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SHARE CAPITAL INCREASES IN CAPITAL COMPANIES UNDER THE ITALIAN COMMERCIAL LAW

Italian commercial law states specific rules for modifications of the articles of association concerning share capital. There are two types of operation of alteration of share capital: the increase and the reduction. In particular, increases can be “real” (pay share capital increases) or “fictitious” (free share capital increases).

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Introduction

Italian commercial law, whose provisions are contained in the civil code and in special laws, establishes specific rules for modifications of the articles of association concerning share capital.

There are two types of operation of alteration of share capital: the increase and the reduction. In particular, increases can be “real” (pay share capital increases) or “fictitious” (free share capital increases).

1. Real share capital increases

When companies decide to realize a real share capital increase, they want to get new capital through new contributions. Infact the additional capital can be contributed in cash or in other form of assets. Hence, real increases are achieved by issuing new pay shares that could be subscribed by current shareholders of the company (those who exercise the right of first offer) or by third parties that will become new shareholders after the subscriptionf.

Article 2438 of the civil code establishes a limit for the increase: is not possible to state an increase if the existing shares are not totally full-paid. This rule is set in order to avoid that the company can have a share capital composed mostly of credits to the members.

The civil code does not state that when this rule is breached the resolution is invalid, but the directors are severally and jointly liable for damages caused to shareholders and third parties.

There is another limit to the increase: the prevailing view under the doctrine and the case-law is on the direction of the impossibility of state a pay share capital increase when

the company suffered a loss which makes it obligatory to proceed to the reduction. First of all, the company must reduce the capital proportionally to the loss and then it is possible to increase the capital. This provision is set in order to avoid the evasion of the regulation about the compulsory reduction.

The extraordinary general meeting has competence to state the increase, because it has competence for alteration of articles of association. However articles of association could set the competence of the Board (that is “delegated” to set the increase). In this case there are two limits: the maximum amount of the increase must be predetermined and the delegation to the board may last for a maximum of five years from the registration of the company or the delegation in the Register of the Business Enterprises.

When the board is delegated, directors may freely decide to state increases achieved by issuing only ordinary shares or specific special category of share or every increase.

They may only set to exclude or limit the right of option of shareholders according to the articles of association.

The resolution of the board must be written by a notary, who must previously exercise a legality control of the act, and must be registered in the register of business enterprises.

The resolution must provide the deadline for the subscription of the increase, minimum within 30 days from the publication of the offer.

Only when the resolution provides it, if the increase is not totally subscribed, the share capital is increased only for the actual contributions. The subscription of a part of the increase.

In the other cases the increase is not “separable” from the settlement. It must not take place.

Within 30 days from the subscription of the new shares, the directors must deposit an attestation of the executed increase for the registration in the register of business enterprises. The increase must not be mentioned in company acts until the attestation is

not registered.

The discipline available for the contributions is the same of the one that regulate contributions during the moment of the incorporation (art. 2340). Hence, contributions must not be less than the increase stated. There is just one difference: the 25 % of contributions in cash must be directly paid to the company, instead of the bank.

In case of share premium, the surcharge must be totally paid at the subscription.

2. The right of option

The right of option is the right of shareholders to be preferred to third parties for the subscription of new shares issued in the occasion of a share capital increase. It is important because it allows the shareholders to keep their positions unaltered: the measure of their participation in the capital. That's why this right has an economic value and can be sold.

The object of the right of option are: new shares issued in the occasion of the real share capital increase and bonds convertible into shares.

It is assigned to the shareholders proportionally to the shares they own.

The term for the exercise of the right of option must not be less than 30 days (15 for listed companies) from the registration of the offer of option in the register of business enterprises.

The right of option is excluded under the statement of civil code when the shares are paid through contribution in assets different from cash.

The right of option may be excluded or limited by the resolution of share capital increase when the interest of the company need it (art. 2441 civil code). The resolution must be approved by more than half of the share capital in the first and in the next convocations of the extraordinary general meeting. The general meeting must motivate the interest of the company in limiting or excluding the right of option and in the entry of new

shareholders.

In this two cases it is required to issue new share premium in order to reduce the financial loss of the existing shareholders.

In listed companies articles of association may exclude the right of option in the limit of the 10 % of the existing share capital, but the price of issuing must correspond the market value of the stocks and it must be confirmed by a report of the statutory auditor.

Finally, the right of option may be excluded by the resolution of the extraordinary general meeting when shares shall be offered to the employees of the company or to the employees of subsidiary or controlling companies. The resolution must be approved by more than half of the share capital in the first and in the next convocation of the extraordinary general meeting.

3. Fictitious share capital increases

Free share capital increases do not involve new contributions: there is not an increase of the company's asset. That's why the italian doctrine and jurisprudence call them "fictitious".

Company will not have new capital. This is the most importante difference between free and pay share capital increases.

The increase is stated by the extraordinary general meeting and it is achieved using the company's own funds that are transferred from unrestricted equity to share capital. In this case the company is not supplied with new capital because it uses its own funds.

Free share capital increases take place by two different modalities: raising the nominal value of the existing shares or issuing new shares that will be freely assigned to shareholders proportionally to their shares. This new shares must have the same features of the existing ones.

Hence. the increase should be realized without altering the existing shareholders

positions.

4. Share capital increases in limited companies

The same discipline of the corporations' share capital increases is provided for the limited companies, except for some differences.

In limited companies the delegation to the board is expressly stated by the art. 2481 of the civil code. It establishes that modalities and limits of the delegation must be stated by articles of association.

The right of option may be excluded or limited only under the statement of the articles of association. However, it can not be excluded when the increase must take place in the occasion of share capital reduction for loss.

The resolution must contain limits and most of all the term within which can be exercised the right of option (not less than 30 days from the communication of the possibility to subscribe the increase).

The resolution must also contain the eventual surcharge and the indication if it is possible to subscribe just a part of the increase. In the opposite case the increase is not "separable".

Within 30 days from the subscription directors deposit the attestation of the increase for the registration.

Contributions have the same discipline applied for contributions in the moment of constitution of the setting up. As it is provided for corporations, the 25 % of contributions in cash must be directly paid to the company in the moment of the subscription.

The discipline of free share capital increase is totally the same of the one available for corporations.