

**The two-tier system in Germany and Italy**  
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**The division of powers  
between management and  
supervisory board in Italy**

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# Introduction

- The **reform of company law of 2001-2004** has entitled companies subject to italian law to adopt the two-tier system.
- From the italian perspective it is interesting to analyse the **formal division of powers** between the management and the supervisory board with respect to the administration of the company because it challenges some of the main features of the **italian traditional structure of the administrative function**.
- We will talk about: a) the **intensity** of the powers that the supervisory board can exert over the management board; b) their **extension**; c) the **conditions** under which they operate.

# The intensity

- The options abstractly available are: a) the supervisory board is only entitled to give the management board **unbinding advices** about administration matters; b) the supervisory board has a power to **authorize/approve** the choices of the management board; c) the supervisory board has a power to **actively influence** the choices of the management board; d) the supervisory board has a power to **force** the management board to decide in a certain direction.
- The italian civil code (art. 2409-terdecies, comma 1°, lett. f-bis) states that the supervisory board “if the articles of incorporation so provide, **deliberates** with respect to strategic operations and industrial and financial plans **prepared** by the management board, it being understood that the latter can be held responsible for the execution of the decisions”
- According to the most convincing interpretation of the statute, the italian supervisory board has a power to **authorize/approve** the projects of the management board and also to **actively influence** its choices.
- The italian law does not assure an **information flow** from the management to the supervisory board adequate to the function of active influence exerted by the latter over the former. Jurisprudence can only partially remedy it.

# The extension

- The formal powers of the supervisory could abstractly be exerted over: a) the **plans** of the enterprise; b) the **most relevant operations**; c) the **ordinary business**.
- The Italian civil code (art. 2409-terdecies, comma 1°, lett. f-bis) states that the supervisory board “if the articles of incorporation so provide, deliberates with respect to **strategic operations** and **industrial and financial plans** prepared by the management board, it being understood that the latter can be held responsible for the execution of the decisions”.
- The supervisory board can probably be entitled to authorize/approve and actively influence the formulation of the **strategic plans** too.
- “**Strategic operations**” are the operations most relevant to the interest of the company.
- Can the power of the supervisory board **generically** refer to “strategic operations”?
- The supervisory board **cannot** exert its power over **ordinary business**.

# The conditions

- The law could abstractly **force or just entitle** the company to subject the most important choices of the management board to the authorization/approval and active influence of the supervisory board. Moreover it could reserve the choice to the **articles of incorporation or** extend it to the **supervisory board itself**.
- The italian civil code (art. 2409-terdecies, comma 1°, lett. f-bis) states that the supervisory board “**if the articles of incorporation so provide**, deliberates with respect to strategic operations and industrial and financial plans prepared by the management board, it being understood that the latter can be held responsible for the execution of the decisions”.
- According to the most convincing interpretation of the statute, companies subject to italian law are **not forced** to provide their supervisory board with the power to authorize/approve and actively influence the choices of the management board.
- The italian supervisory board is probably **not entitled to assume** these powers if the articles of incorporation do not provide so.