

**THE TWO-TIER SYSTEM IN GERMANY AND ITALY**

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**23-24 MAY 2007**

**TWO-TIER SYSTEM AND GROUPS OF COMPANIES**

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**1. Introduction.**

My paper concerns the exam of the two-tier system with particularly regard to the specific problems of the groups of companies.

First of all, I'll try to examine the Italian civil code rules that refer specifically to companies adopting the dualistic system and belonging to a group of companies.

Then, I will examine the by-laws of some holding companies who adopt the two-tier system paying particularly attention to clauses concerning the exercise of the activity of direction and coordination of other companies.

**2. Two-tier system and activity of direction and coordination of company.**

The Italian company law reform has introduced, among others, over than two new corporate governance models, a general group of companies regulation.

For the first time, a general regulation of the groups of companies has been introduced into the Italian legal system, after several sectional regulations.

The new groups of company regulation contains several important rules concerning:

- a) the liability of the holding company in the event of acting in breach of the principles of the correct corporate management (art. 2497 cod. civ.);
- b) a new publicity system for the companies subject to the activity of direction and coordination (art. 2497-*bis* cod. civ.);

- c) the motivation of decisions of the companies subject to the activity of direction and coordination (art. 2497-*ter* cod. civ.);
- d) special circumstances of right of withdrawal (art. 2497-*quater* cod. civ.);
- e) the financings in the activity of direction and coordination (art. 2497-*quinquies* cod. civ.).

Moreover, this regulation applies in the event of a company exercises activity of direction and coordination of other companies. For the application of these rules, in fact, it is not required that the activity of direction has his source into a control relationship.

This new regulation of the activity of direction and coordination, together with other rules concerning groups of company contained in special law, allows to limit a corpus of rules based on principles partially difference from the general regulation of company.

So, it will be interesting to check if in this special corpus it is possible to find some rule specifically concerning company adopting the dualistic system and belonging to a group of company.

### **3. The circulation of information inside the group and the role of the supervisory board.**

The theme of the circulation of information inside the group is very interesting because of the particular role of the supervisory board of the holding company.

- A) With regard to the circulation of information between the holding company's bodies, law provides that the delegated bodies of the holding company report to the management board and to the supervisory board on the

general trend of the management and on its expected evolution as well as **on the transactions of major relevance in size or characteristics entered into by the company or its subsidiaries.**

- B) The supervisory board of the holding company may request directors (of the holding company) information, also with reference to controlled companies, on the trend of corporate affairs or on specific matters.
- C) Moreover, the supervisory board of the holding company may also exchange information with the correspondent bodies of the controlled companies on the **administration and control system and on the general trend of the corporate activities.**
- D) In the event of the company issues shares listed on regulated markets, this power of information (sub C) can also be exercised with regard to **specific affairs of the controlled companies.**

Members of the supervisory board of holding companies that issue shares on regulated markets may **directly request body of management and control of the controlled companies information on the trend of their corporate affairs or on specific matters.**

This corpus of rules grants to the supervisory board of the holding company the power to be informed about all the strategic transaction regarding the companies subject to the activity of direction and coordination. Furthermore the supervisory board of the

holding company is able to discover the general strategy adopted by the management into the exercise of the activity of direction and coordination.

Finally, the supervisory board can control that the administrative board respects the principles of correct corporate management exercising the activity of direction and coordination.

#### **4. Granting of powers to the supervisory board on strategic transactions and on industrial and financial plans (art. 2409-terdecies comma 1, lett. f-bis cod. civ.).**

By the introduction of specific by-laws clauses, it is possible to grant more piercing powers to the supervisory board of the holding company.

In fact, art. 2409-terdecies comma 1, lett. f-bis It. civ. code allows that by-laws of company adopting the two tier-system provides for the power of the supervisory board to resolve on strategic transaction and on industrial and financial plans of the company drafted by the management board, without prejudice to the liability of the management board for its acts.

Naturally, the decision to insert a clause of this kind into the by-laws of a holding company would mean a bigger involvement of the supervisory board in the activity of direction and coordination of the controlled company.

#### **5. The involvement of the supervisory board in the activity of direction and coordination by the introduction into the by-laws of a clause ex art. 2409-terdecies comma 1, lett. f-bis cod. civ.**

Pursuing our speech about this particular kind of clause, now we can analyze what powers can be concretely granted to the supervisory board by their introduction.

First of all you have to notice that art. 2409-*terdecies* comma 1, lett. f-*bis* cod. civ. is a quiet generic rule. This means that there is a big contractual autonomy on the concrete determination of the content of these clauses and the powers to grant to the supervisory board.

However, also having regard to the by-laws of some Italian bank holding who have adopted the dualistic system, we can distinguish these clauses into two big groups:

**A) Clauses providing for a participation of the supervisory board of the holding in the decisions concerning the group's strategic policy and operations.**

Some clause provides that the supervisory board resolves on proposals drafted by the management board and concerning:

- a) the standard to respect on the direction and coordination of the holding company and the group;
- b) strategic policy and operations of the holding company and the group;
- c) industrial and financial plans and budget of the holding company and the group;
- d) strategic operation of the holding company having particular importance for the group.

The purpose of these clauses is to increase the participation of the supervisory board of the holding company in the activity of direction and coordination.

And a more active rule of the supervisory board in this activity will mean a bigger guaranty on the respect of the correct corporate management principles. (You must remember that in the event of exercising activity of direction and coordination in

breach of the principles of the correct corporate and entrepreneurial management, the holding company is directly liable towards the members of the shareholders, the creditors of the company and the controlled company).

This first kind of clause does not present particular problem of validity, because the control of the supervisory board of the holding refers to activities exercised by the management board of the same company.

**B) Clauses providing for powers of the supervisory board of the holding concerning operations of controlled company.**

This second kind of clauses provides for powers of the supervisory board of the holding company concerning operations that must be executed by controlled companies and regarding:

- a) purchase or sale of control shareholding in company having particular strategic value;
- b) purchase or the sale of assets having particular economic or strategic value;
- c) conclusion of strategic commercial agreements.

The first step to do in the analysis of these clauses is to consider that the supervisory board of the holding company is only a body of the holding, there's no being possibility to consider it as the supervisory board of the group.

The juridical autonomy of each company belonging to the group does not allow to grant to the supervisory board of the holding a general competence with regard to the operations executed by the bodies of the controlled companies. The bodies of the controlled companies, even if bounded by a fiduciary relationship to the holding company, are not juridically obliged to respect decisions of the holding company bodies.

Only the management board of the holding company can be considered juridically obliged to respect the decision of the supervisory board.

So, what kind of effects does this kind of clauses produce?

I think the only juridical effect of this kind of clauses is to establish binding rules that the management board of the holding company has to respect exercising the activity of direction and coordination.

The decision adopted by the supervisory board in accordance with this kind of clauses will fix the standards to respect exercising the factual power of the management board of the holding to influence the activity of the controlled company that finds its source in the control relationship.