduction being accompanied by a simultaneous capital increase to bring the capital back to at least the legally required minimum. This dual decision (i.e. reducing and simultaneously raising the capital) must be adopted concurrently and in compliance with the procedures established by corporate law.

Failure to comply with these provisions can have serious legal consequences. Any interested party, including creditors or other stakeholders, has the right to petition the court to dissolve the company if the company capital is reduced below the legal minimum in violation of the law. However, the dissolution of the company is not automatic upon the filing of such a petition, as the law provides a mechanism to remedy the situation and avoid dissolution. If the company raises its capital to the legal minimum before the court's dissolution decision becomes final, the company will not be dissolved. This safeguard ensures that companies are given an opportunity to rectify their capital deficiencies and continue their operations without unnecessary disruption, provided that they act promptly and in good faith to meet the legal requirements.⁹⁴

Historically, the establishment of a limited liability company in Romania required a minimum capital of 200 RON, equivalent to approximately 50 EUR.⁹⁵ This capital was divided into equal company shares, known as *părți sociale*. The law specified that the minimum nominal value of a company share was set at 10 RON. Consequently, a limited liability company with the minimum required capital of 200 RON could be structured to have a maximum of 20 company shares, each bearing a nominal value of 10 RON. However, the legal framework also permitted the use of higher nominal values for company shares. For instance, it was entirely feasible to establish a limited liability company with just two shares, each with a nominal value of 100 RON. The nominal value of these shares was carefully determined to reflect the ownership proportions mutually agreed upon by the company's members, ensuring clarity and fairness in governance and profit distribution.

Significant legislative changes were introduced with the passage of Act No. 223 of 2020.⁹⁶ This act abolished both the minimum capital requirement for limited liability companies and the prescribed minimum nominal value of company shares. Under the current legal framework, the nominal value of a company share can be set at

93 Piperea, 2014, p. 123.

94 Piperea, 2014, pp. 124–125.

95 Piperea, 2014, pp. 126–127.

96 Veress, 2024, pp. 99–100.

any amount, granting company founders greater flexibility for structuring their business. As a result, a limited liability company can now be established with a capital as low as 1 RON (e.g. a limited liability company with a capital of 2,000 RON could now issue 2,000 company shares, each with a nominal value of 1 RON).⁹⁷ This shift represents a marked departure from previous practice and significantly alters the traditional characterisation of these companies. The removal of these requirements has blurred some of the distinctions that previously set limited liability companies apart from other corporate forms. In particular, limited liability company shares can now resemble stocks owing to their nominal flexibility. Despite this resemblance, the Romanian Company Act maintains a clear legal boundary: limited liability company shares are explicitly non-tradable and cannot be considered securities, thereby preserving a fundamental distinction between limited liability companies and joint-stock companies.

In general, the minimal mandatory capital level for limited liability companies has historically facilitated the establishment of such companies, offering Romania a competitive advantage compared to jurisdictions with more stringent capital requirements. This ease of establishment explains the rarity of unlimited liability companies in Romania, as the limited liability company structure offers limited liability protections while imposing no financial barriers to entry.

However, the elimination of the minimum capital requirement has not been without its drawbacks. The debates surrounding minimum capital requirements for limited liability companies in Romania echo similar discussions in other jurisdictions. For instance, excessively low capital requirements for limited liability companies can encourage the proliferation of irresponsible or non-viable businesses, the creation of fictitious entities, and abuses that ultimately harm business partners. These risks are exacerbated when capital requirements fail to provide a meaningful threshold that screens for serious entrepreneurial intent. Conversely, excessively high capital requirements could create barriers for small and medium-sized enterprises, stifling innovation and entrepreneurial activity by making it prohibitively expensive to

97 It seems that from 2026, a new regime will be introduced: a differentiated minimum share capital regime for limited liability companies based on their net turnover. According to this new regime, for existing limited liability companies that have reported a net turnover exceeding 400,000 RON in the previous financial year, the minimum share capital is set at 5,000 RON, while for newly incorporated limited liability companies and for those with a turnover under or equal with 400,000 RON it is set at 500 RON. When a limited liability company crosses the turnover threshold, it must increase its share capital to the new legal minimum by the end of the following financial year; however, subsequent decreases in turnover do not trigger a reduction of the minimum capital. As a rule, the share capital of such limited liability companies may not be reduced below the statutory minimum, except where a simultaneous capital increase is adopted to maintain it at or above that minimum, failing which any interested party may petition the court for dissolution. Limited liability companies already registered must adjust their capital accordingly within two years from the entry into force of the law. If the capital is not brought to the required level within the prescribed time, the court may order dissolution at the request of an interested party or the Trade Register, but dissolution is avoided if the capital is regularised before the dissolution judgment becomes final.

establish a business.⁹⁸ In light of these discussions, one may argue that the minimal capital requirements for limited liability companies in Romania reflect a deliberate economic policy decision, with all the potential risks signalled above. While the low capital threshold facilitates entrepreneurship and economic dynamism, it also necessitates caution to prevent its misuse and to maintain trust in the corporate sector.

In the context of Romanian corporate law, contributions to company capital, irrespective of their specific form, are collectively referred to as “*aport*” (contribution). This term, as defined by the Romanian Companies Act, encompasses various contributions, including cash contributions, in-kind contributions, and even claims as contributions. The concept of “*aport*” is therefore broad, reflecting the flexibility allowed in structuring company capital.⁹⁹ Cash contributions represent a mandatory component of the capital structure for all corporate forms under Romanian law.¹⁰⁰ This requirement ensures a baseline liquidity in the company’s initial capital, which is essential for operational needs and creditor confidence. Importantly, cash contribution must not be confused with company financing:¹⁰¹ cash contribution is an equity injection paid into (or for) subscribed capital that creates or increases membership rights and forms part of the company’s tied capital, which cannot be returned to contributors except through legally-prescribed procedures (e.g., capital reduction or liquidation). By contrast, financing refers to debt instruments such as loans, credit lines, or bonds that give rise to repayment obligations (often with interest), confer no membership status, and rank as claims in insolvency rather than residual ownership. The equity/debt distinction entails different governance, creditor-protection, and distribution rules: equity shapes voting and dividends subject to capital-maintenance constraints, whereas debt is contractually repayable and may be secured or subordinated (including shareholder loans).

In addition to cash contributions, in-kind contributions are also permitted across all corporate forms, albeit they must meet specific legal criteria, that is, possess economic value and be capable of accurate appraisal. In practice, in-kind contributions are realised through the transfer of the appropriate rights, such as ownership, usage rights, or other proprietary interests, to the company. The title to assets contributed passes according to the nature of the asset and applicable transfer formalities (e.g., land-book registration for immovables and intellectual property registry filings), and while incorporation confers legal personality, it does not, by itself, impact transfer for all asset classes. This transfer must also be accompanied by the physical delivery of any usable assets involved, ensuring that the company gains effective control over the contributed resources.

98 Sárközy, 2001, p. 153.

99 In contrast, Hungarian corporate terminology employs the term “*aport*” in a narrower sense, referring exclusively to in-kind contributions, thereby distinguishing it from cash contributions, which are treated separately.

100 Piperea, 2014, p. 130.

101 Angheni, 2013, p. 85.

Ownership and control over the assets contributed to the company typically pass to the company upon its registration in the trade register. This moment is critical because it is when the company formally acquires legal personality, thereby enabling it to own property, enter into contracts, and operate as a distinct legal entity. Unless otherwise stipulated in the founding documents or through specific agreements among members, the assets contributed to the company become its property upon this registration. This transfer of ownership solidifies the company's financial base and is integral to the capitalisation process. It is important to emphasise that the rules governing contributions to company capital serve as a foundation for ensuring transparency, accountability, and fairness among the company's members, while also providing protections for the company itself and its stakeholders. By requiring economically-valuable and appraisable contributions, as well as imposing penalties for non-compliance, the legal framework reinforces the integrity of the corporate structure and creates trust in the business environment.

The ability to contribute claims to a company's capital is subject to significant legal limitations under Romanian corporate law. Contributions made through the assignment of claims are governed by the legal regime applicable to in-kind contributions, but the use of claims, such as collectible debts, is expressly prohibited in certain corporate structures. Specifically, publicly subscribed joint-stock companies, limited partnerships with shares, and limited liability companies are barred from using claims as contributions to company capital. This restriction reflects the risks/uncertainties associated with claims as a form of capital, particularly in the context of entities with a broad base of investors or limited liability protections. More specifically, the use of claims as contributions is permissible only under specific circumstances. For instance, claims may be contributed when a joint-stock company is established through the full and simultaneous subscription of capital by the founding signatories.¹⁰² Similarly, claims can be used as contributions in general partnerships and limited partnerships, where the nature of the corporate structure allows for greater flexibility in determining the composition of company capital and members have unlimited liability. In all cases where claims are contributed, the obligation of the contributing member is not considered fulfilled at the time of assignment. Instead, the obligation is only discharged when the claim is successfully collected by the company, as stipulated in Article 84 Romanian Companies Act.¹⁰³

If the claim cannot be collected through enforcement, the contributing member remains fully liable for the uncollected amount. This liability extends to include legal interest from the due date of the contribution, as well as any damages incurred by the company, such as the costs associated with enforcement proceedings. This framework ensures that the company's capital is ultimately secured, either through the realisation of the claim or through compensation from the contributing member.

¹⁰² Angheni, 2013, p. 86; Veress, 2024, p. 100.

¹⁰³ David, 2014, pp. 288–289.

It also protects creditors and other stakeholders from potential losses arising from unrealisable or speculative contributions.

Failure to fulfil the obligation to transfer contributions to the company can have significant legal and financial consequences for the defaulting member: a member who delays transferring their agreed-upon contribution is held liable for any damages resulting from the delay. In the case of cash contributions, the defaulting member is also obligated to pay legal interest from the due date of the contribution until the obligation is fulfilled. This provision serves to underline the importance of timely contributions in maintaining the company's financial integrity and operational readiness. It is noteworthy that no interest is imposed for delayed in-kind contributions, reflecting the different nature of these contributions, which are typically tied to the valuation and transfer of tangible or intangible assets.

A member of a limited liability company may be expelled if, after being formally put in default, they fail to make the contribution to which they are bound (expulsion is not automatic). In joint-stock companies, where shareholders have not paid the instalments (calls) due on their shares, the company shall summon them to perform; if they still fail to pay, the board of directors or the management board may either pursue them for the arrears or cancel (forfeit) those shares. In place of the cancelled shares, an equivalent number of new shares shall be issued and sold, and the proceeds shall be applied to publication and sale expenses, default interest, and the unpaid instalments, with any surplus returned to the shareholders. If the proceeds are insufficient to cover all amounts owed to the company, or if the sale cannot be effected for a lack of buyers, the company may seek recovery from the original subscribers and subsequent transferees. If, after completion of these steps, the sums due to the company have still not been realised, the share capital shall be reduced without delay in proportion to the difference between the stated capital and the capital actually paid in.¹⁰⁴

The Romanian Companies Act explicitly prohibits the contribution of work or services to a company's capital, whether at the time of incorporation or as part of a subsequent capital increase.¹⁰⁵ This prohibition reflects the fundamental principle that company capital serves as a financial guarantee for creditors, providing a tangible and enforceable basis for the company's obligations. In contrast, labour contributions do not meet this standard, as work or services are inherently non-liquid and non-enforceable. Creditors cannot compel a member to perform work on behalf of the company or enforce labour obligations in the event of default. The exclusion of labour contributions therefore ensures that the company's capital remains a reliable and quantifiable resource, safeguarding the interests of creditors and reinforcing the financial integrity of the corporate entity. These limitations on the use of claims and the prohibition of labour contributions emphasise the Romanian legal framework's accent on protecting creditors and maintaining the stability of company capital. By restricting the forms of contributions to those that are economically valuable,

104 Cărpénaru, 2014, p. 240.

105 Piperea, 2014, p. 132.

appraisable, and enforceable, the law ensures that company capital fulfils its intended role as a financial foundation.

Special laws may impose minimum capital requirements that differ from those established under general company law. These specific requirements are designed to the needs and regulatory frameworks of particular industries, ensuring that companies operating in these sectors maintain sufficient financial resources to meet their obligations and protect stakeholders. Several examples illustrate these specialised capital requirements, and are explored hereinafter.¹⁰⁶ First, non-bank financial institutions, such as leasing companies, are subject to a minimum capital requirement of 200,000 EUR, reflecting the need for these entities to maintain a financial buffer appropriate to the risks and obligations associated with their operations. Furthermore, the National Bank of Romania is empowered to establish differentiated capital requirements depending on the specific type of financial activity being undertaken, as stipulated in Act No. 93 of 2009, Article 18. For mortgage lending companies, which typically manage larger financial transactions and bear greater systemic risks, the minimum capital requirement is substantially higher, equivalent to 3,000,000 EUR. These elevated requirements ensure that entities engaging in high-stakes financial activities have the necessary resources to operate responsibly and mitigate potential risks to their clients and the financial system as a whole.

Second, credit institutions, such as commercial banks, are governed by strict capital requirements and can only be established as joint-stock companies. This structural limitation stresses the importance of transparency, accountability, and regulatory oversight in the banking sector. The capital for these institutions must be fully paid at the time of incorporation, underscoring the necessity of financial stability from the outset. The minimum capital requirement for credit institutions is set by the National Bank of Romania and currently stands at 5,000,000 EUR for commercial banks. This threshold reflects the critical role of banks in the financial system, ensuring that they possess the necessary financial foundation to manage risks, safeguard deposits, and fulfil their obligations to customers and other stakeholders. Moreover, in practice, prudential rules require amounts significantly above the statutory floor.

Third, insurance companies are also subject to rigorous capital requirements, with full payment of the capital mandated at the time of incorporation. The minimum capital amount varies depending on the specific insurance sector in which the company operates, ranging from 1,200,000 EUR to 7,400,000 EUR. These variations reflect the differing levels of risk and capital intensity associated with various insurance activities. For example, companies offering life insurance, reinsurance, or large-scale coverage products typically face higher minimum capital requirements owing to the long-term liabilities and substantial reserves needed to meet their contractual obligations.

These specialised capital requirements show the role of sector-specific regulations in maintaining financial stability and protecting the interests of consumers,

creditors, and other stakeholders. By mandating higher capital thresholds for industries that manage significant financial risks or provide critical economic services, the regulatory framework seeks to minimise the likelihood of insolvency and ensure that these entities can meet their obligations even under adverse conditions. Furthermore, the requirement for full payment of capital at incorporation in high-risk sectors reflects the importance of immediate financial readiness, reinforcing the integrity and resilience of these industries. Of course, this regulation is only part of the rules governing these industries focused on reducing the risk of collapse.

In Romanian corporate law, joint-stock companies have the exclusive right to issue corporate bonds,¹⁰⁷ while limited liability companies are prohibited from doing so. The joint-stock companies bond regime applies *mutatis mutandis* to partnerships limited by shares. A bond is a financial instrument classified as a debt security, granting the bondholder specific rights concerning the company's financial operations. When a joint-stock company issues a bond, it undertakes the obligation, as the debtor, to repay the bondholder, who acts as the creditor, the bond's nominal value along with any predetermined interest or other contractual payments. These repayments must follow the conditions, timeframe, and methods explicitly stipulated in the bond. Bonds provide companies with a regulated method of securing financing while offering investors a reliable and structured debt instrument.

Only joint-stock companies are legally allowed to issue bonds, emphasizing the level of financial oversight and structural rigor inherent to this corporate form. Romanian law requires the nominal value of a bond to not be less than 2.5 RON, creating a baseline for the issuance of such instruments. All bonds within the same series must maintain equal nominal values and confer identical rights to their holders. Bonds may be issued in two formats, namely as physical paper certificates or in dematerialised form as electronic entries in financial records. The latter form has become increasingly prevalent, reflecting advancements in financial technologies and the modernisation of securities markets.

Bondholders have the right to convene a general meeting to discuss and address matters affecting their collective interests. Such meetings must be convened at the expense of the issuing company, either at the request of bondholders representing at least one-quarter of the issued and unpaid bonds or at the request of representatives appointed by the bondholders. This provision ensures that bondholders have a formal mechanism to organise and collectively express their concerns or take the decisions necessary to protect their financial rights. The general meeting of bondholders, once properly convened, possesses substantial powers that allow them to act in the interest of safeguarding their investments. For instance, the bondholders' representatives may engage with the company and legal authorities, undertake actions to protect their rights, and propose measures to ensure that their collective interests are preserved. To facilitate these actions, bondholders may agree to create a fund derived from the interest payments owed to them, which will cover expenses related to the

107 David, 2014, pp. 608–620.

protection of their rights. The meeting can also oppose amendments to the company's founding document or to the terms of the loan if such changes could harm bondholders. Furthermore, bondholders may discuss and adopt resolutions on the issuance of new bonds, ensuring that any future debt issuance aligns with their interests and the company's obligations.

Limited liability companies face stricter limitations regarding financing options, such as not being able to issue bonds, as mentioned above. Unlike joint-stock companies, LLCs are not permitted to issue bonds. This restriction originates from the structural and regulatory differences between the two corporate forms. Joint-stock companies are subject to stricter governance, transparency, and financial oversight requirements, making them more suitable for issuing bonds, which involve broader public participation or institutional investors. Limited liability companies, in contrast, are designed for smaller operations and private ownership, relying instead on other forms of financing such as equity contributions or bank loans.

6.2. The Reduction or Increase of Share Capital

The issue of reducing and increasing share capital is regulated under Articles 207–221 Romanian Companies Act,¹⁰⁸ establishing the framework, conditions, and limitations for such changes. The aim is to safeguard both the company's financial stability and the rights of its creditors and shareholders. Share capital can be reduced in the following ways:

- a) by decreasing the number of shares (for joint-stock companies) or ownership units (for limited liability companies);
- b) by reducing the nominal value of shares or ownership units;
- c) by the acquisition of the company's own shares, followed by their cancellation.

If the reduction is not motivated by financial losses, share capital can also be reduced through:

- a) a full or partial exemption of shareholders from their payment obligations;
- b) refunds to shareholders of a portion of their contributions, proportional to the reduction in share capital and calculated equally per share or ownership unit;
- c) other methods provided by law (e.g., exclusion of a company member).¹⁰⁹

Capital reduction can only be implemented after two months have passed from the date the decision is published in the Romanian Official Gazette, Part IV. The resolution must comply with the minimum capital requirements prescribed by law, explicitly state the reasons for the reduction, and detail the method to be used. Creditors whose claims predate the publication of the decision are entitled to seek guarantees for their outstanding claims that have not yet reached maturity by that date. These creditors have the right to challenge the decision by filing an opposition. Capital reduction

¹⁰⁸ Cărpénaru, 2014, pp. 721–744.

¹⁰⁹ Angheni, 2013, p. 231.

does not take effect, and payments to shareholders cannot be made, until creditors have either been paid in full, provided with appropriate guarantees, or their claims have been rejected by the court as inadmissible or unfounded. The court's ruling must become final before the reduction can proceed. At the request of creditors with claims predating the publication of the decision, the court may require the company to provide appropriate guarantees if it is reasonable to assume that the reduction of share capital might impair the likelihood of their claims being satisfied, and if the company has failed to provide adequate guarantees voluntarily. Additionally, if the company has issued bonds, it cannot reduce its share capital by making refunds to shareholders from amounts repaid for shares unless such refunds are proportionate to the value of the redeemed bonds.

The legal framework for reducing share capital reveals several challenges. First, the mandatory waiting period and creditor opposition rights create potential delays in implementing capital reductions, which can hinder a company's flexibility in managing its capital structure. Second, the requirement to provide adequate guarantees for creditors adds a financial and procedural burden on the company, particularly when the company's assets are insufficient or difficult to liquidate. Third, when bondholders are involved, there is the need to align capital reductions with the proportion of redeemed bonds, potentially complicating the company's financial planning. Furthermore, the detailed procedural requirements, such as obtaining court approval in cases of creditor disputes, can lead to lengthy and costly legal proceedings. However, these rules aim to protect creditors and ensure the company's financial health, even if they limit a company's agility in responding to market conditions or restructuring needs.

The share capital of a company can be increased through the issuance of new shares or by raising the nominal value of existing shares in exchange for new contributions in cash and/or in kind. These two approaches provide flexibility in financing, allowing companies to adapt to their specific needs. New shares bring additional funds into the company, while increasing the nominal value of existing shares can consolidate the capital structure, often signifying financial strength. The allowance for contributions both in cash and in kind recognises the diverse ways shareholders can invest in a company. Non-cash contributions, such as real estate or intellectual property, must be, as we will see, independently appraised to ensure transparency and fairness, particularly in joint-stock companies where shareholder equity is a critical concern.

New shares may also be issued by incorporating reserves (except for legal reserves), retained earnings, and share premiums. Additionally, the company can increase its capital by offsetting liquid and due claims against the company with its own shares. Incorporating reserves, retained earnings, or share premiums into share capital demonstrates financial prudence and stability. This method converts accrued profits into long-term capital, strengthening the company's equity base without requiring additional contributions from shareholders; legal reserves are excluded to ensure a safety buffer against financial uncertainties. The possibility of increasing

capital by offsetting liquid and due claims (debt-to-equity swaps) provides a practical solution for companies facing liquidity issues, allowing creditors to convert debt into equity, reducing liabilities, and potentially stabilising the company's financial structure. However, this requires careful management to ensure that creditors do not gain disproportionate control over the company. Favourable differences resulting from the revaluation of the company's assets are to be included in reserves and cannot be used to increase share capital. This prevents companies from inflating their share capital artificially through accounting adjustments, safeguarding shareholder interests and ensuring that the capital reflects genuine contributions or profits.

An increase in share capital through raising the nominal value of shares can only be decided with the unanimous vote of all shareholders, unless the increase is achieved by incorporating reserves, retained earnings, or share premiums. The requirement for unanimous shareholder approval underscores the importance of protecting minority shareholders, as the rule ensures that all stakeholders must consent to such changes and thereto prevents any shareholder from being disproportionately affected. Of course, while requiring unanimous approval for certain changes protects shareholders, it can also hinder decision-making in cases of dissent.

All these methods are equally applicable to limited liability companies. The flexibility to apply these methods to limited liability companies highlights the adaptability of corporate law to various business structures, ensuring that smaller or privately held companies have access to similar financial mechanisms as larger, publicly-traded entities.

In the case of a public subscription of shares of a joint-stock company,¹¹⁰ the prospectus for the issuance of shares - bearing the authentic signatures of two members of the board of directors or the executive board¹¹¹ - must be submitted to the trade register for the fulfilment of publicity formalities. This regulation ensures transparency and thoroughness in the process of public share issuance. By mandating the inclusion of critical information in the prospectus, the law aims to protect potential investors and maintain confidence in the capital markets. The prospectus must include the following:

- a) the date and registration number of the company in the trade register;
- b) the name and registered office of the company (both to establish the issuer's identity and legal standing);
- c) the subscribed and paid-up share capital (to provide insight into the company's financial health and profitability);

110 David, 2014, pp. 135–175.

111 The requirement for signatures from the senior management ensures accountability. The involvement of directors or executive board members signals that the information provided is verified and accurate, reinforcing investor confidence.

- d) the names and addresses of the directors, executive board members, supervisory board members, auditors, or, where applicable, the financial auditor (to offer transparency regarding the company's leadership and oversight mechanisms);
- e) the most recent approved financial statement, along with the report of the auditors or financial auditors;
- f) dividends paid over the last five years, or since the company's incorporation if fewer than five years have passed;
- g) bonds issued by the company (the last three elemental to ensure clarity about the nature of the investment being offered);
- h) the resolution of the general meeting regarding the new issuance of shares, including their total value, number, nominal value, type, details about contributions other than cash, advantages granted for such contributions, and the date from which dividends will be paid.

A subscriber may invoke the nullity of the prospectus if it does not contain all the required elements, provided that they have not exercised any shareholder rights or obligations based on the prospectus - so as to prevent abuse of this remedy.

The increase of a company's share capital through a public offering of securities and/or by allowing shareholders to trade their pre-emptive rights on the capital market is subject to the provisions of capital market-specific legislation. In the case of a capital increase through a public offering, the administrators or members of the executive board are jointly liable for the accuracy of the information presented in the issuance prospectus, the publications made by the company, or the applications submitted to the trade register office, in accordance with the provisions of capital market legislation. If the share capital increase is carried out through contributions in kind, the general meeting that decided on this must propose to the trade registry the appointment of one or more experts to evaluate these contributions. The requirement for expert evaluation ensures that contributions in kind are accurately valued, safeguarding the interests of existing shareholders and the company. The evaluation mitigates the risk of overvaluation, which could unfairly dilute existing shareholders' equity. In cases where the share capital increase is undertaken as part of a merger or division and involves, where applicable, cash payments to the shareholders or associates of the absorbed or divided company, the preparation of an evaluation report is not required, provided that the merger or division project has been reviewed by an independent expert. This simplifies the process and avoids duplicative assessments, particularly when the independent expert's role provides sufficient guarantees of fairness and accuracy. Contributions in the form of claims are not permitted. The regulation eliminates this as a potential source of valuation disputes and legal complexity. Such contributions can pose risks of inflated valuations or difficulties in verifying the claim's enforceability and value.

After the expert report has been submitted, the extraordinary general meeting, reconvened to consider the experts' conclusions, may decide to approve the share

capital increase. The resolution of the general meeting must include a description of the contributions in kind, the names of the contributors, and the number of shares to be issued in exchange for these contributions. Shares issued to increase the share capital must first be offered to existing shareholders in proportion to the number of shares they already hold.¹¹² The prioritisation of existing shareholders in subscribing to new shares ensures that they retain their proportional ownership in the company and that this is not diluted without their consent. This mechanism reflects the principle of equitable treatment among shareholders. Specifically, the court held that, when increasing share capital by issuing new shares, existing shareholders have a statutory pre-emptive right to subscribe pro rata. The general meeting's decision limiting subscription to only those shareholders physically present was unlawful and had to be set aside.¹¹³ Pre-emptive rights are a core anti-dilution safeguard and cannot be curtailed by a simple majority resolution or by attendance-based conditions, as conditioning subscription on physical presence discriminates among shareholders and violates the principle of equal treatment. Proper procedure requires an offer to all entitled shareholders, clear timelines, and proportionate allocation, with any waiver or restriction valid only if adopted in the form and with the majorities the law prescribes.

The exercise of the pre-emptive right can only occur within the timeframe set by the general meeting or the board of directors, or management board, unless the articles of incorporation stipulate a different timeframe. In all cases, the period granted for the exercise of pre-emptive rights must not be shorter than one month from the date of publication of the resolution of the general meeting (i.e. or the decision of the board of directors, or of the management board) in the Official Gazette of Romania, Part IV.¹¹⁴ After the expiration of this period, the shares may be offered for public subscription. By requiring the pre-emptive period to elapse before offering shares to the public, the regulation creates a balance between shareholder rights and the company's need to access broader financing options. Any increase in share capital carried out in violation of the rules governing the exercise of pre-emptive rights is voidable.

The court held that a share capital increase carried out by converting a creditors' certain, liquid, and due claim into shares (debt-to-equity conversion) is a distinct mechanism that benefits only the creditor and, in this context, the statutory pre-emptive right under does not operate.¹¹⁵ The ruling distinguishes conversion from setoff: the company's payment obligation is novated into an obligation to issue shares, so there is no "subscription window" for other shareholders to exercise pre-emption. While pre-emption is inoperative, the general meeting must still approve the transaction and ensure a fair exchange ratio so that the value of the claim equals the value of

112 Angheni, 2013, pp. 233–235.

113 ÎCCJ, s.com., dec. nr. 2613 din 26 septembrie 2008.

114 We cannot deny that, in some cases, companies may face logistical challenges in meeting the one-month minimum pre-emption period, especially in urgent capital-raising scenarios.

115 ÎCCJ, s. a II-a civ., dec. nr. 3388 din 1 noiembrie 2011.

the shares issued, avoiding hidden dilution. This is especially salient where the creditor is an insider or related party, warranting independent valuation and enhanced disclosure to satisfy capital-maintenance and minority-protection norms. Properly structured, conversion can deleverage and stabilise the company; improperly priced, it can be an instrument of opportunistic redistribution of control. Shareholders also have a pre-emptive right when the company issues convertible bonds.¹¹⁶ Extending pre-emptive rights to convertible bonds aligns with the principle of protecting shareholders' interests, as the conversion of such bonds into shares could also dilute their ownership.

The pre-emptive right of shareholders can be limited or waived only by resolution of the extraordinary general meeting of shareholders. The board of directors or the management board must provide the extraordinary general meeting with a written report detailing the reasons for limiting or waiving the pre-emptive right. This report must also explain how the price of the shares issued was determined. Limiting or waiving pre-emptive rights is subject to strict procedural safeguards, and the requirement for a detailed written report by the board of directors or management board and its approval by a qualified majority ensures that any such limitation serves the company's legitimate interests and does not unfairly disadvantage existing shareholders. The resolution on limitation or waiver must be adopted in the presence of shareholders representing three-quarters of the subscribed share capital and by a majority of the votes of those present. The resolution must be filed with the trade registry by the board of directors or the management board for registration and published in the Official Gazette of Romania, Part IV. The resolution of the general meeting regarding the increase of share capital produces effects only if it is implemented within 18 months from the date of its adoption. The 18-month deadline for implementing the general meeting resolution reflects a principle of expediency and prevents prolonged uncertainty for the company and its stakeholders. By requiring timely action, the regulation ensures that capital increases serve their intended purpose and do not become a source of indefinite delay or administrative backlog. If the proposed capital increase is not fully subscribed, the capital will be increased in the amount of received subscriptions only if the issuance terms explicitly allow for this possibility.

Shares issued in exchange for cash contributions must be paid up at least 30% of their nominal value at the time of subscription, and fully paid within no more than three years from the publication date of the general meeting resolution in the Official Gazette of Romania, Part IV. This minimum 30% upfront payment for cash contributions ensures that subscribers demonstrate a genuine commitment to the company at the time of subscription, reducing the risk of financial shortfalls. The three-year deadline for full payment provides flexibility while maintaining a clear timeline for the realisation of the company's financial plans. Shares issued in exchange for

116 Cărpenu, 2014, p. 739.

contributions in kind must also be fully paid within the same three-year period. When an issuance premium is specified, it must be paid in full at the time of subscription.

The Romanian Companies Act also introduces the concept of authorised capital, referring to a flexible mechanism enabling a company to increase its capital without the need for repeated approvals by the general meeting of shareholders. By delegating authority to the board of directors or management board, the company can respond more swiftly to financing opportunities and market conditions. Under the articles of incorporation, the board of directors or the management board may be authorised, for a specified period not exceeding five years from the date of the company's registration, to increase the subscribed share capital up to a predetermined nominal value (authorised capital) by issuing new shares in exchange for contributions. Such authorisation can also be granted by the general meeting of shareholders through an amendment to the articles of incorporation, for a period not exceeding five years from the date of registration of the amendment. The articles of incorporation may impose stricter quorum requirements for such amendments. In both cases, the time limitation of five years for the authorised capital reflects a balance between managerial discretion and shareholder oversight, ensuring that such powers are not indefinitely conferred and remain subject to periodic shareholder review.

The nominal value of the authorised capital cannot exceed half of the subscribed share capital existing at the time of authorisation. The authorisation granted to the board of directors or management board may also include the power to decide on the restriction or removal of the pre-emptive rights of existing shareholders. This potential restriction or removal of pre-emptive rights by the board, subject to specific conditions, highlights the tension between flexibility in raising capital and the protection of existing shareholders. While this power can facilitate the swift entry of new investors/strategic partners, it can also dilute the interests of current shareholders. This authorisation is granted to the board of directors or management board by the general meeting of shareholders under the quorum and majority requirements previously analysed (i.e. presence of shareholders representing three-quarters of the subscribed share capital and by a majority of the votes of those present). The decision of the board of directors or the management board regarding the restriction or removal of pre-emptive rights must be submitted to the trade registry for registration and published in the Official Gazette of Romania, Part IV.

6.3. Dividends

The issue of dividends is regulated by Article 67 Romanian Companies Act.¹¹⁷ First, shareholder contributions to the share capital do not bear interest. The Romanian law explicitly prohibits the payment of interest on shareholder contributions to the share capital, ensuring that returns to shareholders are tied to the company's profitability rather than acting as a fixed return akin to debt instruments.

117 Cărpenaru, 2014, pp. 241–247.

The portion of the profit paid to each shareholder constitutes a dividend. As a default rule, it is stated that dividends are distributed to shareholders proportionally to their paid-up share capital.¹¹⁸ Romanian corporate law allows the members of a company to agree on varying ratios for the distribution of dividends, offering flexibility in aligning dividend entitlements with the specific member contributions, roles, or agreements. This flexibility supports arrangements that can reflect the unique circumstances of each company and its stakeholders. However, such arrangements are subject to the prohibition of the *societas leonina* principle, under which any agreement that entirely excludes a member from receiving dividends is invalid under Romanian law. This rule serves to protect the rights of all members and maintain equity within the corporate structure, ensuring that each member is entitled to a share of the profits proportionate to their agreed-upon stake in the company.

In Romanian company law, the decision to distribute dividends belongs exclusively to the general meeting of members as a part of its competence to determine profit use.¹¹⁹ The meeting may either reinvest earnings into the company (for development needs or strengthening working capital) or declare dividends for distribution. Shareholders' right to claim dividends does not arise automatically from the existence of profit, but only once the general meeting has expressly approved their distribution. Upon such approval, the dividend becomes a binding monetary obligation of the company, payable to the members under the conditions set by the resolution.

The requirement that dividends only come from legally-determined profits serves to protect creditors and maintain the company's financial stability, as it ensures that shareholders cannot receive returns at the expense of the company's solvency. Dividends are distributed optionally on a quarterly basis based on interim financial statements and annually, following adjustments made through the annual financial statements - unless otherwise stipulated in the articles of incorporation. Quarterly payments are optional and must be made within the timeframe established by the general meeting of shareholders or, where applicable, by special laws. The possibility of quarterly distributions introduces flexibility but increases the complexity of financial management, requiring interim statements/adjustments to reflect accurate profitability. Companies may face legal risks if interim distributions are found to exceed the actual profits determined later.

Any differences resulting from dividend distributions during the year must be settled through the annual financial statements. Payments of these differences must be made within 60 days of the approval of the annual financial statements for the concluded financial year. If this deadline is not met, the company owes penalising statutory interest, unless the articles of incorporation or the resolution of the general meeting of shareholders approving the financial statements stipulates a higher interest rate. In cases where partial dividends are distributed among shareholders during the financial year, the annual financial statements must reflect these partial

118 Veress, 2024, p. 101.

119 ÎCCJ, s.com., dec. nr. 2490 din 29 iunie 2010.

dividends and adjust any resulting differences accordingly. If shareholders owe the company the repayments of dividends following the adjustments made in the annual financial statements, these must be paid within 60 days of the approval of the financial statements. If not paid within this period, the shareholders owe penalising statutory interest, unless a higher interest rate is stipulated in the articles of incorporation or the resolution of the general meeting of shareholders approving the financial statements.¹²⁰

As stated above, dividends can only be distributed from profits determined in accordance with the law. Therefore, dividends paid contrary to the above provisions must be reimbursed if the company proves that the shareholders were aware of the irregularity of the distribution or should have been aware of it under the existing circumstances. Shareholders who receive dividends in violation of the law may be held liable if they knew or should have known of the irregularity. This provision protects distribution integrity, but requires clear evidence to enforce. The right to claim the reimbursement of dividends paid in contravention of legal provisions is subject to a limitation period of three years from the date of their distribution.

Dividends due after the transfer of shares belong to the transferee, unless otherwise agreed by the parties. Accordingly, the law allows the parties to agree how to apportion dividends attributable to the period prior to the transfer, and, absent a contrary clause in the transfer agreement, those dividends accrue to the assignee.¹²¹ Doctrinally, this sets a default allocation rule, as pre-transfer period dividends that have not yet been declared follow the share and, by operation of law, belong to the assignee, unless the parties contract otherwise. Undeclared dividends are a mere expectancy (civil fruits) attached to membership; they pass with the transferred participation, whereas once a dividend has been approved by the general meeting, it crystallises into a separate receivable of the then-member and will not pass unless expressly assigned. Practically, transfer agreements deal separately with declared-but-unpaid dividends and use price adjustments/indemnities to align economics with legal entitlement. In relation to the company, payment follows the registered holder and any record date; a different contractual allocation operates inter partes only unless the company is duly notified and cooperates in directing payment.

If a loss in net assets is identified, the subscribed share capital must be replenished or reduced before any allocation or distribution of profits can occur. This requirement in the event of a loss in net assets before distributing profits ensures that the company retains sufficient resources to meet its obligations, serving as a safeguard against insolvency, but could delay shareholder returns.

120 The imposition of penalising statutory interest on delayed payments by either the company or shareholders creates a strong incentive for compliance. However, this also places administrative and financial burdens on companies and shareholders alike.

121 ÎCCJ, s. a II-a civ., dec. nr. 1331 din 2 aprilie 2014.

7. Serbia

The rules on the legal capital and finances will be presented separately for limited liability companies and joint-stock companies. The same approach will be implemented in Chapters IV, and V, and partially in Chapter VI.

7.1. *Limited Liability Companies*

Serbian company law adopts the traditional Continental European approach concerning the role of legal capital. Here, at least in theory, legal capital has the function of protecting an “organised pool of assets” ensuing upon company formation and securing the creditors’ preferential access to these assets.¹²² As a consequence of adopting this approach, legal capital remains one of the prerequisites for the formation of limited liability companies in Serbian law. The amount of legal capital is a mandatory element of the articles of association of a limited liability company, and it is subject to mandatory registration.

However, Serbian law and legal scholarship have been up to date with the changes in the role and significance of the concept of legal capital in modern company law. The main result of this perceived change is acceptance of the overarching tendency to lower the amount of minimum legal capital, thereby affecting its protective function, as well as the capital adequacy function. This tendency is particularly observable for limited liability companies, where the prescribed minimum legal capital amounts to only 100 Serbian dinars (less than one euro). This tendency reduces the actual role of the legal capital to the method for determination of the percentage of each shareholder’s contribution in the legal capital, that is, to a denominator of the extent of shareholders’ rights in a company (this denominator does not have a conclusive role owing to the existence of the freedom of contract of principle).¹²³

Regarding the definition of legal capital, former Serbian legislation had produced some uncertainties due to imprecise and even incorrect understanding of some main elements of that definition.¹²⁴ Current law defines legal capital in a manner that goes hand-in-hand with common comparative law, describing that it is the pecuniary value of the company’s shareholders’ subscribed contributions to the company, which is registered in accordance with the registration act.¹²⁵ The amount of legal capital is generally fixed and may be changed only in specifically prescribed cases involving the formal reduction and increase of the legal capital, including a set of specific material and procedural requirements for effecting the change. Despite its general invariability, the capital contributed by the shareholders may be used in trading, but

122 Gerner-Beuerle and Schillig, 2019, pp. 723–724.

123 Jovanović et al., 2021, p. 370.

124 Ibid., pp. 453–454.

125 Article 44, Section 3, CA.

must not be returned to the shareholders, except in liquidation upon payment of all creditors.

Serbian law contains several rules relevant to the initial raising of the legal capital, aiming to secure the performance of shareholders' obligations regarding the subscribed contributions. They cover various issues, from the allowed types of contributions to the valuation of in-kind contributions, the rules inflicting the obligation to pay up the contributions, and concomitant liability in case of failure in performing that obligation.

Shareholders' contributions to the company may be in cash or in kind.¹²⁶ The latter may take the form of any assets of value (e.g. immovable property, claims, and intellectual property rights),¹²⁷ except an undertaking to perform work or to supply services. The Companies Act (CA) requires the valuation of the in-kind contributions, which is to be expressed as a monetary equivalent to enable the counting of the overall amount of the legal capital and the individual contributions. However, in the context of private companies (e.g. private joint-stock companies), this valuation may be done either by the certified expert or by the shareholders themselves.¹²⁸ Hence, the expert's valuation of in-kind contributions is not mandatory in limited liability companies.

As a matter of principle, Serbian company law states that persons who have, under the articles of association or otherwise, taken on the responsibility of paying up certain contributions to the company, are liable to the company for fulfilment of that obligation. This obligation nonetheless does not have to be performed before the company's formation. It is possible to include in the articles of association that contributions are to be paid up after the company's formation, but not later than five years from the day of the registration of the articles of association.¹²⁹ A company may not release the shareholders of the obligation to pay up the contribution to the company, with one full and one partial exception to this rule. The shareholders are fully exempted from their obligation in case of capital reduction which triggers the application of rules on creditor protection (these rules are to be discussed in Chapter VII).¹³⁰ The partial exemption refers to the possibility to replace the shareholders' obligation if the general meeting so decides and if the shareholder in question agrees with the replacement. The replacement may entail, for instance, a change of cash contribution for in-kind contribution or *vice versa*, or a change of one sort of in-kind contribution for another (entering certain assets instead of claims towards third parties).¹³¹

The CA prescribes three consequences for a failure to pay up the contribution or for a late payment. First, a general rule on shareholders' liability to compensate for

126 Article 45, Section 1, CA.

127 Marjanski, 2022, p. 728.

128 Article 50, Section 1, CA.

129 Article 46, Section 2(2), CA.

130 Article 46, Section 3, CA.

131 Article 46, Section 4, CA.

damages caused to the company by failing or being late to carry out their obligations.¹³² Second, it allows the company to request liquidated damages from a shareholder in breach, provided that such a possibility is entrenched in the articles of association.¹³³ Under general civil law rules, payment of liquidated damages is possible only as a consequence of untimely performance, or failure to perform the obligation concerning an in-kind contribution. Finally, as the most severe consequence, the law predicts the possibility of the expulsion of a shareholder who breached his/her duties regarding paying up contributions to the legal capital. The expulsion is possible only after a “second chance” to perform his/her obligation has been provided to the shareholder (i.e. an additional period of at least 30 days).¹³⁴ The decision on the expulsion is made by the qualified majority of the general meeting. This is the only situation in which the court does not decide on the shareholder’s expulsion. In any case, the expulsion remains a mere possibility, as the shareholders are not obliged to bring the resolution on the expulsion of the shareholders who breached their obligations regarding paying up the contributions.

From a corporate finance perspective, a key function of the legal capital concept is to ensure that the creditors have preferential access to the company’s assets by limiting the company’s power to pay dividends and make distributions to shareholders.¹³⁵ Serbian law acknowledges the existence of several instruments for maintaining the value of the company’s legal capital, some of which associate with the process of legal capital formation, while others aim to keep its value after initial formation. The former include rules that prohibit returns of contributions to the shareholders and contributions in performing work or supplying services, as well as on the valuation of in-kind contributions. Among the post-formation instruments, the most important are the rules on distribution in the form of dividends or any other form that extracts the company’s value in favour of the shareholders. The rules on distributions to the shareholders touch upon several issues, as follows:

- a) what is considered a distribution;
- b) what type of distributions are covered;
- c) what are the prerequisites for distributing value to the shareholders;
- d) what are the consequences of breach of the rules on distributions.

The adequate scope of application of the notion of distribution to shareholders has been recognised as a significant element of related regulation. It is abundantly clear that this notion always applies to open dividends, and yet open dividends that do not comply with the prescribed rules on distributions are rare in practice. Much more relevant are hidden or disguised distributions, that is, a transaction between the company and its shareholders that confer some economic benefit to a shareholder

132 Article 46, Section 1, CA.

133 Article 48, Section 1, CA.

134 Article 48, Section 2, CA.

135 Gerner-Beuerle and Schillig, 2019, p. 761.

that he/she would not have obtained in an arm's length transaction.¹³⁶ For instance, the hidden distribution might be the sale of an asset below market value to a shareholder.

Serbian law defines the notion of distributions to the company's shareholders in a very broad manner, expressly encompassing dividends, return of additional payments, and loans. In addition to these expressly-recognised types of payments, CA uses a very broad and open formulation that under the notion of distribution includes *similar payments*, as well as *any other payments on any grounds*.¹³⁷ This certainly covers both distributions that have company law character and those that have civil law character.¹³⁸ Therefore, the letter of the law seems to adopt a very strict approach to the distributions to shareholders, although it may be questioned whether the legislator intended to produce such effect and cover all potential disguised distributions. The side effect of such a broad definition is its failure to recognise that certain payments to shareholders may be a result of commercially-sound transactions in the general interest of the company.¹³⁹

Regarding the second problem, by the letter of the law, CA covers only monetary payments. However, in Serbian scholarship, a literal interpretation of this provision is recognised to potentially lead to unintended consequences, therefore arguing for broadening the scope of the provision to non-monetary distributions made to shareholders.¹⁴⁰

Once it is established that a certain payment (or any other transfer of value) qualifies as a distribution, it triggers the application of the rules that assess the permissibility of that distribution. These rules are based on Article 56 of Directive (EU) 2017/1132, entailing that the CA founds its rules on the distributions made to the shareholders on the so-called "balance sheet test" and "profit and losses test". There are no rules that resemble the solvency test or any other more sophisticated test to determine distribution permissibility. The balance sheet test prohibits a company to make any distribution to the shareholders if, according to the latest financial statements, the company's net assets are lower - or would become lower due to such payments - than the amount of paid-up legal capital increased by the legal or company (voluntary) reserves (if any). The exception is in the case of a reduction of share capital.¹⁴¹ The profit and losses test limits the amount distributed to the shareholders to the profit made at the end of the business year, increased by retained earnings from previous years and the amounts of reserves provided for distribution to shareholders, and decreased for the losses brought forward from previous periods and the amounts of reserves (if any).¹⁴²

136 Ibid., p. 769.

137 Article 182, CA.

138 Marjanski, 2020, p. 217.

139 EMCA, Chapter VII, Part I, Section 7.01. (comments).

140 Jovanović et al., 2021, p. 459; Veličković, 2019a, pp. 300–301.

141 Article 275, Section 1, in relation to Article 181, Section 1, CA.

142 Article 275, Section 2, in relation to Article 181, Section 1, CA.

The main legal consequence of non-permitted distributions is the return of those distributions to the company. The persons liable for the return may be shareholders, directors, and members of the supervisory board (if a limited liability company adopted a two-tier management structure). Regarding shareholders, the law provides different rules on the liability of shareholders who received prohibited distribution, those who voted for the general meeting's resolution on that distribution, and those who neither received the distribution nor voted for it. The shareholders who received prohibited distribution are liable in any case for the return of the payment if that is necessary to settle the claims of the company's creditors. If creditors' claims can be settled without a return of the prohibited distribution, the law requires a return only if the shareholders did not act in good faith.¹⁴³ The liability rule for shareholders who voted for the prohibited distributions is stricter as they are always jointly and severally liable for the return of the payment.¹⁴⁴ Finally, the shareholders who did not vote for the resolution may be jointly and severally liable for the return of the distribution if it is proven that they have deliberately or through gross negligence contributed to the company's making such prohibited payment.¹⁴⁵

When it comes to the directors' liability (including supervisory board members, if any), they are liable for the return of prohibited distributions if they approved it, and if they knew or, according to the specific circumstances, might have known that those distributions were in contravention with the relevant provisions of the CA.¹⁴⁶ In addition, the directors and the supervisory board members are liable, even if stated requirements are not met, if it is proven that they have deliberately or through gross negligence contributed to the company's making such prohibited payment.¹⁴⁷

The procedure for the reduction of the share capital may be conducted in regular or simplified procedures. As these procedures mainly relate to the specific measures of creditor protection, those will be discussed in more detail in Chapter VII. There are several methods of capital reduction in limited liability companies, as follows:

- a) covering losses of the company;
- b) creating or increasing the company's reserves to cover future losses, or increasing the capital from the company's net assets;
- c) in case of non-performance of the shareholders' obligation to pay up the contributions;
- d) in case of annulment of the reserved own share;
- e) in case of status changes;
- f) on the occasion of withdrawing and cancelling a share;
- g) in case of mandatory cancelling of own share if this has not been disposed within three years from the day of acquisition.¹⁴⁸

143 Article 185, Section 2, CA.

144 Article 185, Section 3, CA.

145 Article 185, Section 4, CA.

146 Article 185, Section 3, CA.

147 Article 185, Section 4, CA.

148 Article 147, Section 1, CA.

A resolution on the reduction of share capital is adopted by the general meeting by a majority of two-thirds of the total number of votes of all shareholders, unless the articles of association stipulate a different majority, which may not be smaller than the simple majority of the total number of votes of the shareholders entitled to vote on a certain issue.¹⁴⁹ There are several conditions, that are to be gradually assessed (in their respective order), for distributing dividends to shareholders:

- a) the company's financial statements demonstrating that the company has achieved profits in the previous year;
- b) appreciation of the list of priorities established in CA;
- c) resolution of the general meeting.

Positive financial statements are the first and foremost condition for distributing dividends. However, in case of the deterioration of the company's financial condition after the end of the business year, this negative development may significantly influence the possibility of distributing dividends. Directors and supervisory board members are obliged to inform the general meeting about said deterioration, provided that the company's financial status has considerably and not only temporarily worsened due to the losses or reduction of the share capital value. In such a case, the general meeting must exclude from the distribution of profit the amount corresponding to the reduction of the company's assets.¹⁵⁰

The second condition concerns the statutory list of priorities. Before the general meeting can decide on distributions, directors must make sure that previous years' losses and mandatory legal reserves (if the company must have such reserves, which is unusual for limited liability companies) are covered. Once these priorities (if any) are fulfilled, then the company is free to decide to distribute its profits to the shareholders, or to transfer them to the potential reserves prescribed by the articles of association.¹⁵¹ However, it must be underlined that, in Serbia, there is no legal obligation for the company to do that. Serbian law does not entitle minority shareholders to seek a certain percentage of the profits to be distributed.

The third condition refers to the relevant resolution of the general meeting, which must be adopted by a qualified majority. The decision may be brought either at the regular, annual general meeting or any other extraordinary meeting. The latter concerns the distribution of dividends during the business year, referring to the period between the adoption of the previous year and the current year's financial statement.¹⁵² The main material condition for the distribution of interim dividends is the gaining of profits in the meantime, and the adoption of specific financial statements for determining required positive business results.¹⁵³ Only when the general meeting adopts the decision on dividend distribution will a shareholder who is entitled to a

149 Article 147, Section 2, CA.

150 Article 184, Section 2, CA.

151 Article 270, CA.

152 Article 273 in relation to Article 183, Section 1, CA.

153 Marjanski, 2020, p. 221.

dividend become the company's creditor for the amount of that dividend. The decision on the distribution of dividends must contain the day relevant for the determination of the shareholders entitled to the distribution in question. The articles of association may define the method for the determination of that day, in which case the general meeting must apply that method in its determination of the relevant day.

Finally, there is role of directors and supervisory board members in dividend distribution. Their role is threefold and essentially related to each of the three requirements discussed above:

- a) responsible for the accuracy of financial statements;¹⁵⁴
- b) responsible for the statutory list of priorities to be fulfilled before the distribution;¹⁵⁵
- c) may be allowed to decide on the interim dividends if such possibility has been prescribed in the articles of association.

7.2. Joint-Stock Companies

The basic legal rules and principles on legal capital, its definition, and legal, and practical significance discussed above equally apply to joint-stock companies. Briefly, the legal capital is the prerequisite for their formation in Serbian law, and its amount is a mandatory element of the company's statute. The minimum legal capital is naturally higher amounting to 3,000,000 Serbian dinars (cca. 25,000 euros) unless a higher amount is specified for certain joint-stock companies (insurance companies and banks).¹⁵⁶ In addition to the requirements already discussed in the subchapter dedicated to limited liability companies, there are several specific requirements concerning raising the legal capital in joint-stock companies:

- a) the shareholders must pay up at least 3,000,000 Serbian dinars in cash (minimum legal capital) before the formation of joint-stock company;¹⁵⁷
- b) monetary contributions must be entirely paid up before the company's formation;¹⁵⁸
- c) the shareholders must pay up contributions that represent at least 25% of the legal capital (this rule is applicable only if the legal capital exceeds the minimum amount, and if there are contributions in-kind);¹⁵⁹
- d) the in-kind contributions in public joint-stock companies must be evaluated by an expert following specific requirements prescribed in the law¹⁶⁰ (this rule is a consequence of concern that contributions in kind generally might be overvalued);¹⁶¹

154 Article 225, CA.

155 Article 273, Section 2 in relation to Article 183, Section 1, CA.

156 Article 293, CA.

157 Article 266, Section 2, CA.

158 Article 266, Section 1, CA.

159 Article 266, Section 2, CA.

160 Article 50, Section 2, CA.

161 Gerner-Beuerle and Schillig, 2019, p. 748.

- e) the shareholders of public joint-stock companies must pay up in-kind contributions before company formation, while the statute of private joint-stock companies may provide for the possibility of paying them up after the formation, but not later than five years from the day of the registration of the articles of association;¹⁶²
- f) in case of shareholders' failure to fulfil the obligation to pay up the contribution, even after the additional period left in accordance to the rules applicable in limited liability companies, the public joint-stock company's board of directors, or the supervisory board (if any), is obliged to bring the decision on withdrawal and cancellation of shares (in private joint-stock companies the general meeting may bring this decision, as is the case in the limited liability companies).¹⁶³

The main legal instruments, both those referring to the obligations during company formation and upon formation, are generally the same in joint-stock companies and limited liability companies. The same is true for the distributions to shareholders, with most rules created for joint-stock companies in this regard applying *mutatis mutandis* to limited liability companies.

However, certain differences must be mentioned as they relate to distribution and the liability rules in case of prohibited distributions. Contrary to the rules on distributions to limited liability company shareholders, the CA does not contain any indications on the scope of application of distributions (payments according to the Serbian legislator). In legal theory, it is considered that this notion covers all payments with company law origins, that is, payments made on the basis of the status of a shareholder. According to this opinion, any payments based on the performance of contracts between shareholders and joint-stock company are not covered.¹⁶⁴

When it comes to liability rules, there are three differences compared to the rules for limited liability companies, as follows:

- a) there is no liability at all for the shareholders who received distributions in good faith;¹⁶⁵
- b) there are no specific rules on directors' civil liability, meaning that directors of joint-stock companies are only criminally liable;
- c) there are no liability rules applicable to shareholders who voted for the resolution of the general meeting to make a distribution.

As the measures concerning the procedure of the reduction of share capital almost exclusively concern creditor protection, similar to the situation for limited liability

162 Article 46, Section 2(2), CA.

163 Article 280, Section 1 in relation to Article 48, Sections 7 and 8, CA.

164 Jovanović et al., 2021, pp. 459–460.

165 Article 275, Section 4, CA.

companies, these measures will be discussed in Chapter VII. Here, it suffices to bring up the methods of reduction, described as follows:

- a) withdrawal and cancellation of shares in the possession of shareholders;
- b) cancellation of the company's own shares;
- c) reducing the par value of shares (i.e. accounting value of shares in case of no-par shares).¹⁶⁶

The share capital reduction must be conducted respecting the principle of equal treatment of shareholders of the same class. This is secured through a proportionate withdrawal and cancellation of shares of all shareholders of the relevant class of shares, or by a proportionate reduction of par value (i.e. accounting value of shares of all shareholders of the relevant class of shares).¹⁶⁷ The decision on the reduction of legal capital is passed by the qualified majority of the general meeting.¹⁶⁸

Similar to the share capital maintenance rules, the CA provides for a *mutatis mutandis* application of the rules prescribed for the dividends to joint-stock companies and limited liability companies. Hence, the conditions for distributing dividends to limited liability company shareholders equally apply to joint-stock companies. A dividend on shares is paid to shareholders according to the rights attached to the type and class of the shares they hold. Since dividends may be paid out in cash or shares, there are some rules which cover the latter case, which are outlined herein:

- a) such payment shall be approved by the shareholders of the class of shares to which such payment is made under the rules on the voting of shareholders within a class of shares;
- b) payment to each shareholder of a class of shares who is entitled to dividends is made in shares of that class.¹⁶⁹

As an exception, a dividend may be paid in the form of shares of some other type or class only if any such payment is approved by a three-quarter majority of the present shareholders holding shares of the class to which such payment is made, and by the same majority of votes of the shareholders of the class of shares in whose shares the dividend is paid.¹⁷⁰

166 Article 315, Section 1, CA.

167 Article 318, CA.

168 Article 314, Section 1, CA.

169 Article 272, Section 2, CA.

170 Article 272, Section 3, CA.

8. Slovenia

8.1. Rules on Legal Capital

8.1.1. Limited Liability Company

According to the law, the minimum share capital of a limited liability company must be at least 7,500 EUR (Art. 475(1) Slovenian Companies Act, or ZGD-1). Regarding capital relations, the law specifically regulates the contribution or provision of capital to the company, the maintenance of capital at a minimum level, and the increase or reduction of the share capital. The share capital is composed of the capital contributions of the shareholders, which can have different values (Art. 471(1) ZGD-1) but must not be less than 50 EUR (Art. 475(1) ZGD-1).

The share capital contribution can be provided in cash or in kind as a non-cash contribution or acquisition (Art. 475(2) ZGD-1). Prior to company registration, the founders must ensure at least one-fourth of the capital contribution in cash, and the total value of all provided contributions must amount to at least 7,500 EUR, which must be cumulatively met (Art. 475(4) ZGD-1). Non-cash contributions must be fully transferred before the registration in the register. If the value of the non-cash contribution does not reach the value of the assumed capital contribution, the shareholder must pay the difference in cash (Art. 475(5) ZGD-1).

A founding shareholder can provide a non-cash contribution by undertaking an obligation in the company's articles of association to transfer a specific asset, right, or property to the company, and doing so (non-cash contribution). Alternatively, they can commit to pay a certain amount of money as a contribution but fulfil their obligation by having the company acquire a specific asset or right from a third party, with the payment for that asset being made by the shareholder (non-cash acquisition). The capital contributions must always be expressed in monetary terms, and if non-cash contributions are involved, the value of the assets must be determined, and it must be specified which part of the capital contribution is covered by the non-cash contribution. Additionally, it should be emphasised that the provisions of the ZGD-1 governing the post-formation acquisition of a joint-stock company (Art. 188 ZGD-1) do not apply to limited liability companies.¹⁷¹

If the shareholders provide non-cash contributions to the company, they must prepare and sign a report on non-cash contributions before the registration in the register (Art. 476(1) ZGD-1). The report on non-cash contributions determines the value of each non-cash contribution and whether it corresponds to the value of the assumed capital contribution (Art. 476(2) ZGD-1). To determine the value of non-cash contributions, all criteria that can contribute to assessing the fair market value are considered (e.g. invoices, court expert evaluations, and data on market prices of similar items).¹⁷²

¹⁷¹ Ivanjko et al., 2009, p. 882.

¹⁷² Ibid., 2009, p. 883.

If the total value of the non-cash contributions exceeds 100,000 EUR, the shareholders contributing non-cash contributions must, at their own expense, ensure that the non-cash contributions are assessed by an auditor, and the auditor's report becomes a constituent part of the report on non-cash contributions (Art. 476(4) ZGD-1).

8.1.2. Joint-stock company

A joint-stock company is the owner of own assets because it is liable for its obligations with all its assets (Art. 168(2) ZGD-1). In addition to assets, the share capital of such companies is also important, representing the value, expressed in money, that shareholders must contribute to the company as payments for shares.¹⁷³ The share capital in a joint-stock company is fully divided into shares (Art. 168(1) ZGD-1).

Shares may be in the form of shares with a nominal value or as no-par value shares, but the company may not have both types of shares at the same time (Art. 172(1) ZGD-1). Shares with a nominal value must have a minimum value of 1 euro or multiples thereof, and their proportionate share in the share capital is determined by the ratio between their nominal value and the share capital amount (Art. 172(1) ZGD-1). Therefore, the formula for calculating the share capital of a joint-stock company with shares that have a nominal value is as follows:

$$\text{Number of shares} \times \text{nominal value per share} = \text{share capital}$$

The calculation of the share capital is different if the company has no-par value shares. These do not have a nominal value, but each no-par value share represents an equal share and corresponding amount in the share capital, which shall not be less than 1 EUR.

The share capital represents the initial and reverse capital, as well as the guarantee for the obligations of the joint-stock company. The principle of durability and immutability applies to share capital,¹⁷⁴ which, *inter alia*, prohibits the contributions to be refunded and to bear interest (Art. 227 ZGD-1). Special procedures and requirements are established for increasing or reducing the share capital, which also include amending the articles of association. Under Slovenian law, the minimum share capital of a joint-stock company is set at 25,000 EUR (Art. 171 ZGD-1). The share capital must never be reduced below this amount, except in the case of a combined reduction and increase of the share capital (Art. 378 ZGD-1).¹⁷⁵

¹⁷³ Ibid., 2009, p. 463.

¹⁷⁴ Ibid., 2009, p. 464.

¹⁷⁵ Article 378, ZGD-1 allows for an exception to reduce the share capital below the minimum amount, provided that it is subsequently restored through an increase in share capital. A resolution specifying the increase of the share capital must be adopted simultaneously with the reduction of the share capital, and the increase in this case may not be made through non-cash contributions.

8.2. Raising the Legal Capital

8.2.1. Limited liability company

Raising the share capital of a limited liability company is not a fundamental obligation of shareholders and cannot be derived from the company's articles of association. However, the general meeting of shareholders can determine, by resolution, the obligation to raise the share capital to preserve the share capital and protect the company's assets. The increase of the share capital is particularly relevant when the company faces capital inadequacy.¹⁷⁶ Since the indication of the share capital amount is a mandatory component of the company's articles of association (Art. 474(3) ZGD-1), a resolution to raise the share capital constitutes an amendment to the articles of association.

The share capital of a limited liability company may be increased by shareholders providing new cash or non-cash contributions to the company, effectively increasing the company's assets. This is referred to as an effective increase of share capital. However, if the increase in share capital is achieved by transferring assets from the company's reserves and profits to the share capital, it is referred to as nominal increase.¹⁷⁷ An effective increase of the share capital is constituted by the payment of new investments into the company, which are either subscribed by the shareholders themselves or by third parties. These contributions can be of different values but must not be less than 50 EUR. As mentioned, the increase of share capital is carried out through a resolution of the general meeting of shareholders, which determines the new amount of share capital. The difference between the existing and the new amount of share capital is divided into one or more contributions, which the subscriber pays. Effective increase of capital requires the conclusion of a share purchase agreement between the subscriber and the company.¹⁷⁸ Existing shareholders have a pre-emptive right to subscribe to the new contributions in proportion to their existing shareholdings. The deadline for exercising this right is 14 days from the date of the general meeting where the resolution on the increase of share capital was adopted. The pre-emptive right can be excluded by applying the provisions on the exclusion of preferential rights of shareholders to acquire new shares in a joint-stock company.¹⁷⁹ When the capital is increased through non-cash contributions, the correct valuation of the contributed assets is crucial. If the shareholders overvalue a non-cash contribution and deviate from the usual valuation criteria, they are liable to creditors for damages based on the principles that apply to piercing the corporate veil.¹⁸⁰

In addition, the nominal increase of the share capital is carried out through the transfer of assets from the company's reserves and profits to the share capital, without the contribution of new cash or non-cash contributions. Following the adoption of

176 Ivanjko et al., 2009, pp. 884–885.

177 Ibid., p. 885.

178 Ibid.

179 Ibid., p. 885.

180 Ibid., p. 886.

the resolution of the general meeting on the increase, the initial contributions of the existing shareholders are increased in proportion to their ownership stakes in the existing share capital. The provisions of Articles 358 and 359 ZGD-1, which regulate the increase of share capital from the company's assets in a joint-stock company, are applied *mutatis mutandis* to the nominal increase of share capital in a limited liability company. The general meeting of the limited liability company must adopt a resolution on the transformation of other items of equity into share capital with at least a three-quarter majority. This can only be done after the adoption of the annual report for the last financial year that ended prior to the decision on the increase of the share capital.¹⁸¹

8.2.2. Joint-stock company

Similar to the situation for a limited liability company, the ZGD-1 provides for the effective increase of share capital in a joint-stock company, which involves increasing the share capital through contributions. The increase of the share capital by way of contributions is conditional upon the payment of all the contributions made to date, unless only an insignificant amount remains unpaid (Art. 333(5) ZGD-1). The general meeting's resolution regarding the increase of the share capital shall require a majority of at least three-quarters of the share capital represented at the meeting to be passed. The articles of association may stipulate a different majority - but it should not be less than a majority of the share capital represented at the meeting if at least one half of the share capital is represented at the meeting where the resolution is being decided on (Art. 333(1) ZGD-1) - and additional requirements for the issuance of non-voting preference shares. For an increase of the share capital through contributions, a mandatory provision applies stating that it must always be carried out by issuing new shares (Art. 333(2) ZGD-1). When subscribing to the newly-issued shares, existing shareholders have a pre-emptive right to subscribe to the new shares in proportion to their shareholdings in the share capital. However, the shares can also be offered to external shareholders (i.e. new shareholders), and existing shareholders have at least 14 days to exercise their pre-emptive rights (Art. 337(1) ZGD-1). They can exercise the right themselves, transfer it to someone else, or choose not to use it at all. The pre-emptive right can only be fully or partially excluded by a resolution on the increase of the share capital. In such a case, the adoption of the resolution by the general meeting for the increase of the share capital requires a three-quarter majority of the share capital represented at the general meeting (Art. 337(3) ZGD-1).

Similar to the situation for a limited liability company, a joint-stock company can also increase its share capital from the company's assets. The provisions regulating the increase of share capital through contributions are applied *mutatis mutandis* for the resolution on the increase of the share capital and its registration (Art. 358(2) ZGD-1). However, companies with no-par value shares can increase their share capital

181 Ibid.

without issuing new shares, provided that the resolution on the increase specifies the method of increase (Art. 358(2) ZGD-1).

A conditional increase of the share capital occurs when an increase in debt capital takes place. It may only be carried out for the following purposes:

- a) holders of convertible bonds exercising their right to convert such bonds for shares or exercising their pre-emptive right to purchase new shares;
- b) preparation for the merger of several companies or payment of consideration to shareholders in connection with changes in the legal status of companies;
- c) company employees exercising their right to receive new shares in exchange for their receivables stemming from participation in the profits which has been made available to them by the company, and in order to provide option entitlements for the purchase of shares granted by the company to the members of the management or supervisory bodies, company employees, or employees of its affiliated company (Art. 343(1) ZGD-1).

The minimum price of the shares issued in the procedure of a conditional increase of the share capital shall not exceed one half of the share capital existing during the meeting regarding the conditional increase of the share capital, and may only reach 10% of the share capital existing during the meeting (Art. 343(2) ZGD-1) – the latter serving to ensure share purchase options. The validity of a resolution on the conditional increase of the share capital shall require the majority of at least three-quarters of the share capital represented at the general meeting. (Art. 344(1) ZGD-1).

Authorised share capital is an institution under which the share capital of a joint-stock company may be increased in a simplified procedure where no special resolution of the general meeting and its registration are required for the actual issue of shares. This is because such a decision is taken in advance for a certain period and then implemented by company management, including the issue of new shares and registration.¹⁸² The authorised share capital is therefore the amount of the share capital that may be increased by the issue of new shares for consideration pursuant to a statutory authorisation to the management of the company for a maximum period of five years after the registration of the company (Art. 353(1) ZGD-1). The authorisation may also be given by an amendment to the articles of association for a period of five years after the registration of this amendment (Art. 353(2) ZGD-1).

The concept of authorised share capital is similar to the institution of authorised capital (*authorised shares*) in comparative corporate law, but these two institutions should not be equated. Authorised share capital refers to the statutory determination of the number of shares that a joint-stock company may issue in the future, regardless of different classes and series. The general meeting cannot increase the share capital and issue new shares through authorised capital (authorised shares) alone.¹⁸³

¹⁸² Ibid., p. 700.

¹⁸³ Ibid.

8.3. Capital Maintenance

8.3.1. Limited liability company

A fundamental obligation of shareholders in a limited liability company is to maintain the share capital to protect the company's ability to conduct business and safeguard the rights of its creditors. This obligation complements the obligation to provide share capital and make initial capital contributions, the main difference being that the obligation to maintain share capital is continuous, whereas the obligation to contribute capital is only a one-off obligation and is associated with the permanence of the shareholder's status. Maintaining the share capital of the company involves preserving the value of the company's assets as recorded in the books, after deducting its liabilities. Shareholders are required to maintain the registered share capital of the company, regardless of whether it has been fully paid up or not.¹⁸⁴

In connection with this principle, Article 495 ZGD-1 introduces a general prohibition on payments made from the share capital to shareholders. The sanction for reducing the share capital is the legal obligation to repay all prohibited distributions (Art. 496(1) of the ZGD-1). If the refund cannot be demanded from the recipient, the other shareholders, proportionate to their shareholdings, will guarantee the amount that needs to be refunded and is necessary to settle the company's obligations to its creditors. Amounts that cannot be demanded from individual shareholders are distributed among them in proportion to their ownership interests. If ineligible payments are also made by managers, they shall be liable in the same way as the company member with the largest business interests (Art. 496(3) ZGD-1).

Furthermore, to ensure adherence to the principle of maintaining share capital, a special regulation is introduced when a shareholder provides a loan to the company instead of own capital. A shareholder that granted a loan to the company when in terms of the diligence of a good businessperson they should have provided it with their own capital may not pursue a claim against the company for repayment of the loan in bankruptcy or compulsory settlement proceedings. Such a loan shall be deemed to form a part of the company's assets in bankruptcy or compulsory settlement proceedings (Art. 498 ZGD-1). However, if the company has already repaid the amount of the loan in the year preceding the initiation of the bankruptcy or compulsory settlement, the shareholder who provided the loan or the shareholder who provided collateral or acted as a guarantor must compensate the company for the amount of the loan that was repaid. If a company repays a loan in the year prior to the commencement of bankruptcy or compulsory settlement proceedings, the shareholder that granted the loan, provided security, or stood as a surety shall compensate the company for the amount of the repaid loan (Art. 499 ZGD-1).

184 Ibid., pp. 898–899.

8.3.2. *Joint-stock company*

For joint-stock companies, the ZGD-1 establishes the principles of providing share capital and of maintaining share capital, the latter being primarily ensured by prohibiting the return of contributions. Shareholders provide contributions to the company in exchange for shares, thereby affording tangible assets to the company. From the perspective of maintaining share capital, the prohibition on refunding contributions is significant. Shareholders cannot withdraw from a joint-stock company, as is possible in certain cases of statutory or contractual withdrawal in a limited liability company, by having their withdrawal financed through the return of their contribution. As a result of the absolute prohibition on such refunding, a shareholder can exit by selling their shares to another shareholder or a third party. The sale of shares has no consequences for the assets or the share capital of the joint-stock company, as neither of them is reduced.¹⁸⁵

Despite the principle of maintaining share capital, the creditors of a joint-stock company cannot always rely on the company having assets equal to its share capital, as the assets secured through share capital can decrease through business operations. However, they have an important safeguard here that ensures that the company will not distribute anything to its shareholders from its assets other than the available retained earnings, after covering losses, until all creditors are adequately satisfied.¹⁸⁶ This limitation does not apply to payments made to shareholders in exchange for goods and/or services provided by shareholders within the scope of their business cooperation.¹⁸⁷

The principle of the prohibition of refunding contributions and maintaining share capital also protect shareholders/shareholder groups among themselves. If certain shareholders were treated unequally¹⁸⁸ in profit distribution, they could invoke the same sanctions as creditors for the prohibited refund of contributions. In the ZGD-1, it is detailed what constitutes and does not constitute a prohibited refund of contributions, along with a specific form of “concealed profit distribution” (Art. 227(3) ZGD-1). In Article 227(1) ZGD-1, a general prohibition to refund and pay interest on contributions is established. However, in the Article 227(2) ZGD-1, exceptions are made for the payment of a proportion of the distributable profit in accordance with the ZGD-1, or for payment for the purpose of a permissible acquisition of own shares in accordance with the ZGD-1.

The prohibition on concealed profit distribution is essential as it makes particularly inadmissible payments for benefits or services provided by the shareholder or related companies if they exceed their fair value, regardless of whether the payment is made to the shareholder, related company, or a third party at their instruction. Thus, it is possible to consider actions such as interest-free loans provided by the

185 Ibid., pp. 466–467.

186 Ibid., 2009, p. 467.

187 Ibid.

188 Article 221 ZGD-1, which regulates the principle of equal treatment of shareholders, stipulates that the company’s bodies must treat shareholders equally and under the equal conditions.

company and the provision of disproportionately high commissions as forms of engagement with transactions that attempt to conceal profit distributions. Additionally, the assumption of gratuitous sureties by the company for the shareholder or the provision of collateral by the company to a third party on behalf of its shareholder is also considered a refund of contribution.¹⁸⁹

In addition to the prohibition of returning investments, the charging of interest on investments is also prohibited. Interests include continuous recurring income that the shareholder would obtain from the contribution. “Guaranteed dividends”, which are to be paid even when there are no profits available for distribution, are also considered as interest that must be paid. However, this does not include the payment of preferred dividends to preferred shareholders.¹⁹⁰

It is important to distinguish between prohibited refunds of investments and payments made based on the effects of reducing the share capital. In the case of a simplified reduction of the share capital, there are no payments made to shareholders, but only the regular reduction of the share capital (Art. 372 ZGD-1) or the reduction of share capital by the withdrawal of shares (Art. 381 ZGD-1) are relevant in this context. In the case of a regular reduction of the share capital, it is not considered a prohibited refund of contributions since there is no unlawful interference with the share capital; rather, the share capital is reduced in accordance with a lawful procedure. Additionally, a reduction of share capital by way of a share withdrawal does not involve the company paying all shareholders the effect of the reduction resulting from the withdrawal; instead, the company pays certain shareholders for the shares acquired for the purpose of the share withdrawal.¹⁹¹

Every legal transaction that violates the principle of prohibition of return of investments and charging of interest is void. As a result of the nullity of the legal transaction, the company has all available claims, including contractual claims (unjustified enrichment and damages), proprietary claims (reivindication), and especially a specific corporate law claim under Article 233 ZGD-1. This independent claim is specifically suited for the return of prohibited payments and is stronger than any other claims and possible objections raised by the shareholder. The claim can be asserted by the company itself and by the company’s creditors if the company is unable to pay them (Art. 233(2) ZGD-1). Minority shareholders can also assert this claim (Art. 233(1) ZGD-1), with the provisions of Article 328 ZGD-1 being applicable *mutatis mutandis* regarding the filing of a lawsuit for the recovery of damages on behalf of the company at the request of minority shareholders.^{192,193}

189 Ivanjko et al., 2009, p. 468.

190 Ibid.

191 Ibid., p. 469.

192 Shareholders whose combined interests account for at least one-tenth of the share capital or whose nominal value (or the corresponding amount of share capital) amounts to at least 400,000 euros.

193 Ivanjko et al., 2009, p. 470.

8.4. Reduction of Capital

8.4.1. Limited liability company

A reduction of the share capital of a limited liability company requires a resolution of the general meeting in the form of an amendment to the memorandum of association, and this amendment must be certified by a notary public. The law treats the reduction of share capital in a uniform manner, without distinguishing between the nominal and effective reduction of share capital (see Article 520 ZGD-1). An effective reduction of share capital is followed by the payment of part of the share capital to shareholders and a reduction of the company's assets, while a nominal reduction of share capital involves a reduction of share capital and a transfer of assets to the company's reserves.¹⁹⁴ The law also allows the reduction of share capital to be carried out in a simplified manner or by share withdrawal. In this case, it refers to the *mutandis mutandis* application of the relevant provisions in a joint-stock company (Art. 520 ZGD-1).¹⁹⁵

8.4.2. Joint-stock company

A regular reduction of share capital (effective reduction of share capital) is the reverse of the increase in share capital by contributions. A majority of at least three-quarters of the share capital represented at the resolution is required for the validity of a resolution to reduce the share capital (Art. 372(1) ZGD-1). As a general rule, a company will apply the institution of ordinary reduction of share capital if it decides to make payments to shareholders. However, compliance with the rules governing the procedure for securing creditors is essential here.¹⁹⁶ Creditors whose claims against the company arose before the registration of the resolution on the regular reduction of share capital in the register must be provided with security if they notify their claims within six months after the publication and are unable to be paid. Creditors must be informed of this right (Art. 375(1) ZGD-1). Payments to shareholders based on the reduction of share capital shall be made only after six months have passed since the registration of the regular reduction, and after the timely-notified creditors have been satisfied or provided with security (Art. 375(2) ZGD-1).

In a reduction of the share capital, no new shares will be issued, but the number of shares will be reduced, either by reducing the nominal amounts of the shares, by pooling the shares, without pooling the shares in the case of bulky shares, and even without consolidation in the case of no-par value shares. However, in the case of non-cumulative shares, the procedure for the cancellation of shares must also be carried out in the course of the procedure for the reduction of the share capital (Art. 376 ZGD-1). If the company has no-par value shares, the reduction of share capital also involves the procedure of cancellation of shares (Art. 376 ZGD-1).

¹⁹⁴ Ibid., p. 887.

¹⁹⁵ See the Reduction of capital in joint-stock company in Chapter III., D., II.

¹⁹⁶ Ibid., pp. 717, 718, 723.

A simplified (nominal) reduction of share capital is also possible, serving as the reverse of a nominal increase of share capital. This process of reducing the share capital, which may also be carried out in a simplified manner, is intended to cover a loss carried forward, or a net loss for the financial year, or to transfer amounts to the capital reserves (Arts. 379(1) ZGD-1). The decision to reduce the share capital must state the purpose of the reduction. A simplified reduction of the share capital is only permissible when the company no longer has any available profits or reserves from profits, and only after the capital reserves have been previously used, with the exception of the legal reserve fund (Art. 379(2) ZGD-1).

A company may reduce its share capital also by the withdrawal of shares, but only in exceptional cases. This may be done either by compulsory acquisition or by acquisition by the company. A compulsory withdrawal is only permissible if it was provided for or authorised in the original articles of association or by an amendment to the articles prior to the acquisition or subscription of the shares (Art. 381(1) of ZGD-1).

8.5. Dividends

8.5.1. Limited liability company

The right to participate in profits is a fundamental shareholder right in a limited liability company, and can be equated with the right of a shareholder to receive dividends in a joint-stock company. The right of a shareholder to participate in the profit is conditional by nature, as Article 494(1) ZGD-1 grants it to the shareholder only on the condition that the balance sheet profit has also been generated. The right to participate in profits is always expressed in monetary form in the valid currency, it is transferable, and can also be pledged. The principle of the proportional distribution of profits according to the amount of business shares held by the shareholders applies here (Art. 494(2) ZGD-1). Shareholders are also not obligated to return the amounts received in good faith as a share in the profit, unless the shareholder was not in good faith and the share was paid out even though the shareholders should have known that the profit is necessary for the preservation of the company's share capital (Art. 497 ZGD-1).

8.5.2. Joint-stock company

Participation in profits is a fundamental property right of a shareholder in the joint-stock company. It is necessary to distinguish between the right to a share of the profit (dividend) as an abstract corporate (not yet contractual) right of the shareholders on one hand, and the (contractual) right to receive dividends determined by the general meeting with a resolution on the use of the balance sheet profit in accordance with Article 230(5) ZGD-1. Only when the general assembly determines the method of using the balance profit for the payment of dividends to shareholders does this right become of a contractual nature. Based solely on the abstract corporate right to participate in the balance sheet profit, the shareholder does not yet have a contractual claim towards

the company.¹⁹⁷ The general meeting can use the balance profit for other purposes with a resolution on the use of this profit, but shareholders have the possibility to challenge this resolution if the minimum statutory dividend of 4% of the share capital is not distributed with the resolution (Art. 399(1) ZGD-1).

Before the resolution on the distribution of profit among shareholders, it is necessary to consider the order of using the net profit, which is precisely determined by Article 230(1) ZGD-1. When preparing the annual report, the net profit must be used for the following purposes in the following order:

- a) coverage of carried forward losses;
- b) formation of capital surplus on the basis of a concluded compulsory settlement;
- c) formation of legal reserves;
- d) formation of reserves for own shares;
- e) formation of reserves provided for by the articles of association.

9. Slovakia

9.1. Rules on Legal Capital

The provisions on legal capital and corporate financing embrace the rules regarding the formation and maintenance of the share capital, the company's financial structure, and the ways in which assets return to shareholders without infringing the legal requirements on capital maintenance. In general, a company may finance its activities through equity or debt. Equity includes the shareholders' contributions to the share capital, contributions to the capital funds, the reserve fund, and the retained profits. As small and medium-sized enterprises usually do not have sufficient equity, they often use external capital to finance the company (debt finance). A company's debt finance includes short-term or long-term credits, loans, and other liabilities arising from its business activities, as well as non-repayable financial aid.¹⁹⁸

One of the basic requirements for the incorporation and existence of capital companies is the registered share capital. The principle of the actual creation of the share capital and that of its maintenance are reflected in several provisions of the Slovak legislation. These include, for instance, the requirement of a minimum amount of contributions to be paid up before the company is incorporated,¹⁹⁹ the determination of the value of a contribution in kind,²⁰⁰ or the possibility of increasing the share capital through contributions in cash only after the existing contributions have been paid up in full.²⁰¹ The guarantee function of the share capital was significantly strengthened by the amendment to the CC that entered into force on 1 January 2016.

¹⁹⁷ Ibid., p. 503.

¹⁹⁸ Dolný, 2021, p. 474.

¹⁹⁹ Section 111, CC.

²⁰⁰ Section 59(3), CC.

²⁰¹ Section 142, CC.

This amendment introduced the concept of a company in crisis (*spoločnosť v kríze*), reinforcing protective mechanisms for monitoring the company's equity-to-debt ratio and strengthening the general prohibition on repayment of contributions (*zákaz vrátenia vkladu*). While the prohibition on the repayment of contributions had been part of the CC since the Euronovela (Act No. 500/2001 Coll.), the so-called *Lex Váhostav* expanded this concept in response to the then-current issues regarding bankruptcy and restructuring processes.²⁰² The Slovak CC stipulates that if the equity-to-debt ratio is less than 8:100, the company is in crisis.²⁰³ If the total debt is higher than the company's assets, the company is already insolvent and would be obliged to file a petition for bankruptcy.²⁰⁴

9.2. Rules on Legal Capital Contributions

9.2.1. Limited liability company

A capital company is obliged to create its share capital. In Slovak corporate law, the share capital is defined as the aggregate of contributions in cash and in kind pledged by all shareholders and expressed in monetary terms.²⁰⁵ Contributions in kind (e.g. movable property, immovable property, an enterprise, know-how, or an account receivable, including receivables against the company) can only be assets if their economic value can be determined. A shareholder who transfers a receivable to the company is liable as a guarantor for its enforceability up to the value of the pledged contribution in kind.²⁰⁶

It is expressly prohibited by law to make contributions through a commitment to perform certain work or supply services.²⁰⁷ This prohibition derives from Article 46 of Directive 2017/1132 (former Article 7 of Second Council Directive 77/91/EEC of 13 December 1976) applicable exclusively to joint-stock companies; the Slovak legislator decided to apply such a restriction to all types of companies, including limited liability companies. Such a prohibition is considered impractical, especially for innovative and technologically oriented start-up companies.²⁰⁸

The articles of association shall specify the amount in which a contribution in kind is set-off against the shareholder's contribution.²⁰⁹ The value of a contribution in kind is determined by an official appraiser, unless the conditions for a simplified method of appraisal laid down by law are met. First, it was established in judicial practice that contributions in kind must be paid up before the company is incorporated, and the determination of the value to be set off against the shareholder's contribution

202 Dolný, 2021, p. 483.

203 Section 67a, CC.

204 Dolný, 2021, p. 539.

205 Section 58(1), CC.

206 Section 59(5), CC.

207 Section 59(2), CC.

208 Dolný, 2021, p. 459.

209 Section 59(2), CC.

in kind must not be manifestly disproportionate, otherwise the act would be contrary to good morals.²¹⁰ However, the Supreme Court later deviated from its previous stance regarding the relationship between the value of the contributed asset and the amount to which the contribution is credited. Consequently, it is not excluded that a non-monetary contribution by a shareholder to a company may be credited to the shareholder's contribution at a monetary value lower than its value as determined by an expert appraisal.²¹¹

The person authorised to administer the contributions prior to the incorporation of a company can be the founder, who is authorised to do so in the articles of association, or a bank or a branch of a foreign bank, even if it is not the founder of the company.²¹² The administrator of contributions (*správca vkladov*) is obliged to prepare a written statement on the payment of contributions by individual shareholders, which must be attached to the application for registration of the company in the Commercial Register. If the administrator of contributions states in the written statement a higher amount than that paid up by the shareholders, he/she is liable to the company for the fulfilment of the shareholder's obligation to pay up the contribution and liable to the company's creditors up to the amount of this difference.

For a limited liability company, the minimum amount for the registered share capital is 5,000 EUR. The value of each shareholder's contribution must be at least 750 EUR.²¹³ Before filing the application for registration of a company in the Commercial Register, any contribution in cash must be paid up to at least 30%, and any contribution in kind must be paid up in full. The total value of the paid-up contributions must be at least 50% of the minimum amount of the share capital prescribed by law. In the case of a single-person limited liability company, the share capital must be paid up in full before the company's registration in the Commercial Register.²¹⁴

Special provisions on the payment of contributions apply to limited liability companies initially formed in a simplified online procedure using an electronic template of the articles of association. If the shareholders decide to set up their company in this simplified manner, they may participate in the share capital exclusively in cash, and contributions in kind are not allowed. Moreover, only one person may be designated the administrator of contributions, namely the director of the company, who may be exclusively a natural person.²¹⁵

The company acquires ownership rights to an object of a contribution only upon its incorporation, and ownership of real property only once the right is registered in

210 The Supreme Court of the Slovak Republic, No. 4 Obo 125/2003.

211 The Supreme Court of the Slovak Republic, No. 1 M Obdo V 2/2008, 1 March 2011.

212 Section 60(1), CC.

213 Sections 108 and 109, CC.

214 Section 111(2), CC.

215 Provisions on the simplified online formation of limited liability companies are provided in Section 110a, CC, and are the result of the implementation of Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 regarding the use of digital tools and processes in company law (Digitalisation Directive).

the Land Register. If the company does not acquire the ownership right to the object of the contribution (e.g. if a historical collection that was to become the object of the contribution in kind is stolen before the company acquires the ownership right), the shareholder who undertook to provide such a contribution must pay its value in cash in accordance with the principle of the actual creation of the share capital. Moreover, if the value of the contribution in kind does not reach the amount specified in the articles of association at the time of registration of the share capital in the Commercial Register (e.g., when the motor vehicle that was to become the object of the contribution in kind has been damaged), the shareholder must pay the difference in cash. It is prohibited to exempt the shareholder from the obligation to pay up the contribution and to unilaterally set off the contribution.²¹⁶ Importantly, the registered share capital represents only a calculation figure, and there is no obligation on the part of the company to retain the same funds or assets which have been contributed thereto as long as other assets sufficiently cover the company's liabilities.

Generally, the proportion of the shareholder's contribution to the share capital determines the size of the shareholder's business share (*obchodný podiel*).²¹⁷ Shareholders, within their private autonomy, may regulate their rights and obligations among themselves, irrespective of the amount of their contribution to the share capital.

9.2.2. Joint-stock and simple joint-stock companies

The general provisions on contributions discussed in the previous subchapter apply to all capital companies. For the joint-stock company, the minimum amount of the share capital is 25,000 EUR, which may change during the company's existence but may not fall below the minimum amount laid down by law. The amount of share capital is the aggregate of the nominal values of the shares issued by the company, and while this nominal value must be expressed as a whole number, the law does not specify a minimum nominal value.

Compared to a joint-stock company, the legal framework of a *simple joint-stock company* provides for certain special provisions. For a simple joint-stock company, the minimum amount of share capital is 1 euro,²¹⁸ with a minimum nominal value of 1 eurocent per share, and the entire value of the share capital must be paid up before the company is incorporated. Neither the formation of the company nor an increase of the share capital may be effected by subscription to shares based on a public call.

9.3. Legal Capital Maintenance

9.3.1. Limited liability company

Once a company is incorporated, it is essential that the assets contributed to the company are handled in such a way that the interests of the company and of its

²¹⁶ Sections 108(2) and 113(1), CC.

²¹⁷ Section 114, CC.

²¹⁸ Section 220t(2), CC.

creditors are not jeopardised. One of the mechanisms for ensuring that the share capital is actually maintained is the prohibition on repayment of investment contributions to the shareholders during the company's existence. This is a necessary correction to the principle of limited liability according to which shareholders are not liable for the companies' debts (if the contribution is fully paid),²¹⁹ serving to prevent a company from being tunnelled by its own shareholders. The ban on repayment of the shareholder's investment contribution (*zákaz vrátenia vkladu*) arises from the nature of the contribution itself. Once a shareholder makes a contribution to the share capital, the shareholder's property is transferred to the company's assets, and its repayment is in principle excluded, with the exception of the payment of profits.

The repayment of the contribution is a property transaction between the company and its shareholder, whereby the shareholder receives a payment from the company that does not correspond to a fair market consideration.²²⁰ Thus, the word "contribution" is defined very broadly in the CC, such as by referring to a gratuitous cash loan granted by the company to a shareholder, whereas under market conditions the shareholder would have to pay interest on these funds. Asset allocation may also be made through a transaction with a shareholder in which the company does not receive sufficient value in return.

The prohibition on repayment of the contributions applies to shareholders of a limited liability company as well as to former shareholders if the contribution was repaid to them within two years after they ceased to be shareholders, to future shareholders or related persons of shareholders, and to third parties acting on behalf of shareholders.²²¹ A prohibited allocation to a shareholder may result in the liability of both the shareholder and the managing directors of the company. The legal consequence of the prohibition on repayment of the contribution is not the nullity of the legal transaction, but rather the shareholder's obligation to return to the company the difference between the adequate consideration and the consideration provided.²²² The managing directors who were in office at the time of the unlawful repayment of a contribution are jointly and severally liable for damages to the company and to the company's creditors for returning the unlawfully-repaid contribution.²²³

In addition to the above-mentioned ban, the Slovak Commercial Code expressly prohibits the payment of interest on contributions and the payment of advances on a share in profits.²²⁴ However, shareholders may be paid a share in profits (dividend) and other benefits in case of a reduction of the share capital or use of a capital fund created from contributions.

219 Ovečková et al., 2022, p. 682.

220 Ovečková et al., 2020, p. 389.

221 Section 123 in connection with Section 67j, CC.

222 Section 67k(1), CC.

223 For the assessment on creditor's protection rules in case of prohibition on repayment of contribution see Chapter 6.

224 Section 123(2), CC.

In a limited liability company, a reserve fund is mandatorily created in the amount and at the time specified in the articles of association. There is no obligation to create a reserve fund upon the company's incorporation. If the reserve fund is not created upon the company's incorporation, the company shall create it from the net profit shown in the annual financial statements for the year in which the profit is made for the first time, in the amount of at least 5% of the net profit, but not more than 10% of the share capital. The company must replenish the reserve fund annually, and the use of the reserve fund shall be decided by the company's managing directors. If the cash in the reserve fund exceeds the statutory minimum, upon the decision of shareholders, the company may use it for purposes other than covering losses. For example, it can be distributed to shareholders.²²⁵

The company's equity also includes capital funds (*kapitálové fondy*) created from shareholders' contributions. These are effective means for strengthening the company's equity without having to go through the more demanding process of increasing the company's share capital. Although the legal regulation of capital funds was introduced into the Slovak legislation by Act No. 264/2017 Coll. amending the CC, which only entered into force on 1 January 2018, capital funds could be created even before their explicit stipulation in legal provisions.²²⁶ From a systematic point of view, the legal regulation of capital funds created from contributions is included among the provisions on joint-stock companies,²²⁷ but they also apply to capital funds created by limited liability companies.

The shareholders may agree in the articles of association that the general meeting can decide to impose on the shareholders an obligation to make a cash payment (only)²²⁸ above the amount of the contribution to cover losses suffered by the company (i.e. so-called surcharge obligation, or *príplatková povinnosť*). If the general meeting approves such a surcharge, it shall be binding on all shareholders who pledged contributions. The total amount of the surcharge obligations may not exceed half the amount of the share capital. These financial means may only be used to cover company losses.²²⁹

9.3.2. Joint-stock and simple joint-stock companies

Various provisions are formulated to reflect the principle of share capital creation and maintenance for joint-stock companies. First, the issue price of a share may not be lower than its nominal value. Second, as in the case of a limited liability company, the value of the contribution in kind must be determined by an official appraiser. Furthermore, to prevent a circumvention of the provisions on contributions in kind, additional requirements have been laid down for the acquisition of assets from

225 Section 124 (1) and (2), CC.

226 Patakyová et al., 2022, p. 953.

227 Section 217a, CC.

228 Patakyová et al., 2022, p. 591.

229 Section 121(1), CC.

shareholders.²³⁰ Transfers of property between a company and its shareholder or a person close to its shareholder, if the consideration is at least 10% of the share capital, are subject to the same rules as in the case of a contribution in kind (i.e. its value must be determined by an official appraiser and then approved by the general meeting).²³¹ These rules apply to joint-stock and simple joint-stock companies, but not to limited liability companies. Similarly to a limited liability company, the prohibition on repayment of contributions applies to joint-stock company shareholders.²³²

9.4. Increase and Reduction of Legal Capital

9.4.1. Limited liability company

The increase of the share capital is linked to the need to raise new equity mainly owing to the expansion of business activities. The Commercial Code (CC) provides for two forms of share capital increases, namely increase against contributions and increase from company resources. A share capital increase requires a resolution by the general meeting to be approved by at least a two-thirds majority of the votes of all shareholders. The increase of the share capital by new shareholders' contributions in cash is only permissible if the existing contributions in cash have been paid up in full.²³³ Generally, existing shareholders have a subscription right to make new contributions *pro rata* to their existing contributions;²³⁴ this is a default norm, and the rule can be differently stipulated in the articles of association or in the resolution of the general meeting. The shareholders may exercise this right within one month from the decision of the general meeting to increase the share capital, otherwise it lapses, albeit the articles of association may provide for a different time limit. Third parties may also be permitted to subscribe to new contributions.

Furthermore, the share capital may also be increased by converting retained earnings or other company's equity funds into share capital. This type of capital increase requires the formal approval of the annual financial statements by the general meeting prior to the adoption of the capital increase decision.²³⁵ However, it is not an effective increase, but rather a reclassification in the accounting records.

Share capital reductions are primarily driven by the need to free up resources to cover company losses when its financial situation is unfavourable, although this is not the sole reason for such a reduction. The resources thus freed up may also be used for distribution to shareholders or for the creation of other funds within the equity. However, capital funds under Section 217a of the CC cannot be created from the freed resources from the decrease of the share capital, as these funds need to be created by

230 Ovečková et al., 2020, p. 371.

231 Section 59a, CC.

232 Patakyová et al., 2022, p. 814.

233 Section 142, CC.

234 Section 143, CC.

235 Dolný, 2021, p. 507.

shareholder contribution (*príspevok*).²³⁶ When the share capital is reduced, it must be ensured that the amount of share capital does not fall below the minimum amount of laid down by law.

The share capital may be reduced in two ways: nominally, where there is no change in the amount of the company's equity or assets, but it is only an accounting transfer; or effectively, where the amount of contributions is reduced, entailing that company assets are reduced as a result of the cash payment, generally to shareholders. As the reduction of the share capital may jeopardise creditors' interests, the CC provides for a number of requirements designed to protect them. These include the obligation of managing directors to publish an announcement of the reduction decision of the general meeting and of the amount of the reduction in the Commercial Gazette,²³⁷ calling the creditors to give notice to the company and to act on their right to sufficient security for or satisfaction of their claims.²³⁸ A registration of the reduced share capital into the Business Register is conducted only if evidence is provided that creditors have been secured, unless their claims have been satisfied in the meantime.

9.4.2. Joint-stock company

For joint-stock companies, the CC recognises several forms of an increase of the share capital:

- a) a capital increase against contribution (subscribing for new shares);
- b) a capital increase out of the company's assets;
- c) a combination thereof;
- d) a contingent capital increase, namely by increasing the share capital through the issue of exchangeable or preference bonds.²³⁹

An increase of the share capital may be affected by means of a public or private call to subscribe for shares, or without a call to subscribe for shares if only the existing shareholders participate in the increase of the share capital. Each shareholder has a right to obtain new shares in the event of a capital increase *pro rata* to the nominal value of their shares in the share capital (i.e. the subscription right). The decision to increase the share capital is entrusted to the general meeting, which decides by a two-thirds majority of the votes of the shareholders present. Moreover, the articles of association or the general meeting may authorise the board of directors, for a period not exceeding five years, to increase the share capital up to a specified nominal amount.²⁴⁰

²³⁶ Ovečková, 2022, p. 1690.

²³⁷ The Commercial Gazette is a public administration system available online at: <https://obchodnyvestnik.justice.gov.sk/ObchodnyVestnik/Web/Zoznam.aspx> (Accessed: 15 December 2024).

²³⁸ Ovečková et al., 2020, p. 374.

²³⁹ Dolný, 2021, p. 504.

²⁴⁰ Section 210, CC.

A reduction of the share capital may be actualised by reducing the nominal value of shares or by withdrawing a certain number of shares in issue. The sources freed up by the reduction of the share capital may be used to cover the company's losses, to create company funds, to waive the shareholders' obligation to pay up the outstanding part of the issue price of their shares, or may be distributed to shareholders. Compared to a limited liability company, the protection of creditors in the event of a share capital reduction in joint-stock companies is even stronger. The decision of the general meeting to reduce the share capital must be filed in the Collection of Deeds, while creditors who have outstanding claims against the company may demand that the company provide adequate security for their claims if their claims are not adequately secured.²⁴¹ When a reduction of the share capital is to be registered in the Business Register, the registration court checks whether the time limit for its announcement in the Commercial Gazette has been observed and whether the conditions for securing creditors' claims have been met. If the board of directors determines that payment to the shareholders would cause the company's insolvency, it must refrain from making such a payment. Such a payment could be considered a voidable juridical act.²⁴² Nevertheless, the creditor protection mechanisms are not activated if the share capital is reduced solely for the purpose of covering losses or is reduced by withdrawing shares in issue, whether gratuitously or for consideration.²⁴³

9.4.3. Simple joint-stock company

For simple joint-stock companies, the articles of association may exclude the need for a majority of shareholders holding certain types of shares to approve a change in the share capital.²⁴⁴ Another advantage over a joint-stock company is the possibility of excluding the right of the existing shareholders to subscribe for new shares when the share capital is increased. It is also possible to issue shares exclusively to the company's employees, excluding the subscription rights of existing shareholders.²⁴⁵ In addition to these special rules, the general joint-stock law applies to the increase and reduction of the share capital and the distribution of net profits or capital funds in simple joint-stock companies.

9.5. Profit Distribution and Dividends

9.5.1. Limited liability company

In general, each shareholder of a limited liability company is entitled to a portion of the profits, and has the right to participate in the profits *pro rata* to their paid-up contributions. A different method of calculating the share of profits may be provided

241 Section 215(3), CC.

242 Dolný, 2020, p. 513.

243 Section 215b(2), CC.

244 Section 220zf(2), CC.

245 Šuleková, 2016, p. 2.

for in the articles of association.²⁴⁶ The general meeting makes decisions whether to distribute the profits or retain them for further investment, and a simple majority of the shareholders present at the general meeting is required to approve the distribution of profits.²⁴⁷ The actual proposal for the distribution of profits is submitted to the general meeting by the managing directors in a manner that complies with the law and the distribution tests provided for in Sections 179(3) and (4) CC for joint-stock companies, as it applies to limited liability companies as well. A company may only pay a share in profits from net profit (net surplus test) if such payment does not reduce its equity below the value of the share capital and the reserve fund (balance sheet test), and if it does not thereby cause its insolvency (insolvency test).²⁴⁸ Before deciding on the use or distribution of the company's profits, the annual financial statements must be approved.

If a shareholder has been paid a share in the profits in excess of that to which he/she is entitled, he/she is obliged to return the unlawfully-paid dividend.²⁴⁹ The managing directors are liable for the shareholder's compliance with this obligation, and the provisions on joint-stock companies apply to the distribution of payments from the capital funds.

9.5.2. Joint-stock and simple joint-stock companies

In joint-stock and simple joint-stock companies, the shareholders' share in the profits is generally determined *pro rata* according to the participation they have in the share capital. The articles of association lay down the manner in which profits are distributed not only to shareholders (dividends) but also to board members (royalties). The right of board members to share in the company's profits should be specifically regulated in the articles of association regarding its amount. The distribution of profits is decided at the general meeting by a majority of the votes of the shareholders present.

Unlike a limited liability company, a shareholder of a joint-stock company is not obliged to return a dividend received in good faith.²⁵⁰ The CC expressly stipulates the presumption of a shareholder's good faith, which must be rebutted by the company.²⁵¹ The members of the board of directors of a joint-stock company are liable for damages caused by the unlawful payment of a dividend. As a result of the transposition of the EU Capital Directive, the net surplus test and the balance sheet test have been introduced into Slovak legislation. In addition, the Slovak legislator has introduced in Section 179(4) CC the so-called insolvency test, according to which a company may not distribute net profits or other equity to its shareholders if it would thereby cause its insolvency. The possibility of opposing such a juridical act owing

²⁴⁶ Section 123(1), CC.

²⁴⁷ Section 127(3), CC.

²⁴⁸ Patakyová et al., 2022, p. 818.

²⁴⁹ Section 123(4), CC.

²⁵⁰ Section 179(1), CC.

²⁵¹ Ovečková et al., 2022, p. 1483.

to its voidability ensures the protection of creditors *ex post*.²⁵² As aforementioned, these distribution tests are also applicable to the distribution of net profits in limited liability companies.

Capital funds created from the shareholders' contributions may also be distributed to company's shareholders, but only if the company's articles of association so provide. The actual use of the paid-up capital fund must be decided by the general meeting, and its distribution is possible if:

- a) it has been approved by the general meeting;
- b) a notice of the amount of the distribution has been published 60 days prior to the distribution;
- c) the conditions for distribution set forth in Section 179 CC (i.e. the distribution test) are met.

The capital fund created from the contributions may not be distributed to shareholders if the company is in crisis or would be in crisis as a result of the distribution (company crisis test).²⁵³ The shareholders are obliged to return amounts paid out of the capital fund in violation of the law unless they can prove that they received them in good faith. Members of the statutory body who were in office at the time the distribution was provided in violation of this prohibition shall be jointly and severally liable for its return. In addition, those who held office as members of the statutory body during the period in which the company did not assert its claim for the return of the contribution, and who knew or should have known of this obligation given all the circumstances, are also jointly and severally liable. Liability (*ručenie*) arises towards the company and the company's creditors as well.²⁵⁴ The legal provisions governing the distribution of capital funds of a joint-stock company also apply *mutatis mutandis* to a limited liability company and simple joint-stock company.

10. Conclusions

Together, the eight jurisdictions examined here sketch a coherent but evolving picture of what "legal capital" still means in European company law after the codification brought by Directive (EU) 2017/1132 and the waves of national reforms that followed. The picture is not unitary, but a complex system in which minimum subscribed amounts, in-kind valuation, maintenance rules, distribution tests, and director duties interact with accounting and insolvency law, sectoral prudential regimes, and the contractual freedom of founders and investors. The doctrinal centre of gravity has moved decisively away from treating the registered figure of capital as a reliable guarantee for creditors and toward a composite of *ex ante* formation discipline and *ex*

252 Dolný, 2021, p. 513.

253 Section 217a(2), CC.

254 Section 67f(2) and (3), CC.

post payout policing. Although the formal categories still matter, they matter differently for public and private companies.

Across the systems, the classic public-company design remains largely intact. Public companies carry meaningful floors for initial capital, often well above the Directive's baseline, and they remain bound by a tightly-scripted ceremony for formation and changes to capital. Prohibitions on issuing shares below par, mandatory expert valuations of contributions in kind, pre-emptive rights on cash increases, and two-step or even double-entry registrations for reductions continue to consolidate creditor expectations. Managing bodies are under an express obligation to react to equity erosion (e.g. an archetype is Czech law's early-warning rule to convene when half of capital is threatened), and courts can police abuses through clawbacks and director liability where distributions have breached the balance-sheet constraints. In this setting, capital is still a governance instrument, signalling device to the market, and trigger for procedural creditor protection when it is increased or reduced.

The private-company story is sharper and more heterogeneous. Several legislatures have reduced the statutory floor to a token amount or abolished it altogether, especially for the most entrepreneur-friendly forms, as follows: Czech private companies can start with a single Czech koruna when only one share exists; Romanian limited liability companies can be formed with a nominal capital at the threshold of 1 RON after the 2020 reform; Serbia's 100 dinars and Poland's one-złoty simple joint-stock companies confirm this direction; Slovakia's simple joint-stock companies sit at one euro. Hungary preserves a higher floor for the limited liability company, but couples it with unusually flexible timing for cash pay-ins and the possibility to catch up from distributable profits. Slovenia and Croatia deliberately retain mid-level floors for the the limited liability company (d.o.o.), combining them with rigorous maintenance and clawback rules. In reality, nonetheless, the minimum number on the face of the corporate charter is no longer a proxy for creditor safety in the private space. The operative constraints are instead accounting-based distribution tests, solvency overlays where they exist, and effective remedies against disguised value extractions.

The rules governing how contributions are made and when they must be paid show both convergence and outliers. Everywhere, in-kind contributions must be capable of reliable monetary appraisal and transfer of control, and almost everywhere public companies require independent expert valuation, with narrowed exceptions. Slovenia's regime adds a pragmatic cutoff by mandating an auditor's opinion when non-cash contributions exceed a threshold, and its law articulates shareholder liability for overvaluation with a clarity that maps neatly onto veil-piercing principles. Slovakia insists on full pay-in of non-cash contributions before registration for the limited liability company (s.r.o.), and it has built a modern framework for appraisers and simplified routes in specific cases. Public companies in Hungary accept a mix of expert valuation or "accepted" values if anchored in freshly-audited financials or quoted market prices, but still require minimum cash percentages at incorporation and short deadlines to complete the remainder. The details differ, but the vector is

the same: there is no tolerance for work or services as capital; there is a high-level suspicion of claims as capital outside tightly circumscribed situations; the duty to make good the value of any non-cash contribution that fails to transfer or turns out to be short is universal.

Setoff and capitalisation of claims continue to be pressure points where legal capital interacts with the flexibility for venture finance. The Czech approach illustrates the doctrinal shade, as the BCA forbids capitalisation of a claim at formation, but, outside increases, it does not contain the CC's former explicit ban on setoff of a shareholder's receivable against the contribution debt. On this matter, scholarly opinion is divided and practice resolves this through written setoff agreements, qualified majorities, and exclusions for uncertain or indeterminate claims. Romania takes a more categorical line for widely held or limited liability companies, excluding claims as capital except in narrow founding scenarios, and then only on a collected-cash basis, with full liability for shortfalls and interest from the due date. Slovakia, by contrast, is comfortable with receivables as in-kind contributions, but overlays guarantor-style responsibility for enforceability up to the contributed amount. Two policy instincts collide here, namely the desire to let companies delever or on-board strategic creditors quickly, and the fear that paper claims will be used to manufacture capital without assets. The national answers vary, but the creditor-protection logic behind each answer is consistent with the broader capital-maintenance theme.

Capital maintenance has migrated from the symbolism of a fixed number to a functional triad of tests and remedies. First, the balance-sheet or net-assets constraint tied to the last approved financial statements, with variations on whether development costs must be deducted or locked. Second, the profit-availability constraint that forbids distributions out of legal or statutorily non-disposable reserves and demands that past losses be covered before any payout. The third, which is becoming increasingly more visible, is an explicit or implicit solvency screen. Poland's simple joint-stock company and Romania's solvency-style prohibition for interim payments generalise what was long a directors' duty under corporate or insolvency law: distributions must not push the company below the line where it can meet its due debts in the ordinary course. Slovakia is the most explicit, with its "crisis" concept hard-wiring an equity-to-debt ratio into corporate law and forbidding cash leakage to insiders while the company sits in that zone. Even where the solvency test is not named, courts and codes reach for functionally-equivalent tools, from management's duty to refuse payout when insolvency would result to clawbacks and director liability when distributions slip through purportedly compliant resolutions.

The systems also converge on the anatomy of a lawful distribution decision. There must be eligible financial statements within a defined freshness window and, where interim dividends are used, interim statements that can bear the weight of the payout. The general meeting ordinarily takes the distributive decision, subject to exceptions for fixed profit rights or board-level authority under authorised capital mandates. Managing bodies must then re-check the tests at time of payment and refuse to execute if the situation has deteriorated. If money flows despite a

prerequisite failure, the law makes the recipient's good faith do most of the doctrinal work. In public companies, several systems protect good-faith recipients more readily; in private companies, good faith often yields to a stricter restitution duty. Slovenia shows a particularly robust system, as the clawback action sits on a specific corporate-law footing, outranks general unjust enrichment objections, and can be brought not only by the company but also by creditors and qualified minorities. Serbia goes further at the definitional front, construing "distribution" broadly for the d.o.o. (i.e. dividends, loans, returns of additional payments, and any similar transfers) precisely to capture disguised leakages; the a.d. regime (for companies limited by shares) is more conservative, which is consistent with its capital-market signalling function and other public-law constraints.

Capital reductions and increases remain the moments when creditor protection is ritualised. Where the reduction is nominal to cover losses or to reshuffle equity into capital reserves, the core constraint is that no cash may flow to shareholders; where it is effective and pays money or releases unpaid contribution obligations, the law interposes publicity in official journals, notice to known creditors, waiting periods, and a right to demand satisfaction or security if enforceability would be impaired. Croatia's and Slovenia's texts insist on a waiting period after registration before any payment is made. Czech and Slovak law add a two-step logic in public companies, with a first entry for the resolution and a second for the effectuated amount, and both legal orders let creditors halt registration until safeguards are furnished. The rationale is the same everywhere, which is that shareholder claims are residuary and cannot overtake fixed claims. On the upside, modern codes give boards more tools to raise equity with speed when a window opens. Authorised capital allows management to issue shares within a capped ceiling and a limited horizon without reconvening the meeting each time; conditional capital ties the future increase to convertible or exchangeable securities or to employee participation. Poland's PSA (simple joint-stock company) goes further by abandoning par value and letting founders design a distribution-and-payout discipline that fits high-velocity venture cycles while keeping creditors whole through tough tests and workable clawbacks.

Director and manager duties have been tightened, clarified, or both. The duty to convene when losses threaten half of the capital has firmed up in public companies and has analogues in private companies under general "serious reason" standards. Business judgment is not a safe harbour for ignoring distribution tests, nor for failing to refuse payment when insolvency looms. Several systems pin joint and several liability on those who assented to unlawful payments unless they can show compliance with the duty of care at the time. Others, such as Slovenia, extend the joint liability to managers who presided over a period during which the company failed to pursue restitution that was plainly due. Shareholder liability is calibrated by role and knowledge; those who voted for the unlawful payout or received it with notice of irregularity face stricter restitution and sometimes damages exposure; those who neither voted nor received value may still be captured by knowledge-based standards when they facilitated the outcome.

Two other levers deserve emphasis as they show how capital law coordinates with creditor-protection techniques outside the balance sheet. One is the treatment of shareholder loans. The subordination rule for shareholder loans that should have been equity, and its duty to reconstitute repayments made in the run-up to insolvency, operationalise a simple fairness idea: insiders should not elevate themselves over arm's-length creditors when the company is thinly capitalised. The other is sector-specific minimums coupled with full and immediate pay-ins. Banking and insurance floors, and the National Bank's power to calibrate capital for non-bank financial institutions, respond to systemic risks rather than private orderings. These rules sit comfortably alongside the low floors for general-purpose companies because they speak to a different policy problem.

In summary, the comparative evidence suggests three actionable lessons for law-makers and practitioners. First, for private companies, the credibility of legal capital as a creditor shield now depends less on the number in the articles and more on the quality of the maintenance regime and the enforceability of clawbacks. Jurisdictions that pair low or symbolic minima with explicit solvency screens, credible interim-accounts discipline, and lender-enforceable clawbacks offer functionally-stronger protection than those that cling to higher floors but tolerate porous payout practices. Second, valuation and timing rules around in-kind contributions and setoff must be engineered for the use cases that actually appear in modern finance. Systems that keep the categorical ban on labour contributions, insist on expert valuation where information asymmetries are highest, and allow tightly-documented setoff or capitalisation pathways in increases fare better at reconciling creditor comfort with deal velocity. Third, creditor participation in capital-changing events remains essential, but need not be heavy-handed. Where the law tailors waiting periods to whether the cash will in fact leave the company and gives courts clear criteria to assess when enforceability would be impaired, the ceremony remains protective without becoming paralysing.

None of this implies that legal capital is obsolete, but rather that it has been repurposed. In public companies, it still structures market expectations and coordinates gatekeeping by notaries, registries, auditors, and regulators. In private companies, it plays a finer role as the baseline against which payout tests are run, as the denominator of voting and profit-sharing (unless the founders have bargained around it), and as the legal switch that turns on rigorous creditor-protection procedures. That repurposing is not a weakness; it is legal capital's adaptation to an economy where risk is managed less by static numbers and more by information, accountability, and timing.

For boards, founders, lenders, and counsel, the operational translation is straightforward even if the statutory language is not. Formation should be planned with an eye to valuation that would withstand hostile scrutiny, contribution pay-in schedules that actually fit the cash flows of the business, and charter language that anticipates future raises through authorised or conditional capital. Governance should embed a recurring discipline around the preparation and age of the financial statements used for distributions, and decision logs should document the balance-sheet and solvency

screens at the point of payment, not merely at the meeting that approved the payout. Transactions with insiders should be benchmarked to arm's-length economics,²⁵⁵ and structured to avoid the optics and substance of disguised distributions. Where financing will alternate between shareholder debt and equity, the team should assume that loans advanced into thin capital will be treated as equity in distress and should price and document accordingly. When losses accumulate or liquidity tightens, the priority is to trigger the early-warning duties, assemble options that include nominal increases or reductions, and keep a paper trail that shows how creditors were notified, heard, and, where required, secured.

There are chances for measured reforms, but not necessarily for a revolution. Legislatures considering further reductions of minimum capital for private forms should do so in tandem with explicit solvency tests, sharper good-faith standards for recipient shareholders, and targeted education for small-company directors about their distribution and early-warning duties (a missed opportunity in Romania). Exceptions to expert valuation for in-kind contributions could be harmonised across company types by using objective, auditable anchors (e.g. timely-audited accounts or liquid market prices), coupled with make-good liability if the value proves short *ex post*. Interim dividends, attractive for growth companies and family firms alike, benefit from tighter rules on staleness of interim accounts and from automatic settlement mechanics when the annual close reveals an overshoot. Shareholder-loan subordination, already well developed, can be extended or clarified with safe harbours for genuine rescue finance. Finally, authorised capital has proven itself as a speed tool when calibrated to a proportion of existing subscribed capital and limited in time; its use can be widened, so long as the power to restrict pre-emptive rights remains firmly tethered to a reasoned board report and enhanced majorities in the authorising resolution.

This comparative survey therefore does not end with a verdict for or against legal capital. It ends with an observation about method. Where the law has been realistic about what capital can and cannot guarantee, and has accordingly shifted the weight of protection to timely information, enforceable payout discipline, and credible remedies, firms have gained flexibility without asking creditors to accept opacity. Where symbol and substance still diverge, the doctrines to align them are already visible. The task ahead is not to abandon legal capital, but to keep integrating it with the modern instruments of accounting accuracy, solvency awareness, director accountability, and targeted creditor voice.

255 Whenever a company does a deal with someone who already sits on the “inside” (i.e. a shareholder, director, manager, or an affiliate they control), the terms of that deal should be no less favourable to the company than if it had been negotiated with an independent, unrelated third party in the open market.

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