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**Groups of Companies based on Contracts in Italy.
Considerations in the Light of the Action Plan.**

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**Groups of Companies based on Contracts in Italy.
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- The Action Plan also confirms the prevailing approach of the European national legislators – with the exception of the German legislator – of using caution when regulating the group of companies.
- In fact, the Action Plan only states that “*The Commission will, in 2014, come with an initiative to improve both the information available on groups and recognition of the concept of group interest*” (§4.6).

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- Consequently, the traditional disputes related to the group, and, more specifically, how to balance of the group interests against the interest of each legal entity of the group and the protection of minority shareholders and creditors and, in this context, establishing the limits of the parent company's interference in the subsidiary, is far from having been fully and unequivocally answered at the regulatory level.

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- One possibility of (at least) a partial solution to the interpretation uncertainties stemming from the non-intervention of the legislator in the area of intercompany relationships and transactions could be self-regulation.
- The self-regulation approach is nowadays frequent even in the Italian corporate practice.

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- This approach may be followed even in the Italian corporate practice.
- As a matter of fact, to date, apart from some special laws, Italian corporate law does not regulate the group of companies. Indeed, there is no mention of “group” as a legal entity in the Italian Civil Code, apart from specific provisions applicable to a group of companies (e.g. consolidated balance sheet).

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- The 2003 reform of corporate law (so-called “Riforma Vietti”) has, however, explicitly allowed the parent company to exercise the direction and coordination of the activities of a subsidiary.
- Before the 2003 Reform, Italian corporate law allowed the parent company to exercise a “dominant influence” in the subsidiary’s shareholders’ meeting and therefore to exert influence, even though not directly, through the voting rights in the said meeting on directors appointment approval of the financial statements.

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- At the same time, although the Reform does not set forth the ways in which to exercise the parent company's power of direction and coordination, it:
 - i. implicitly accepts that the parent company may issue, even verbally, directives or rules of conduct to the directors and/or management of the subsidiary company;

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- ii. establishes a general prohibition to cause damage to the minority shareholders and/or creditors of the subsidiaries, by giving precedence to the interests of the parent company above those of the subsidiary [unless the parent company can show that the subsidiary has been, either directly or indirectly, compensated],
and providing for the parent company and the directors to be liable for damage caused to the minority shareholders and/or the creditors as consequence of “abuse” of the power of direction or coordination;

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- iii. provides that the decisions of the subsidiary company which are “influenced” by the parent company are grounded and subject to appropriate disclosure (see sec. 2497 and following of the Italian Civil Code).

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- There are many uncertainties among scholars as well as in corporate practice:
 - i. regarding the actual limits of the parent company's right to interfere in the subsidiary activity (e.g. if such right and/or power could also include the most relevant business decisions);

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- ii. at the same time, on how to ensure that the parent company's directives are enforced when the directors and/or management of the subsidiary company does not want to “collaborate” with the parent company;
- iii. regarding the non-compliance of the subsidiary directors with the parent company's directives.

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- In order to overcome, at least partly, the uncertainties in the role of the parent company, it is possible to enter into group “contracts” or “regulations” in order to establish:
 - a. the matters which are subject to the exercise of the direction and coordination: e.g. the approval of business or financial plans, budgets, capex, extraordinary transactions, management remuneration policies, hiring of top managers;

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- b. the ways in which to perform the direction and coordination: e.g. duty to first submit decisions or resolutions to the parent company prior to submitting them to the board and committees of directors; regular reporting obligations;
- c. any types of compensation, whether prior or subsequent, for prejudice which the subsidiary company may suffer as a result enforcing the parent company's directives.

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- The limits of the formation of “contractual groups”:
 - i. illegality of the provision stating the general “dominance” of the parent company towards the subsidiary company [as opposed to what is possible following the execution of a *Beherrschungsvertrag* according to § 308 AktG];

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- ii. subject to compliance with the general principle of sovereignty of the directors of the subsidiary company with respect to the management of the company;
- iii. compliance with the rules pertaining to transactions between related parties.

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- The group “regulations” or “contracts” must:
 - i. be approved by the board of directors of both the parent company and the relevant subsidiary company;
 - ii. be communicated to the relevant bodies of such companies.